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Comment on Burbank and Silberman

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Professors Burbank and Silberman have given us a superb tour d'horizon of the status of civil justice reform in the United States. While I would neither add to nor subtract from it, I suggest that a reader should be aware of some issues that lurk beneath the surface of the reform process. Whether what lurks beneath turns out to be rocks on which the process will flounder or only markers that form the channel for progress remains to be seen. I address four issues briefly.

I. FEDERALISM

The paper focuses on reform in the federal courts. That is not inappropriate since historically the federal courts have been the lead dog on the sled of reform. One should have in mind, however, that some 98% of all civil litigation in the United States takes place in the state courts. And state court systems tend to look less to the federal courts for leadership in reform now than they did in the past. The reason is that civil justice reform has become politicized and contentious. There was a time when the federal rules were drafted and revised by what could be called a group of wise men—lawyers and judges above the fray who looked dispassionately at the justice process and sought out what was best for it. But rule making is no longer an Olympian exercise and the rulemakers are no longer viewed as omniscient and detached. Much is at stake for particular litigation interests in the shaping of rules of procedure, and with the democratization of the rule making process, those interests have access and work to influence it. Special interests of various sorts—manufacturers, small business, insurance companies, civil rights lawyers, class action lawyers, personal injury lawyers, commercial lawyers and, not to be ignored, the judges themselves, and even Congress—confront each other. The product that emerges will not necessarily be a model for the highest and best form of administration of justice.

Meanwhile states are pursuing their own initiatives: California, for example, has successfully implemented a fast track system, and

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Arizona has adopted extensive mandatory pre-discovery disclosure, fee shifting offers of judgment, judicial evaluation by litigants, and use of pro-tem judges. One can expect state justice systems to invite increased attention and to exercise growing influence in civil justice reform.

II. Adversary Process

The dominant reality of the civil justice landscape is the adversary process. Viewed in isolation, our court system is quite adequate as is our framework of procedural rules. What generates the need and demand for reform, largely, are the excesses of the adversary process. We are caught in a dilemma: The adversary process drives the civil justice process—we regard it as the crucible for the production of truth—but its perceived excesses have led to the demand for sanctions and for controls on discovery. Hence, we have Rule 11 and mandatory disclosure.

What makes the dilemma so intractable is that there is no bright line dividing the legitimate from the excessive. Lawyers, while they will readily complain of their opponent's abusive tactics, will rarely if ever feel that they have themselves abused the process. If their opponent offers to settle because the litigation has become too burdensome, the occasion will be one for celebration, not remorse. Moreover there are profound philosophical differences over where that line should be drawn for fencing in lawyers is seen by many as trespassing on fundamental liberties.

Our approach to reform has been to make rules that attack the manifestations of adversarial excess because we feel unable to come to grips with the causes, with the setting of effective limits on what lawyers are entitled to do in representing their clients. Still there is great and nearly universal concern over the growing adversariness in litigation—the prevalent just plain nastiness. And that leads to the third issue.

III. Growth of Judicial Power

The authors view with scepticism, or even lack of enthusiasm, the increasing exercise of judicial control over the litigation process. Yet, perhaps ironically, there is widespread dissatisfaction among the bar that judges do not intervene enough. The consensus among lawyers seems to be that only early, active and ongoing judicial intervention and management can control the excesses of the adversary process. What the bar is saying to the bench is: "Stop me before I kill again!"

The exercise of judicial control and management of litigation has indeed been increasing. But far from being a power grab, it has been a response to a need created by the increasing aggressiveness of law-

yers, by the escalating costs of litigation, and also by the volume of litigation that is flooding the courts. The need for judicial management has become particularly acute as large-scale multi-claim, multi-party litigation has become common-place, which leads to the final issue.

IV. Impact of Mass Litigation and the Pressure for Aggregation

Large-scale litigation casts a shadow over the civil justice process. Litigation arising out of mass-accidents, defective products, large-scale frauds, harmful substances and environmental disputes challenges the limits of the traditional two-party adjudication process. If adversary excess tests the viability of that process, mass litigation threatens it with obsolescence.

The sheer volume of claims in such litigation impedes and may preclude access to justice for individual claimants while the potential exposure confronts defendants with a risk of bankruptcy. Those characteristics mandate intensive and pervasive judicial management to ensure fair treatment of all of the interests involved.

There is a prevalent view that the system cannot deliver justice if the large number of cases arising out of the same or related events are left to be individually tried (often in dispersed courts). There is merit in that view because repetitive trials of the same issues, assuming the courts' limited resources make them feasible, can be enormously burdensome, costly and inefficient. Yet, aggregation of large numbers of cases is not necessarily a solution of the problem; the volume of cases may exceed the capacity of a single court to manage and resolve, and in the process the individual interests of litigants may be smothered.

Some see class actions as the best vehicle for the resolution of mass disputes. But in class action litigation, civil procedure takes on an entirely different character. Lawyers no longer act in their traditional roles as the representative of a client with a distinct interest. Instead they represent groups which, although in theory bound by a common interest, inevitably comprise diverse individual interests. Ultimately it is the judge on whom the responsibility falls to ensure that litigants are fairly represented, yet it is unrealistic to expect the judge to become an effective fiduciary for the many members of a class, often numbering in the thousands.

The civil justice process is changing in other ways. Traditionally it has rested on the assumption that trial is the controlling frame of reference. While most cases are resolved short of trial, trial nevertheless provides the context for the framing and evaluation of a legal controversy. But class actions (for all practical purposes) do not go to trial. Like nuclear weapons, they have become such powerful engines

of destruction that their potential virtually forces the parties to settle. Most defendants cannot take the risk of an adverse judgment that might bankrupt them. And even for plaintiffs the procedure is so fraught with uncertainty that compensation may be unattainable other than by settlement.

What makes large-scale litigation (whether class action or not) so lethal is the exposure of defendants to multiple punitive damage awards. Nothing in the law now precludes a plaintiff suing for compensatory damages to recover also punitive damages based on the same evidence of wrongful conduct on which other plaintiffs have previously recovered punitive damages, and on which future plaintiffs may again do so. The prospect of such multiple recoveries drives much of this litigation which could otherwise be readily settled on the basis of compensatory damages alone, and it also casts a shadow over the settlements that are made.

To sum up, the politicization of the rule-making process, the dilemmas of the adversary process, and the explosion of mass litigation all tend to distort the civil justice system. While they generate a need for reform, they also offer obstacles that stand in the way to rational reform. Until one confronts these realities and attacks the causes of the present dissatisfaction with the system, tinkering around the edges is not likely to bring significant results.