Aggregate Litigation & All That We Do Not Know

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A good article raises a normative question, wrestles with it, and ultimately answers it. A great article also inspires the reader to cogitate. Briana Rosenbaum’s *The RICO Trend in Class Action Warfare* is undoubtedly a great article. The article addresses a complex and interesting issue—the use of the federal Racketeer Influenced and Corrupt Organizations (“RICO”) statute to sanction attorneys—while also inspiring thought about other fascinating questions. My Response to the article will focus on one such question: What do we really know about aggregate litigation?

Legal empirical work is more fashionable than ever, and this is certainly true in the field of civil procedure. Yet, there are some aspects of

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2. For the purpose of this discussion, I will use the term aggregate litigation to refer to class actions, mass actions, and multidistrict litigation.

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civil litigation and civil procedure that appear to be empirically
understudied. Perhaps there is a lack of interest in the specific rule or
document such that it is overlooked. Perhaps there is no way of knowing what
we need to know. Or, perhaps even if we discovered what we wanted to
know, it would not overcome our own biases and perceptions.

Aggregate litigation is a hothed of scholarly activity, so surely there is an
interest in how it really works. This leaves us with the latter two
justifications. I argue both apply. First, while there is much we would like to
know about aggregate litigation, some of it—due to structural and
institutional challenges—is simply unknowable. Second, even if empirical
work could provide credible answers to questions about aggregate litigation,
it would not diffuse the us-versus-them nature of the debate. At bottom, this
is about our values. One either believes in the enterprise of aggregate
litigation and will therefore find the support—theoretical or empirical—to
buttress that evaluation, or one is skeptical of aggregation and will similarly
marshal whatever evidence is available to support that viewpoint. It is this
question—what we know and what we do not know and whether it matters—
over which I will ruminate.

Before reaching that discussion, however, a quick summary of the
article that inspired it is instructive. Rosenbaum’s article seeks to confront
the question of whether what she terms “the RICO reprisal” is a valid
response to potentially frivolous aggregate litigation. Ultimately, she

4. For example, there was a flurry of empirical legal scholarship following the Court’s
pleading decisions in Bell Atl. Corp. v. Twombly 550 U.S. 544 (2007), and Ashcroft v. Iqbal 556
U.S. 662 (2009). See generally, e.g., JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON
RESOLUTION OF RULE 12(b)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE
JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011),
Twombly and Iqbal Matter Empirically?, 59 AM. U.L. REV. 553 (2010); Lonny Hoffman, Twombly
and Iqbal: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss, 6 FED.
CIV. L. REV. 1 (2011); Patricia Hatamyar Moore, An Updated Quantitative Study of Iqbal’s Impact
on 12(b)(6) Motions, 46 U. CHI. L. REV. 603 (2012); Alexander A. Reinert, Measuring the Impact
of Plausibility Pleading, 101 VA. L. REV. 2117 (2015); Jonah B. Gelbach, Note, Locking the Doors to
Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery, 121 YALE L.J. 2270,

5. See infra note 22.

6. See infra notes 25–38 and accompanying text.

7. I have made a similar argument in the summary judgment context. See Brooke D.
Coleman, Summary Judgment: What We Think We Know Versus What We Ought To Know, 43 LOY.
CHI. L.J. 705, 725 (2012) ("[T]he real question is not so much about the efficiency or fairness of
the summary judgment process, but really just about one critical issue—the jury trial.
Regardless of what the data might tell us, the bottom line is that one either has great faith in
the value of the jury trial or one does not. And maybe that is where the debate about summary
judgment should start and end.").

8. Rosenbaum, supra note 1, at 168.
determines that—especially given the existing remedial structure for vexatious litigants—RICO is an ill fit for combating specious claiming. She provides a number of reasons: RICO was not designed or adopted with such use in mind; it offends federalism values; may violate the Rules Enabling Act; and it is too strong a weapon in this context—think about bringing a semi-automatic weapon to a knife fight. Yet, even if one accepts that RICO is necessary to deter frivolous aggregate litigation, Rosenbaum argues that we must modify its application in order to curtail its negative impact on critical litigation values such as access to justice.

As Rosenbaum works through her impressive normative argument, she must necessarily weave together an atomized set of issues—state procedure rules, federal procedure rules, RICO’s adoption and subsequent use, the Rules Enabling Act, federalism, aggregate litigation, and litigation values. Like any great scholar, however, Rosenbaum knows the limits of her inquiry. For example, there are potential structural solutions to the problem of frivolous aggregate litigation that she acknowledges but does not cover exhaustively. Similarly, Rosenbaum recognizes that perceptions—largely negative—about aggregate litigation abound even though we are often unsure if those perceptions are reality. More specifically, Rosenbaum notes that it is unclear “[w]ether there is a problem with specious claiming in the mass tort context, or more broadly in aggregate litigation.”

Even still, Rosenbaum feels compelled to admit that some mass action attorneys include frivolous claims among meritorious ones in an attempt to obtain a larger settlement—an empirical notion that she simultaneously questions. She assumes as much, however, in order to reach her broader

9. Id. at 220–21.
10. Id. at 184–87.
11. Id. at 187, 208–11.
12. Id. at 186–88, 204.
13. Id. at 201, 203–04 (noting that “[c]ivil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device” (quoting Miranda v. Ponce Fed. Bank, 948 F.2d 141, 144 (1st Cir. 1991))).
15. Id. at 214 (discussing a series of proposed reforms to the various “flaws in aggregate litigation devices”).
16. Id. at 168–69.
17. Id. at 169.
18. Id. at 173 (“Unfortunately, improper conduct in litigation—both in traditional two-party actions and aggregate litigation—is not a new issue); id. at 215 (“Although over-aggregation is indeed a problem requiring a remedy . . . .”).
19. Id. at 174 (describing the defense bar’s criticism of aggregate litigation as not necessarily established); id. at 213 (describing the potential abuses in aggregate litigation as due to structural flaws in the aggregate litigation system, and not necessarily due to bad behavior or intent); id. at 171–72 (arguing that aggregate litigation “scholarship has largely gone the way of popular opinion, often focusing on a smaller subset of ethical issues related to
point about why the RICO reprisal is a mistake and how that mistake can be mitigated. Rosenbaum is not alone in taking this tack—literature on aggregate litigation is rife with a recognition of its frailties.\textsuperscript{20} Yet, most of those weaknesses are assessed using a potent combination of theoretical arguments and anecdotal evidence. With a few exceptions, there is very little comprehensive empirical study of the success and abuse of aggregate litigation.\textsuperscript{21} Stated differently, we really do not know how much good or ill results from this rather established litigation method.

I am by no means questioning the groundbreaking theoretical work grappling with the challenges inherent in aggregate litigation. As Rosenbaum explains, the tension that arises from lawyers‘ role as “fiduciary and entrepreneur” has been thoughtfully addressed in the literature.\textsuperscript{22} Similarly, there is a breadth of engaging and important scholarship on the unique challenges that certain kinds of aggregate litigation present.\textsuperscript{23} What is missing is an understanding of the degree to which these tensions are problematic. How much frivolous litigation is filed? And, how often do defendants settle because they rationally fear aggregate litigation and its ability to consolidate claims into a “bet-the-company” scenario? Finally, how

perceived egregious plaintiff lawyering in aggregate cases?\textsuperscript{24})

\textsuperscript{20} See infra note 22.

\textsuperscript{21} See infra notes 32–37 and the accompanying text.


much meritorious litigation is chilled by the adoption of policies like the RICO reprisal or by recent developments in the law like the restrictive approach to certification taken by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*.24

If we are adopting policies like the RICO reprisal, it seems that we should concretely understand and know the answers to these questions. The RICO reprisal, like other aggregate litigation reforms, is spurred by a sense that attorneys file needless litigation. Yet, where policies such as the RICO reprisal are adopted, one would hope that it is in response to something more than mere conjecture.

Thus, a return to my brief reflections on empirical work and aggregate litigation.

First, there are a number of challenges to this kind of work. The Administrative Office of the Courts, a bureaucracy that many scholars look to for basic statistics, does not even track the number of class actions filed in federal court.25 This makes it nearly impossible to develop a theory of class action filing trends. While scholars generally agree that—over time—class action filing rates in federal court have varied, we are not altogether sure of the magnitude of that change. In other words, the lack of even the most basic data on class actions presents a huge challenge to doing empirical work.26

With respect to multidistrict litigation, the black box is even more pronounced. For example, when class actions settle, the court assesses the settlement terms for fairness.27 In multidistrict non-class litigation, however, the judge is not required to undertake any review of settlement agreements.28 There is almost universal agreement that settlement rates in

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26. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 HARV. L. REV. 78, 147 (2011) (noting that only limited data is available about classaction litigation); *see also Hensler et al., supra note 22, at 51 n.52 (2000) (discussing the absence of comprehensive data on class actions in both state and federal courts).*

27. *Fed. R. Civ. P. 23(e)(2) (“If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”).*

28. *See Burch, supra note 23, at 116-17 (“[N]onclass settlements like those in Guidant,
all aspects of civil litigation have increased—another empirical question that is somewhat unsettled—yet, there is similarly universal agreement that when settlements are private, there is no way to know what values and objectives were used to resolve the claim. When a class action settles, a court’s evaluation pulls back the curtain on some of these issues and provides good insight. That insight is completely lost in the context of some multidistrict litigation, leaving critical empirical information in the dark.

This is not to say that—in the face of these challenges—valuable empirical work on aggregate litigation is not being done. Deborah Hensler is a notable leader in empirical research on this front. In addition, the Federal Judicial Center has done important studies. Finally, other scholars are entering the fold. For example, in *Judging Multidistrict Litigation*, Beth Burch used a cross-section of multidistrict litigation cases to determine the impact of repeat players. And, others like Bob Klonoff have surveyed case law in an effort to unearth trends. Most recently, Klonoff surveyed a wide

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29. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 525 (1991) (“While it is true that most civil suits are settled, the figure is nowhere near the 99 to 95 percent figure that has passed into procedure folklore, and is more likely in the neighborhood of 60 to 70 percent.”).


31. Although, even then, getting good information about how a class action settlement actually works after a judge’s approval is a challenge. See Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data* (RAND Inst. for Civ. Just., Working Paper No. WR599-HCJ, 2008), http://www.rand.org/content/dam/rand/rand/pubs/working_papers/2008/RAND_WR599.pdf (“A veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement and ultimately, little information is available about how many class members actually received compensation and at what degree.”).

32. See Deborah Hensler, *Biography*, STAN. L. SCH., https://law.stanford.edu/directory/deborah-hensler (last visited Mar. 20, 2017) (stating Deborah Hensler is the Judge John W. Ford Professor of Dispute Resolution, and her “empirical research on dispute resolution, complex litigation, class actions and mass tort liability has won international recognition”).


34. See generally Burch, supra note 23.

variety of district and appellate court cases and made predictions about how parties will respond on key issues like ascertainability and the use of statistical proof.36  Yet, when it comes to research on how aggregate litigation actually affects settlement or whether there is a burgeoning set of frivolous cases being filed, the empirical work is quite thin. Again, there are exceptions. For example, in 1996, a Federal Judicial Center study found that settlement rates for class action cases were generally the same as in individual cases.37  Yet, overall—mostly because there is so little data on how aggregate litigation systemically works—scholars cannot study some of the thornier questions. Thus, empirical work is largely based on observations about the developing case law or is focused on discrete issues that can actually be studied. In other words, we know a lot less than we should.38

This leads to my second point. While I believe that we should endeavor to remove the barriers to doing empirical work on aggregate litigation, I am skeptical that it would make a difference in our collective hearts and minds. First, there are fundamentally different views about the value of aggregate litigation.39  These differences will necessarily impact our ability to agree on what this new, additional empirical evidence might demonstrate. Even now—with the limited information we have—studies are used to suit one’s fundamental views. For example, the Supreme Court has recently taken certiorari in less class action cases.40  Klonoff argues that the Court might be

36. Id.
37. See Willging et al., supra note 33, at 92, 182 fig.2 (studying only four districts); see also Thomas E. Willging & Shannon R. Wheatman, Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make? 81 NOTRE DAME L. REV. 591, 645, 652-54 (2006) (finding, on limited data, no differences in treatment of class actions between state and federal courts, and observing that “[a]ttorney perceptions of judicial predispositions toward their clients’ interests show little or no relationship to the judicial rulings in the surveyed [state and federal class action] cases”).
39. See Fiss, supra note 22, at 31 (“The individualistic values that the class action calls into question are all pervasive features of our law, perhaps of all law, and, for good or bad, will always exert a restraining influence on the great temptation of social reformers to create collective instruments that might better serve their ends.”); John Leubsdorf, Class Actions at the Cloverleaf, 39 ARTS L. REV. 453-457 (1997) (“Distress of the government led many in the 1960s and 1970s to welcome the class action brought by the ‘private attorney general’ as an alternative. Now, the conflicting values and the disbelief in a common good that fostered distrust of the government have infected trust in class actions. Those who want to cut back government also want to cut back class actions.”).
wary of defendants’ rhetoric regarding the “blackmail pressure to settle” in aggregate litigation—an argument that Klonoff believes might be valid, but one he also believes is largely overblown. Yet, we have no way of knowing whether the Court believes this rhetoric is overstated. The Court could just be waiting for a better case with better facts. We also do not know whether one of the largest criticisms of aggregate litigation—the blackmail settlement effect—is true, and further, we do not know whether the Court believes it to be true. One’s sense of the value of aggregate litigation necessarily colors how one might judge even this small data point. It is hard to see how this tendency would change, whether we have better information or not.

Second, as Rosenbaum points out, our collective tolerance for frivolous claims is largely behind the debates about aggregate litigation. She states, “The goal of the civil justice system is not, and cannot be, to have a system absolutely free of frivolous lawsuits.” I think she is right, but it is not that simple. The problem is that we do not agree on how much frivolous litigation we are systemically willing to tolerate. Put differently, we do not agree on how much meritorious litigation we are willing to forego in order to decrease the number of frivolous cases overall.

It is this conundrum that comes up squarely in aggregate litigation. There are positive values to aggregate litigation—social change, aggregation of small negative-value claims, and deterrence, to name a few. Yet, there are negative aspects of the method—loss of individualism and perverse incentives inherent in representative litigation. For myself—and for Rosenbaum, I believe—tolerating a higher number of frivolous cases is an acceptable price for the greater good aggregate litigation can achieve. Yet, ours is not the only view. That difference alone prevents empirical evidence from doing much to move people away from their deep-seated positions on the basic value of aggregate litigation. In other words, aggregate litigation might just have to say, “you either like me or you don’t,” and we might just have to accept that polarity regardless of what the data might show.

So, where does this leave us? After all, garnering useful empirical evidence—much like the RICO reprisal—is not the only challenge facing aggregate litigation. For example, more and more cases are shunted into

41. Id. at 11–14.
42. Rosenbaum, supra note 1, at 217.
43. Id.
44. See Brooke D. Coleman, The Vanishing Plaintiff, 42 SETON HALL L. REV. 501, 504 (2012) (“[I]f it were the case that more restrictive procedural rules resulted in less frivolous litigation, with only a slight loss in unique meritorious claims, a restrictive procedural regime may make sense... If it were determined, however, that a restrictive procedural regime filters out more meritorious claims than what is ultimately beneficial to society—meaning that the claims being lost are unique and not otherwise captured by successful litigation—then there is more room to question a procedural regime that is guided by a restrictive ethos.”).
private arbitration and often the ability to aggregate claims—even in arbitration—is prohibited. All of this could lead one to be quite dubious of aggregate litigation’s future. From my perspective, however, the picture is not quite that bleak. As long as lawyers innovate the way they are bound to do and as long as scholars like Rosenbaum are paying attention, I am fairly sanguine. I may not have the numbers and data to back up my rather rosy view, but maybe, just maybe, that is beside the point.

45. Arthur R. Miller, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 EMORY L.J. 293, 300 (2014) (noting that recent Supreme Court cases “take away access to the judicial system and the opportunity for class or aggregate arbitration from countless consumers, employees, investors, and small businesses that lack any real bargaining ability and are left subject to adhesive noclass arbitration clauses relating to a wide range of basic transactions and societal amenity”).

46. I am not alone in this assessment. See id. at 306 (“Uncharacteristically for those who know my negative personality, I will be optimistic for a change and answer ‘no.’ As Mark Twain might say, ‘The reports of aggregate litigation’s death are greatly exaggerated.’ But, of course, inevitably the landscape will continue to change, reformulate, and transmogrify.” (footnote omitted)); see also generally Klonoff, supra note 49.

47. This may not just be the case in the class action context, but in other areas of procedure as well. See Jonah B. Gelbach, Material Facts in the Debate over Twombly and Iqbal, 68 STAN. L. REV. 3969 (2016) (concluding that even after assembling a comprehensive collection of data, “it might not be possible to settle the controversy over Twombly’s quality-filtering effects using empirical evidence”).