Class Actions: An Interview with Arthur Miller

by Rachel V. Rose

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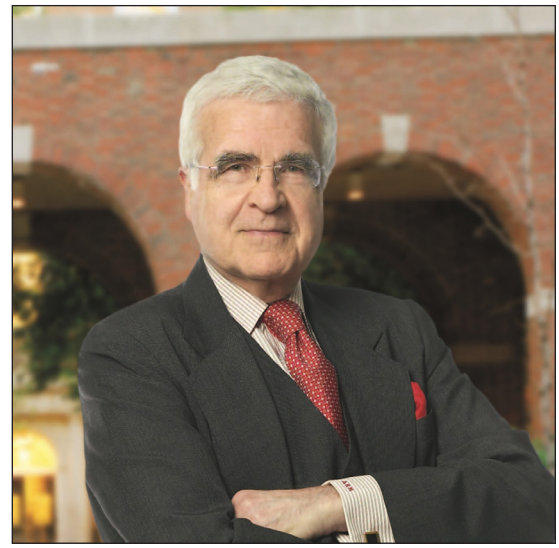
Arthur R. Miller CBE, LL.B., is a professor at the New York University School of Law, associate dean of the NYU School of Professional Studies, director of the Tisch Sports Institute, chairman of the NYU Sports & Society Program, and former Bruce Bromley Professor of Law at Harvard Law School (1971–2007). He is on the faculties at the universities of Minnesota and Michigan and practiced law in New York City. His undergraduate degree is from the University of Rochester, and his juris doctor is from Harvard Law School. He has hosted "Miller's Court" for eight years, is a former legal commentator for Boston's WCVB-TV, legal editor for ABC's "Good Morning America," and host of "Miller Law" on Court TV. He is the author or co-author of numerous works on civil procedure, notably the Wright & Miller treatise, *Federal Practice & Procedure*. He has also written on copyright and on privacy issues. Miller carries on an active law practice, particularly in the federal appellate courts.



Rachel Rose: On June 24, the House Judiciary Committee approved the Fairness in Class Action Litigation Act of 2015 (H.R. 1927). Specifically, this bill requires that class-in-class action lawsuits consist of members with the same type and scope of injury. In essence, the scope of who the lead plaintiff can represent is narrowed. In light of this legislation, how does proposing legislation to alter a Federal Rule of Civil Procedure juxtapose against the Rules Enabling Act?

Arthur Miller: The rule-making power that you find in 2072 (the Rules Enabling Act) isn't exclusive in the court; rather, it is a delegated power. Congress maintains its ability to legislate. Congress has exercised restraint, by and large, since the Rules Enabling Act was enacted around 1934. There is nothing that prevents Congress from legislating—nothing.

It is not a question of whether Congress complies with the protocol or the structure or the process in the Rules Enabling Act—one is fish, one is fowl. Congress has in fact legislated, infrequently, but it has done so. By and large, it makes a mess of things, which is one of the reasons that I think that they exercise restraint—they know they are not experts in procedure. For reasons that I cannot quite remember, Congress legislated with respect to Federal Rule of Civil Procedure (FRCP) 4. The rule makers can then amend again, and that trumps the statute. For example, the Federal Rules of Evidence (FRE) are a statute. Congress took the evidence rules away from the court because they did not like the proposed privilege provisions. The original FRE, which went up through the system and were about to be promulgated, were stopped by Congress. Congress wanted state law to control privilege, so they took the proposed rules away and did their own set of rules. The FRCP are just rules that are enacted pursuant to the power delegated to the court by the statute.

RR: Is there a separation of powers issue that emerges between Congress and the Rules Enabling Act (REA)?

AM: The reality is, the Supreme Court, because it is operating under a delegated power from Congress, is not going to trump Congress unless the Court believes that the legislation is unconstitutional. That would not come for years, because you would need a case

challenging a federal statute, and that would have to get all the way up to the U.S. Supreme Court. They would have to adjudicate it and decide that the procedural statute is unconstitutional, and that could take three to six years. The Court does not sit there and say, "We don't like that procedural statute that Congress passed, even though that is a matter we thought that they delegated to us." It is always possible for the rule maker to rework what Congress does with a rule and send it back up the chain to see if it floats through Congress.

The Rules Enabling Act is inconsistent with Congress legislating the FRCP; however, REA does not eliminate Congress' ability to legislate a rule change because Congress still has the Constitutional power to do so. It is inconsistent with the delegation and inconsistent with tradition and it is better policy to leave rule making to the process that has been established which works really quite well. No matter what your political flavor, the processes defined in the REA are sound protocols. Given the history of the FRE, given the fact that Congress has legislated in the service of process area [FRCP 4], then in effect be overridden by subsequent rule making, which Congress could then trump, it has been an uneasy yet respectful relationship between Congress and the rule-making process.

RR: How would this legislation potentially alter the findings in *Wal-Mart v. Dukes* in relation to FRCP 23(a)?

AM: It would not change it. The result would be the same. The effect of this bill would be basically to cripple class actions and give defense interests everything that they have asked for. This has been "one degree-itis." Defense [corporations'] interest, for many years now, have understood that the federal judiciary has become more resistant to class actions. The rule-making process is largely dominated these days by defense interest. Corporations have pushed in the courts to get a decision like *Wal-Mart* or *Amchem* or any number of other decisions and have pushed in the rule-making process to make it more difficult to get a class action certified. One of the master strokes of defense interests was the Class Action Fairness Act. I always ask to whom is that statute fair?

In *Wal-Mart*, the class might have been certified under FRCP 23(b)(3) in relation to a significant common issue of law or fact. Except that the defense has been extremely successful over the decades at constricting certification, because of the requirement of predominance. Except in very obvious cases that are almost identical, where are all of your liability issues are common, it is very hard to convince a court that you have predominance of the common question, which was a safety valve requirement that was put in by the reporter back in 1963. I was the assistant to the reporter—a young academic to my mentor, Ben Kaplan of the Harvard faculty, who was then the reporter. I am one of the last people alive who was a percipient witness to the rule-making process that produced Rule 23 in 1966. The next change to Rule 23 was in 2002 with the Interlocutory Appeals Act. This is when the class actions became a piece of warfare between plaintiff interests and defense interests.

Wal-Mart was correctly decided, given its facts, but the Court's opinions could have been written differently to avoid the collateral damage the decisions have caused. It is now all about front-end loading these cases, not about the resolution of the merits — notice pleading to fact pleading, making the class certification World War III, creating interlocutory appeals that delays resolution for two to three years—these are the examples of the procedural restrictions that have occurred in recent years.

RR: How effective is it for a corporation to litigate in multiple jurisdictions instead of bundling or joining either evidence or claimants?

AM: That is a calculated decision typically made by a corporation's experts and is based on a lot of analysis on how many cases there may be and how many cases there are likely to be in each of the two litigation environments. In essence, it is a gamble.

RR: Would this legislation impact superiority in relation to FRCP 23(b)(3), which stipulates "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"?

AM: Notice that the language says "superior" and not far superior. There is no concrete landmark definition for either predominance or superiority. They are two concepts that were put into the rule. Both of these terms were left to judicial elaboration. There have been varying assumptions over the years, since 1966, as to what the two words mean, but there is nothing definitive.

Until recently, the rules were always thought of as open textured—that is, phrased in general terms to maximize flexibility and contextual decision making and to left to the discretion of the trial judge. These basic concepts that were put into the Rules were meant to be reserved for judicial elaboration. And there have been varying assumptions over the years about superiority. One cannot define things that are going to change from one context to another. There is no way the human mind can predict with a level of certainty every litigation possibility. A detailed provision does not make sense when you cannot even predict the contest in which the rule will have to be applied.

Predominence was a word thought to convey that if you are going to certify under FRCP23(b)(3), which is a strange beast, one that was not a historically recognized class action. Rules (b)(1) and (b)(2) are—the historical roots of these two go back centuries—but (b)(3) was a giant joinder device. The rule makers thought it was desirable for distributive justice (as the Yalies call it) to provide a vehicle for small claims. To justify the class form, a high level of overlap among the claim is required. Sometimes efficiency, economy, and system values trump individual actions; we need to aggregate when the commonality is extremely high. This means that the efficiency and economy of joint adjudication is worth it. Then we are going to put in all of these procedural protections like notice and opt-out, so we want a very high level of commonality predominance, as well as making sure there is no other dispute adjudication method that is superior, like administrative regulation in certain cases. Or, for example, the opinion written by Judge Richard Posner, involving a case in which the individual claims were worth so much money that it is reasonable to say that each can proceed on his or her own—meaning that one-on-one litigation is superior to aggregate litigation. The aggregated form is designed for the "small people" (i.e., consumer rights, employment discrimination). Doctrines of preclusion of course will protect the system from masses of individual repetitive litigation.

RR: On April 29, Chief Justice John G. Roberts sent a letter to Vice President Joseph R. Biden submitting the amendments to the Federal Rules of Civil Procedure, which were adopted by the Supreme Court. Would you please explain the changes to the discovery rules under FRCP 26 and the impact on proportionality?

AM: Whether or not it creates a culture shift among federal judges regarding discovery remains to be seen. You can look at these changes and say, "So the judges always had that power." Ironically, that power went in in 1983 when I was the reporter, but no one paid the slightest bit of attention to it, which is why defense interests got upset. So defense interests got it moved to FRCP 26 — up front. A lot of noise is made about proportionality. The intent, which is defined in the 1983 Reporter's Notes was to signal to federal judges, "If you see unnecessary or cumulative or redundant discovery, cut it off." Now, front end "fist fights" are going to ensue. The 1983 intent was to be a back-end control when a problem arose, not a front-end mechanism to stop discovery.

RR: Could proportionality, in relation to FRCP 26, also be interpreted to mean that the discovery that is required to substantiate a claim, from the plaintiff's perspective, is too burdensome?

AM: All the pressure, for more than 20 years now, has been to constrict discovery. All of the amendments to the Discovery Rules have had the intent of limiting discovery so that there is a mind-set, a culture shift, away from equal access to all data. In my judgment, this has been achieved by defense interests because of their impact on the rule-making process and because they sold a bill of goods to people who are constantly screaming expense, cost, delay—the statistics do not support this notion. The best statistics that we have say that discovery costs run between 2% and 5% of damages claimed, which is much less than a broker's fee on a real estate transaction.

RR: Hypothetically speaking, if the cost of discovery was an outlier and statistically significant, what would that mean and how would it be remedied?

AM: A judge can always say, "Enough." But not on the front end, not before you start. This new provision is going to breed motions. If you are a defense lawyer, you are going to say that this is disproportionate whenever you can with a straight face.

RR: How would the proposed rule affect other FRCP, such as FRCP 12, 13, 14, and 15?

AM: When you sense blood in the water, the sharks attack. After years of trying to limit discovery, the defense bar realized in the 1980s that there was shift toward the conservative side. With each step, it is piling on. The pressure to make the rules more defense friendly will continue.

RR: Do you have a favorite Supreme Court opinion? If so, what was it?

AM: The case that I taught for 55 years now, that I have always loved, is *Erie v. Tompkins.* This has nothing to do with class actions; it just happens to be my favorite case because it establishes a basic principle of judicial federalism. There are certain cases that you remember from your first year of law school. Then if you become an academic and teach it as in my case, it is as close to a brother or a sister that you can imagine. *International Shoe* involving personal jurisdiction is another one.

My love for these cases, both *Erie* and *International Shoe*, stems from their establishment, at a mega level, of a doctrine. They have enormous breadth of application, and they are incredibly significant. *International Shoe* defines the limitations of the Due Process Clause on every state in the Union and altered *Penoyer v. Neff*, which was decided in 1877. *Erie*, which was decided in 1938, establishes the source of governing law for every diversity case decided in every federal court today and for the pass 70 years or so. It is a very important case involving the distribution of judicial power and law-making power that literally pulls a 180-degree turn on 96 years of jurisprudence. In terms of the operation of the federal courts, these cases are as central as *Brown v. The Board of Education* is to civil rights.

RR: What is your perspective on the number of judicial vacancies in the federal courts?

AM: President Barack Obama and the Senate leadership failed us by leaving so many judgeships open.

RR: What accomplishments are you most proud of?

AM: My whimsical side would say it is that I am the only law professor in American history to have an Emmy Award. I am a good teacher, and I am fortunate that I have the opportunity to communicate beyond the law school I have taught at. I have had such wonderful students who have accomplished amazing things and I am proud of them. I am proud of those PBS and BBC seminars I did for so many years. People come up to me on the street and say, "My family and I would watch those and discuss them afterwards." Most of all, I am proud that I communicated to so many people in so many ways, either through my federal practice treatise, my civil procedure books and tapes, commentary on *Good Morning America*, or being involved in the rule-making process as a reporter, committee member, and commentator. ☉

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