IV

REMARKS AT MONDAY AFTERNOON SESSION UPON RECEIVING YOUNG SCHOLARS MEDAL

By Elizabeth Chamblee Burch
Associate Professor at University of Georgia School of Law

By Michael N. Simkovic
Associate Professor at Seton Hall University School of Law

President Roberta Cooper Ramo and The Honorable Goodwin Liu, Chair of the ALI Young Scholars Medal Committee, presided over the awards ceremony.

President Ramo: Well, let me call up, please, to the podium Justice Goodwin Liu and the two young scholars who are about to be presented with the Young Scholars Award.

While they walk up, let me, first of all, thank Goodwin. Those of you who have been around for a while will remember when we first began the idea that we wanted to get young scholars once again involved in law-reform issues. And you may remember my saying I went to Gerhard Casper, who was then the President at Stanford, and said, Gerhard, what would you do? And he said, well, if I were you, I would convene 10 young scholars from across the country and say to them, "If you owned The American Law Institute, what would you do?"

So I did it. Pretty much everybody does what Gerhard says. I'm no different than anyone else. And one of the ideas that came from that meeting of young scholars was that we recognize the young scholars in our country that are doing work related to law reform. And this project was born.

Part of the success of that project depends upon having someone who is willing to undertake the enormous—enormous—task of chairing a very large committee that reads all of the work of all of the people nominated. And I want to thank Goodwin, as I introduce him. I think everybody in this room knows, but I want to say again, it's such a rare thing to be able to have someone who is both a justice on a supreme court but also still a scholar and academic and a teacher to lead an effort like this. It's made an enormous difference. And I'm personally very grateful that Goodwin agreed to do it, not just once but twice.

So ladies and gentlemen, from the California Supreme Court, Justice Goodwin Liu. (*Applause*)

Justice Goodwin Liu (CA): Thank you. That was such a stirring speech by William Hubbard. I felt the earth move under my feet after that, and that was just what we needed to not fall into an afternoon nap. So that's terrific.

Well, thank you, Roberta, for the honor and privilege of chairing this selection committee for the Young Scholars Medal, and I'm here to announce the medal recipients today. This is the third round of awards that the ALI has given, in an effort to recognize early-career academics who are engaged in practical scholarly work with the real potential to influence law reform.

Our definition of "young" is broad. (*Laughter*)

But not too broad. Don't get your hopes up. Not too broad. (*Laughter*)

It encompasses anyone who has been a full-time academic for at least three but no more than 10 years and who is within 15 years of having received his or her law degree. Each medal recipient is given the opportunity to speak at an ALI meeting—you'll be hearing from one of them today and the other one next year—and to convene an ALI conference on issues related to their work. In addition, we give them a $5000 award.

Last cycle we received 44 nominations from law deans throughout the country. This cycle we received 61 nominations, spanning a wide range of subject matters and analytical methods. Our Committee narrowed this pool to 10 finalists, and, for each of these candidates, we considered his or her most substantial work. This typically meant reviewing about 150 to 200 pages of writing for every candidate.

Just so you know, the Committee this year consisted of Kate Bartlett from Duke, Rochelle Dreyfuss from NYU, Christine Durham from the Utah Supreme Court, Jesse Furman from the Southern District of New York, Phoebe Haddon from Rutgers–Camden, Howell Jackson from Harvard, Jack Jacobs from the Delaware Supreme Court and now with Sidley Austin, George Newcombe from Simpson Thacher, Eric Posner from the University of Chicago, Roberta Ramo from just about everywhere, Randall Shepard from the Indiana Supreme Court and now Indiana University, Stuart Singer from the Boies, Schiller firm, Henry Smith from Harvard, Kate Stith from Yale, David Stras from the Minnesota Supreme Court, and Jon Tigar from the Northern District of California. And of course, Ricky Revesz lent us his wisdom and insight at every stage of this process. So let's take a moment. Please join me in thanking this group. (*Applause*)

So this august group read the files, and we met in February, in a locked room in San Francisco at our courthouse, and did not emerge until two names had been selected. It was a very robust and thoughtful discussion, and our Committee is pleased to select, as this year's Young Scholars Medal recipients, Professor Elizabeth Chamblee Burch from the University of Georgia and Professor Michael Simkovic from Seton Hall.

I'm going to first introduce Professor Simkovic, who will then give a few brief remarks, and then I will introduce Professor Burch, who will give more extended remarks about her work. And you will hear more from Professor Simkovic next year.

Professor Simkovic joined the faculty of Seton Hall in 2010. His research focuses on the regulation of credit markets throughout the United States Bankruptcy Code, and the regulation of financial markets in general through mandatory disclosure requirements. He's an expert on the credit-card industry, the causes of the financial crisis of 2008, credit default swaps, securitization, leveraged buyouts, and open-market stock repurchases.

Just five years into his academic career, Professor Simkovic has authored a dozen articles on these subjects, already with very significant impact. Congress cited his research when it enacted reform of the credit-card industry in 2009. His work showed that changes to the Bankruptcy Code that reduced losses to credit-card companies did not lead to lower credit prices but rather increased profits of credit-card lenders. And this work was featured on the front page of *The New York Times*, and the 2009 legislation addressed many of the problems he identified by mandating simpler disclosures and more standardized credit-card terms.

His article, "Competition and Crisis in Mortgage Securitization" [88 IND. L.J. 213 (2013)], is one of the most widely read articles about the causes of the subprime mortgage crisis. It's rigorous, yet written in a very accessible style, which our Committee appreciated. This article was cited by the Government Accountability Office, the GAO, in setting its framework for housing-finance reform.

I personally first encountered Professor Simkovic's work while serving on the ABA Task Force on Financing Legal Education. In addition to his research on credit and financial markets, Professor Simkovic is widely cited for his 2014 article with Frank McIntyre in the Journal of Legal Studies called "The Economic Value of a Law Degree" [43 J. LEGAL STUD. 249 (2014)]. In that article, he counters the most vocal critics of legal education today with sober, empirical analysis showing that for most law graduates, the present value of a law degree well exceeds its costs by several hundred thousand dollars. This work continues to play a major role in debates on federal student loans and higher-education policy and it earned him a photo on the cover of *National Jurist* magazine as one of the most influential persons in legal education. How many of us can say we've had a cover photo on a magazine?

So with that, let me turn the podium over to Professor Simkovic, and please join me in congratulating him on the receipt of the medal. (*Applause*)

Professor Michael N. Simkovic (NJ): Thank you very much for this incredible honor. I'm humbled and grateful.

I'd especially like to thank Justice Liu and members of the selection committee, as well as everyone here at The American Law Institute.

I'd also like to congratulate my corecipient, Elizabeth Burch, and to thank her for being the featured speaker first. (*Laughter*) I guess she drew the short straw.

I want to thank my mother who is here, who inspired me to become a lawyer, and who took a bus from New York yesterday when the trains weren't running, as well as everyone here who traveled from far and wide under difficult travel conditions to be here today.

I'd like to thank my colleagues at Seton Hall, UNC, and Fordham, who challenged me constantly to become a better scholar and a better teacher. In particular, I'd like to thank Michael Risinger; Charlie Sullivan; Adam Steinman; Howie Erichson; my dean, Patrick Hobbs; Dean Boozang; and Dean Mike Martin.

Thank you also to the people of Davis Polk, who have served as great mentors. I think Guy Struve and Brad Smith are here today.

Thank you also to the Harvard Law School community, which was an incredible place to learn.

I'm grateful and privileged to be in the company of everyone here today and look forward to being with you again next year. I hope that this is just the beginning of a long involvement with the wonderful people and the wonderful work of The American Law Institute. Thank you. *(Applause)*

Justice Liu: It is now my pleasure to introduce the other medal recipient and our featured speaker for this segment, Professor Elizabeth Burch.

Professor Burch joined the faculty of the University of Georgia School of Law in 2011, after having previously taught at Florida State University and the Cumberland School of Law.

Her areas of expertise are civil procedure, mass torts, and complex litigation. In less than a decade as a scholar, she has earned numerous teaching awards and has authored or coauthored almost 30 articles, as well as the leading textbook on these important subjects. She has been especially influential in the area of aggregate litigation, elucidating various problems of representation, monitoring, conflicted incentives, and potential for procedural abuse in current litigation and judicial practice.

One of her articles, "Financiers as Monitors in Aggregate Litigation" [87 N.Y.U. L. REV. 1273 (2012)] suggests that third-party funders could monitor large-scale litigation that proceeds outside of Rule 23's safeguards and insulate plaintiffs against attorney overreaching and self-dealing.

Another article, "Judging Multidistrict Litigation" [90 N.Y.U. L. REV. 71 (2015)] discusses her empirical study of repeat players in multidistrict litigation and suggests new standards and safeguards for judges to use in appointing lead lawyers, compensating those lawyers, and reviewing non-class settlements.

A third article, "Litigating Together: Social, Moral, and Legal Obligations" [91 B.U. L. REV. 87 (2011)] is more theoretical. It suggests that aggregate-litigation procedures themselves can bring plaintiffs together, encourage self-governance through social norms, and promote democratic ideals such as bargaining and voting.

All of her articles are incredibly careful, insightful, and interdisciplinary, and she has quickly established herself as a leading voice in the field of complex and aggregate litigation.

In addition to her service on the core committees of her law school—that's appointments, tenure and promotion, and recently the dean's search committee—Professor Burch has contributed her expertise as cochair of the American Association of Law Schools Section on Scholarship, as chair of the Mass Torts Subcommittee of the ABA Committee on Class Actions and Derivative Suits, and as coeditor of the Mass Tort Litigation Blog, which has everything you want to know about mass torts and more.

Professor Burch is no stranger to ALI. She was elected in 2012, and she participated in our Principles project on Aggregate Litigation.

And with that, I'd like to ask to the podium Professor Burch for her remarks. Please join me in congratulating her. *(Applause)*

Professor Elizabeth Chamblee Burch (GA): Well, I want to echo Mike's thank you to so many people who have been involved both in the ALI and my career, to Justice Liu, to the ALI itself, and to the Young Scholars Committee for reading all of those law-review articles. I feel like I owe you many, many cups of coffee for having done that.

And I also want to just take a moment to thank just a handful of the scholars who have taken their time to mentor me over the years, Brannon Denning, Richard Nagareda, Sam Issacharoff, and Howie Erichson, who must get two gold stars today.

I'm also lucky to have had a number of outstanding deans over the years, John Carroll, Don Weidner, Rebecca White, and Bo Rutledge. They've all been committed to prioritizing scholarship, even as law schools across the country are facing a number of challenges.

And most importantly, I want to thank my husband, Thomas Burch, whose unwavering support on an everyday basis continues to make my work possible.

So, as Justice Liu mentioned, the ALI has suggested that instead of giving a traditional academic talk, that I talk more about some of the themes in my work. And so I thought what I would do is highlight some of the different ways in which I've approached the principal–agent problem in large-scale litigation, and then give you a bit of an overview on how third parties might function as financiers in aggregate litigation. This isn't going to give me a ton of time—as you might imagine—to wade into any of the specifics, but my hope this afternoon is really just to start a conversation that we can continue well into the question-and-answer period and hopefully beyond that.

Aggregate litigation is an umbrella term. As many of you know, it includes class actions. It includes multidistrict litigation. And there are a number of unique concerns that arise in each of those contexts. But there's one core issue that scholars and courts have grappled with continually, and that's the principal–agent problem. That's the notion, of course, that as agents, lawyers are supposed to work hard on behalf of their clients, but their incentives never align perfectly.

This problem isn't unique to aggregate litigation. You can imagine that any sort of compensation system creates incentives that are helpful in some ways and harmful in others. So billable hours, for instance, might encourage attorneys to prolong the lawsuit or file unnecessary discovery requests or even motions that aren't necessary. Contingency fees may fare no better. They actually situate the lawyer not only as the agent but also as the financier. These dual roles can pull attorneys in divergent directions. The lawyers' monetary self-interest might conflict with their duty of loyalty. So, for example, contingent fees might motivate attorneys to settle quickly and cheaply, particularly if the cost of investing additional time and additional capital might exceed their return on that particular investment. Conversely, we might be worried that lawyers could underfund litigation, particularly as firms are experiencing cash-flow problems.

So clients need ways to reassure themselves that their attorneys will faithfully pursue their interests, even when they aren't being watched. And we think of these, obviously, as monitoring or as agency costs. On one end of the spectrum, in individual litigation, we trust that clients can monitor their attorneys by insisting on explanations, by asking for additional information, or ultimately hiring and firing new counsel, if it should come to that. In class actions, which lie at the other end of the spectrum, we trust that the judge will more or less perform a monitoring function by certifying that class counsel adequately represents the class, ensuring that the settlement is fair, reasonable, and adequate, and approving attorneys' fee requests.

But nonclass aggregation actually falls in between these two poles and faces a special set of problems. Attorney–client relationships are attenuated since attorneys tend to represent hundreds, if not thousands, of clients who have roughly similar claims. Those clients may have diverse goals and varying injuries that can create conflicts of interest in the representation itself. Moreover, litigation is exceedingly expensive in this context; the investment can span 20 years. So, for example, in the Dalkon Shield litigation, it took the attorneys' borrowing at high interest rates to keep the litigation alive, and they didn't ultimately see a profit for 20 years. Finally, just as in class actions, repeat players are prevalent. Plaintiffs' lawyers rely on one another to form funding coalitions, to receive client referrals, and to share information with one another. The concern is that if lawyers are playing the long game, they might be more worried about currying favor with one another than faithfully serving diverse clients' interests.

Over the years, I've suggested a number of different approaches to these problems. First, we might look to individual litigation as our model and seek ways to empower clients to litigate together, to share information with one another, and even to govern themselves. My favorite example in this context is the Stringfellow Acid Pits toxic-tort litigation, which took place in California a number of years ago. A single group called the Concerned Neighbors in Action formed out of a number of other community organizations, and created a charter that governed members' litigation activities, as well as their settlement activities.

The second possibility is that we could look at class actions as our model. And if class actions are our model, then we might seek ways to empower judges to police misconduct by ensuring that diverse plaintiffs are adequately represented when they appoint lead lawyers in multidistrict litigation. Judges might then compensate lead lawyers on a quantum meruit basis, which gives them a private law metric to assess the benefit that lead lawyers conferred on the plaintiffs.

We could even go one step further towards class actions and encourage judges to think about certifying issue classes, particularly when the defendants' conduct towards the plaintiffs is non-individuated. If that's the case, then judges would once again have all of Rule 23's quality-control measures at their fingertips.

Finally, we might actually look outside of this traditional litigation context, and encourage the use of private monitors in the form of third-party financiers. And here I'm thinking about hedge funds, private investors, or even venture capitalists. This is where I will concentrate the remainder of my remarks.

The basic thrust of this idea is that a plaintiff could assign a financier a stake in her lawsuit, just like the contingency fee does now. In exchange, the financier would then fund the lawsuit on a nonrecourse basis. If this is done holistically, the financier could become a super stakeholder of sorts, something more or less akin to an institutional lead plaintiff in a securities class action. As a sizeable and a sophisticated monitor, these funders can then help manage some of these principal–agent problems by unbundling the attorneys' competing roles as investors and advisors.

Now there are roughly three different types of alternative-litigation financing, and as you probably guessed, each one of these could create different incentives and problems, particularly as we consider them as candidates for the missing monitor. So, first, if you've ever heard anything about consumer legal financing, up to this point, you've probably heard about consumer legal funding. That tends to be what's in the news. This is where lenders make nonrecourse loans to plaintiffs, and the consumers then use the money for day-to-day living expenses, much like you would a car title loan. There are very high interest rates to the tune of 36 to upwards of 150 percent per year. That can reflect the high risk. If the plaintiff doesn't recover, then the lender doesn't recover. So, lenders are looking to invest in lawsuits that are likely to settle relatively quickly.

The second type of alternative-litigation financing is where financiers fund lawyers. They provide money to law firms based on the firm's portfolio of cases. These are recourse loans. In other words, the attorney has to repay the loans regardless of whether they win or lose any particular case. And so you can imagine that the funder might prefer to prolong the litigation and receive those monthly interest charges, at least so long as the attorney's firm isn't in danger of going into bankruptcy. The lawyers, on the other hand, might pressure their clients to settle kind of quickly so that they can avoid these monthly interest charges, or they might try to pass the interest rates on to their clients. This is what happened, for example, in some of the Ground Zero workers' personal-injury cases against the City of New York.

One of the firms involved borrowed about $35 million and tried to pass those costs on to their clients.

Finally, there are commercial-claims lenders that fund business-versus-business disputes. In other words, they loan money to commercial plaintiffs to pay the attorneys. In exchange, the financiers receive a portion of the plaintiffs' litigation proceeds or some multiple of the supplied capital. Here again, lenders prefer cases against defendants who have deep pockets, and they prefer not to have cases with novel legal theories or political questions that might wind up in front of a jury trial or on appeal. So they perform substantial due diligence because they prefer a quick settlement.

You might be thinking at this point, as you should, that perfectly aligning the financier's incentives with the plaintiffs' incentives is very much an impossible task, and I agree with you. But if we can think about these moving parts as puzzle pieces, one way that we might reconfigure them is to design fee structures as checks and balances.

So, I've suggested that we allow companies like commercial-claims lenders to contract directly with the plaintiffs for a portion of their proceeds, much like attorneys do in contingency-fee litigation today. But instead of fronting money to the plaintiffs for their daily living expenses like consumer legal funding does, the third parties would use that money to finance the litigation on a nonrecourse basis. The lenders would then pay plaintiffs' chosen attorney on a billable-hour rate, plus a small percentage of the gross proceeds as a successful litigation bonus.

I'll close simply by suggesting that there are four different benefits, even apart from disentangling the lawyer's role as an investor from his or her role as a legal advisor. The first is that these financiers are repeat players, and as repeat players, they are in a better position than one-shot plaintiffs to insist that attorneys keep their costs reasonable.

Second, financiers might prefer to have a quick settlement, particularly if it covers their costs and provides them with a profit. But here the hope is that the billable-hour attorney's self-interest and duty of loyalty to the clients can counterbalance the financier's push for a quick settlement. Billable hours encourage attorneys to spend time counseling clients to explain the risks of litigating versus the risks of settling and thereby offsetting some of the behavioral biases that one-shot plaintiffs can face like contrast biases or uninformed risk preferences.

Third, if we pay these attorneys a success bonus, then that should help counteract any tendency to unduly prolong the litigation, while rewarding efficiency and productivity. Unlike just paying them a flat billable-hour rate, the hope is that this will continue to attract the kind of quality plaintiffs' lawyers who are accustomed to experiencing a significant payday at the end of a lawsuit.

And finally, third-party financing can empower law firms that have less capital to litigate some of these high-stakes, resource-intensive cases, which can, in turn, intensify competition among the elite plaintiffs' bar. So these new entrants can increase cognitive diversity among the lead lawyers, which in turn, can foster innovation, creative thinking, and problem-solving.

So I'll close there. As I mentioned, this is very much a thematic overview. I've glossed over a host of these practical and logistical questions just to give you a sense of the big picture. But I'm happy to get into some of those questions during the Q&A and certainly thereafter.

President Ramo: Thank you, Elizabeth. (*Applause*)

It is so interesting for those of us who don't work in these areas to hear the young scholar's approach that was really fascinating, and we look forward to many other seriously long conversations with you.

For today, because we're running a little late, I think maybe two questions. Anybody want to ask?

(*There was no response.*)

I think you've stunned them into—

Professor Burch: I've answered all of your questions.

President Ramo: It's so perfectly clear. So I thank you and congratulations to you both. And thank you, Goodwin. (*Applause*)