ARTICLES

INTRODUCTION TO A FESTSCHRIFT HONORING PROFESSOR RHONDA WASSERMAN

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Rhonda Wasserman joined the faculty of the University of Pittsburgh School of Law in 1986, after graduating from Yale Law School and practicing law in New York City for three years. She has been a powerhouse on the Pitt Law faculty for three and a half decades. In that time, she served in many roles, including Associate Dean for Academic Affairs and, outside the law school, Reporter to the Local Rules Committee of the United States District Court for the Western District of Pennsylvania. She has been recognized with numerous titles and honors, such as John E. Murray Faculty Scholar, Buchanan, Ingersoll & Rooney Faculty Scholar, Distinguished Public Interest Professor, and elected member of the American Law Institute. She is well known to be one of Pitt Law’s finest teachers, as her many teaching awards will attest; she received the University of Pittsburgh Chancellor’s Distinguished Teaching Award in 2000, and the Pitt Law Student Bar Association’s Excellence in Teaching Award in 1990, 2005, and again in 2018. Her national and international prominence led to invitations to teach as a visiting law professor at Harvard Law School, Wuhan University School of Law in Hubei Province, China, and the University of Latvia Faculty of Law in Riga, Latvia. Her service contributions to the Law School are legendary and too numerous to fully list, but they include unwavering devotion to three student organizations, the Pitt Law

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Women’s Association, the Pitt Legal Income Sharing Foundation (PLISF), and the Jewish Law Students’ Association. In her long tenure as faculty advisor to these groups, Professor Wasserman made a lasting mark and touched many students’ lives. As a colleague, she has been unfailingly collegial, admirably courageous when the rubber hits the road, and endlessly generous with her time and wisdom. But it is Rhonda Wasserman as eminent legal scholar whom we celebrate in this festschrift symposium issue of the University of Pittsburgh Law Review.

Rhonda Wasserman is a procedural scholar par excellence, with over twenty law journal articles and a leading treatise on procedural due process. In this body of work, complex litigation and the challenges posed by class actions figure prominently. She has tackled a wide range of urgent topics in this space, including the controversial ascertainability requirement imposed by several circuit courts for certifying a class; the promise and peril of cy pres mechanisms for distributing unclaimed class settlement proceeds; the unfairness of class action waivers in arbitration agreements; the challenges of binding future class action claimants; the complications that arise when claimants exercise back-end opt-out rights; the implications of secret class action settlements; interjurisdictional preclusion in transnational classes; and the effects of multiple related class action lawsuits. While procedural in its subject matter, this scholarship is animated by a deep commitment to substantive justice, fair legal recourse, and the rule of law. Another strand of


4 See Rhonda Wasserman, Legal Process in a Box, or What Class Action Waivers Teach Us About Lawmaking, 44 Loy. U. Chi. L. J. 391 (2012).

5 See Rhonda Wasserman, Future Claimants and the Quest for Global Peace, 64 Emory L.J. 531 (2014).


8 See Rhonda Wasserman, Transnational Class Actions and Interjurisdictional Preclusion, 86 Notre Dame L. Rev. 313 (2011).

Rhonda Wasserman’s scholarship examines the intersection of procedural justice and family law, including jurisdictional and conflict of law disputes.\(^\text{10}\) She was among the first legal scholars to analyze the obligation of states to recognize family status determinations, such as adoption, marriage, and divorce, made by courts in other states for non-traditional families and same-sex couples. One of her articles in this area was awarded the prestigious Dukeminier Award conferred by the Williams Institute of UCLA School of Law.\(^\text{11}\)

As is true for legal scholarship generally, the reach and influence of Rhonda Wasserman’s scholarship cannot be fully captured by a citation count. Nevertheless, it would be remiss not to mention what a highly cited scholar indeed Rhonda Wasserman is! She has long been among our most-cited legal scholars in leading citation metrics. But it is her record of judicial citations that is perhaps most striking. As Professor Sandstrom Simard notes in her contribution to this issue, Rhonda Wasserman’s very first article\(^\text{12}\) was cited by the Second Circuit Court of Appeals and two state appellate courts.\(^\text{13}\) Her subsequent articles have continued to attract the attention of state and federal judges; our WestLaw research found forty-five judicial opinions citing to her work.\(^\text{14}\) Two of her articles have found their way into two of the opinions of the United States Supreme Court.\(^\text{15}\)


\(^\text{14}\) See Appendix.

This festschrift issue of the *University of Pittsburgh Law Review* is dedicated to the scholarship of Rhonda Wasserman. It is celebratory in tone, but also substantive and weighty in its contribution to legal scholarship. It is a testament to Rhonda Wasserman’s influence that this issue was able to attract such a distinguished group of legal scholars. The contributions connect to Professor Wasserman’s scholarship in varying ways; some focus primarily on Professor Wasserman’s published work, while others develop the authors’ own legal theories and arguments, with themes similar to and in dialogue with, Professor Wasserman’s work. Each is an important piece of scholarship in its own right.

Professor Richard Freer uses a 2012 law review article by Rhonda Wasserman on class action waivers in arbitration clauses\(^{16}\) as a launching point to explore how the themes identified in that article have continued to animate the U.S. Supreme Court’s interpretation of the Federal Arbitration Act (FAA) in the ensuing decade. Tracing the evolution of several themes touched upon in that article, Professor Freer points out the places where Rhonda Wasserman’s analysis was prescient and accurately foreshadowed future developments under the FAA, and examines how these themes have continued to evolve in the decade since the article was published. Like Rhonda Wasserman, Professor Freer is critical of the path the Court has charted, which favors arbitration when it serves business interests, but not when it might be used for aggregating “negative-value claims”—those claims for which the cost of securing a remedy exceeds the maximum possible recovery. Professor Freer’s analysis exposes the high cost of the Court’s recent FAA precedents for injured consumers, employees, shareholders, and other individuals’ access to justice. Through its incisive critique, the article aims to spark a reconsideration and correction of the Court’s path.

Professor Linda Mullenix’s festschrift contribution takes a deep dive into class action settlement litigation and judicial approval of class settlements, an issue that has received the scholarly attention of Rhonda Wasserman as well. In the same spirit as Professor Wasserman’s expressed concern for the fairness of class settlements,\(^{17}\) Professor Mullenix considers the growing use of expert witnesses in judicial approval of settlement classes, which she shows has vastly expanded in the wake of the 2003 and 2018 amendments to Rule 23. Professor Mullenix develops an insightful metaphor to explain how and why expert witnesses have become the evidentiary equivalent of the architectural “flying buttresses,” a now outdated device


intended to bolster physical structures, in their support for class settlement approval. The article sets forth a typology of the various modes of class settlement expert testimony and critically examines the courts’ turn to external experts—particularly mediators—in class settlement approval proceedings. It is a fitting tribute to Professor Wasserman’s scholarly agenda of protecting the interest of fairness to all parties in class settlements.

Professor Linda Sandstrom Simard explores several key strands of Professor Wasserman’s class action scholarship in her article, *Rule 23: What it Reveals About How, and When, Courts Should Ascertain the Identities of Individual Class Members*. Both professors Sandstrom Simard and Wasserman have a longstanding shared scholarly interest in the appropriate contours and consequences of class action litigation. Professor Sandstrom Simard notes that their scholarly paths first converged while they were both researching the preclusive effects of transnational class action litigation, which led them to different but complementary articles developing legal theories to support a framework for transnational class litigation in U.S. courts. Another shared scholarly interest highlighted by Professor Sandstrom Simard centers on “negative value class litigation” and the ability of claimants to use the class action device to aggregate claims that would otherwise be too low in value to warrant individual litigation. As Professor Sandstrom Simard explains, the ability to certify a Rule 23 class for negative value claims is instrumental to legal and social movements to address economic inequality because large corporations profit from and exploit the inability of consumers to seek redress for small economic harms. In her discussion of Professor Wasserman’s scholarship on secret class action settlements, unclaimed settlement monies due to difficulty identifying or notifying absent class members, the promise and pitfalls of *cy pres* remedies, and the controversy over assessing the ascertainability of a class, Professor Sandstrom Simard traces the economic justice threads at the center of Professor Wasserman’s class action scholarship. She then responds to Professor Wasserman’s call for further attention to ascertainability by elaborating her own proposal to tie administrative feasibility to the nature of the class under Rule 23(b), rather than as a Rule 23(a) prerequisite for certifying a class.

Professor Tobias Barrington Wolff uses the occasion of this festschrift to tackle the thorny jurisdictional and remedial problems that arise when a dispute occurs over compliance with a federal court’s consent decree in a district other than the one where the decree was issued. The problem is perplexing because of the hybrid nature of a consent decree, which straddles the disparate realms of contracts, judgments, and courts’ remedial powers to issue injunctive relief. Discerning the appropriate jurisdictional and legal framework governing the enforcement of consent decrees requires engaging with such complexities as the scope and source of federal common law, the boundary between enforcing contracts and enforcing injunctions, and the nuances of forum selection and venue. Professor Wolff’s article emerges from his
experience as appellate counsel in litigation to enforce the consent decree that resulted from a legal challenge to the Trump administration’s separation of children from parents who are immigrants and asylum-seekers detained at the U.S. border. Professor Wolff and his colleagues won a Third Circuit Court of Appeals ruling recognizing original subject-matter jurisdiction in federal district court to enforce the consent decree in another district than the one where the consent decree was issued. As a result, children subject to the consent decree were able to have their rights vindicated in the federal district court in the district in which they were being detained. The issues Professor Wolff discusses—relating to judicial power and jurisdiction, remedies, forum selection, and choice of law—have also figured prominently in Rhonda Wasserman’s scholarship. The article reflects both scholars’ shared concern for the real-world impact of procedural law and its implications for substantive justice.

Professor Patrick Woolley’s contribution to the festschrift begins by highlighting two of Professor Wasserman’s articles on class actions as a launching point for his own analysis of an issue of interest to both scholars: the implications of the U.S. Supreme Court’s recent personal jurisdiction precedents for the ability of courts to exercise personal jurisdiction over class action defendants. Professor Woolley takes up the concern that, in light of the Court’s decision in *Bristol-Meyers Squibb Co. v. Superior Court*, specific jurisdiction may no longer exist in any forum in a class suit involving a nationwide class action. After rejecting two possible arguments for salvaging specific jurisdiction in such cases—that only the Fifth (and not the Fourteenth) Amendment applies to absent class members’ claims in federal court, and that only named class plaintiffs need meet the constitutional requirements for specific jurisdiction—Professor Wooley theorizes a third way out of the *Bristol-Meyers* dilemma. Focusing on the nature of, and relationship between, class members’ claims, Professor Woolley argues, can supply the necessary connection between the forum state and the claim to support specific jurisdiction. Professor Woolley explains why, under certain conditions that he elaborates, class members’ “negative-value claims” that are not worth the cost of suing individually should be treated as the “same claim” for purposes of personal jurisdiction. It is a theory likely to find a receptive audience with Professor Wasserman, whose scholarship also aims to protect the rights of class members and their access to court.

This extraordinarily high-quality set of articles from these five top-notch scholars in their field stands as an enduring tribute to the scholarly legacy of

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18 137 S. Ct. 1733 (2017) (holding that a territorial connection linking some class action plaintiffs to the forum state does not in itself suffice to create specific jurisdiction over the defendant with respect to the claims of all other class plaintiffs in the action).
Professor Wasserman. It is a celebration worthy of a truly great legal scholar, one of Pitt Law’s all-time finest, my dear friend, colleague, and mentor, Rhonda Wasserman.
Appendix: List of Judicial Citations to Publications by Rhonda Wasserman (last updated Feb. 2023)

United States Supreme Court


Lower Federal Courts


**State Courts**


