UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

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| CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>vs.<br><br>WAL-MART STORES, INC., et al.,<br><br>Defendants. | No. 5:12-cv-05162-SOH<br><br>CLASS ACTION |

EXPERT REPORT OF PROFESSOR CHARLES SILVER IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AN AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

I, Charles Silver, declare as follows:

## I. INTRODUCTION AND CREDENTIALS

In support of its objection to Class Counsel's fee request, the New York State Common Retirement Fund (NYSCRF) relied upon Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 Columbia Law Review 1371 (2015) (hereinafter "*Is the Price Right?*"). I am one of the authors of that study. Although NYSCRF correctly cites certain statistics from the study, in my opinion it errs by contending that the statistics warrant a fee award below the amount Class Counsel requests in this case.

Before explaining why, I will briefly set out my credentials. I hold the Roy W. and Eugenia C. Endowed Chair in Civil Procedure at the School of Law at the University of Texas at Austin, whose faculty I joined in 1987 after obtaining my J.D. at the Yale Law School. I have studied and written about fee awards in class actions and related matters for decades. My first publication after joining the Texas Law faculty was an analysis of the restitutionary basis for fee awards in class actions. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 Cornell Law Review 656 (1991). Twenty-five years later, I coauthored *Is the Price Right?* with Professors Lynn A. Baker and Michael A. Perino, prominent scholars in the areas of mass torts litigation and securities regulation, respectively. The Corporate Practice Commentator chose *Is the Price Right?* as one of the ten best in the field of corporate and securities law in 2016. Altogether, I have published over 100 major writings, many of which appeared in peer-

reviewed publications. I am one of the ten most-cited members of the University of Texas law faculty.

Judges have cited my writings in several published opinions. References also appear in leading treatises, including the Manual for Complex Litigation (Fourth), the Restatement (Third) of the Law Governing Lawyers, and the Restatement (Third) of the Law of Unjust Enrichment and Restitution. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's Principles of the Law of Aggregate Litigation (2010).

Finally, I have often provided expert testimony and reports on attorneys' fees and other matters relating to the professional responsibilities of attorneys involved in civil litigation. For example, in *Silverman v. Motorola, Inc.*, 2012 WL 1597388 (N.D. Ill.), I submitted a report that Judge Amy St. Eve relied upon when awarding a 27.5% fee on a recovery of $200 million and that Judge Frank Easterbrook also considered when affirming the award on appeal. *See Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956 (7th Cir. 2013).

A copy of my CV is attached to this report as Exhibit A.

## II. ANALYSIS

As mentioned above, the NYSCRF supported its objection to Class Counsel's fee request by citing certain statistics from *Is the Price Right?* It pointed out that the

> study found that in cases in which a lead plaintiff and lead counsel had an ex ante agreement regarding fees . . . , the mean fee request is 17.62%. Additionally, the mean fee award for all securities litigation in "high-volume districts" (those in which judges have a greater personal experience of the "market rate" for these cases) is 21.67%.

Objection Letter from Nancy G. Groenwegen, Counsel to Comptroller Thomas P. DiNapoli on behalf of the New York State Common Retirement Fund, March 4, 2019, p. 2 (hereafter "NYSCRF Objection"). The NYSCRF then added that "[f]or large settlements . . . in high-volume districts, the mean fee award is 17.46%." *Id*. Finally, the NYSCRF urged the Court to start with the latter number and adjust it downward because the settlement proposed in this case is unusually large. *Id*.

To understand why the statistics cited by the NYSCRF do not support its recommendation, one must know that the normative thrust of the study is that judges presiding over securities class actions should mimic the private market in which clients hire lawyers directly. This means, initially, that judges should set fee terms at or near the start of class litigation rather than when settlements are announced, as usually occurs. In the private market, lawyers and clients typically agree on fees when representations begin.

An important reason for ex ante fee setting is that the risks of litigation are more palpable when class-based litigation starts then when it concludes. At the latter point, the risks have played out and the outcome is known. This creates a hindsight bias – a tendency to set the ex ante odds of winning far too high. This tendency harms claimants by causing judges to set fee percentages below the levels that are needed to encourage plaintiffs' attorneys to represent them zealously.

In this case, the Court did not set fee terms when it granted the motion filed by the Board of Trustees of the City of Pontiac General Employees' Retirement System (the "Fund") to serve as Lead Plaintiff. Nor were fee terms set out ex ante in a written

agreement between the Fund and Robbins Geller Rudman & Dowd LLP ("RGRD"), the firm it chose to serve as Lead Counsel. Instead, the Court is deciding what the fee will be ex post, and the Fund and RGRD are supporting RGRD's application for 30% of the recovery, a fee well within the normal range for complex commercial litigations.

Both practices are normal. In *Is the Price Right?*, we found that ex ante fee agreements between lead plaintiffs and their chosen attorneys were rarely introduced into the record and that judges almost never set fees ex ante. We found evidence of ex ante fee agreements in only 78 of 431 cases with fee requests, and in only 4.88% of the cases was an ex ante agreement mentioned in the order appointing the lead plaintiff. The number of cases in which judges set fees upfront was less than a handful.

The question, then, is: How should a court set fees in connection with a settlement when there is no ex ante agreement between a lead plaintiff and the law firm it retained to handle a class action and the court did not set fee terms upfront? The answer, as I have argued repeatedly and as many judges have agreed, is that the court should "mimic the market" by estimating the terms that would have been reached had they been set by agreement in advance.

This is the first place where the NYSCRF errs. Neither the mean of 17.62% for the fee agreements in our sample, nor the average of 21.67% for awards in high-volume districts, nor the mean of 17.46% for large settlements in high-volume districts is a proxy for the market rate. The second and third figures are based on fee percentages chosen ***by judges***, not by sophisticated clients hiring lawyers to handle complex commercial cases on straight contingency. Consequently, those numbers are indicative of judicial practices,

not of market rates. The first figure is better because it is grounded in actual fee agreements, but the sample of agreements we studied was not randomly selected and, consequently, may not be representative of the whole. For example, our study did not include securities fraud class actions that were dismissed, so we knew nothing about the terms that may have been included in ex ante fee agreements in those cases.

An even more important point is that the statistics we reported are wholly disconnected from the facts of this case. In a functioning market, one would expect contingent fee percentages to vary directly with anticipated risks, meaning that they should rise as perceived risks increase. Because we did not study the 78 cases with ex ante agreements in sufficient detail to evaluate their risk profiles, we could not say how risky those cases were. Nor could we estimate the marginal impact of risk on fees. Consequently, our findings do not provide a reliable starting point for use in this case. I return to this subject below.

The NYSCRF Objection also errs by encouraging the Court to perform a lodestar cross-check. I have argued against cross-checks for decades for several reasons, one being that sophisticated clients never use them when they hire lawyers to handle complex commercial cases on straight contingency. In *Is the Price Right?*, we also found that lodestar cross-checks are a waste of time because they have no significant effect (upward or downward) on fee awards once lead attorneys' fee requests are controlled for. The lodestar method is a terrible way of setting class counsel's fees. It should be tossed onto the trash-heap of discredited doctrines, not used as a cross-check on percentage-based awards.

Finally, although I am glad to see that the NYSCRF appears to enter into ex ante fee agreements with the law firms it retains, the fee grid it uses departs substantially from the terms that sophisticated business clients agree to pay when they hire law firms to handle complex commercial cases on straight contingency. For one thing, I have never seen a sophisticated business client set a fee in the 8%-14% range for the first $100 million recovered. To my knowledge, which is based on years of study, sophisticated clients always pay 25%-40% of the recovery in this range. For another, the formula in the NYSCRF's grid contains fee percentages that decline as the recovery grows. To my knowledge, sophisticated business clients rarely use declining scales or percentages as well. They more often pay either flat percentages or percentages that rise as litigation progresses.

The NYSCRF defends the use of declining percentages by arguing that a declining scale is needed "to prevent a windfall." NYSCRF Objection, p. 2. Although this may sometimes be true, it is generally false in cases like this one where liability and damages are hotly contested by a wealthy defendant with a track record of refusing to settle. Academic commentators are in general agreement that stronger marginal incentives are needed to motivate plaintiffs' attorneys to extract higher dollars in cases like these because defendants resist paying higher dollars more strongly. For example, it is far easier to convince a defendant to pay $1 million to settle a case with an expected verdict of $100 million at trial than it is to convince the same defendant to pay $75 million. Fee percentages that increase with the recovery encourage plaintiffs' attorneys to turn down

cheap settlements by offering them larger fractions of the higher dollars that are harder to obtain.

Professor John C. Coffee, Jr., the leading commentator on class actions, hypothesized that the tendency of public pension funds to use declining scales is the result of political pressure.

> [P]ublic pension funds prefer the "declining percentage" formula largely for political reasons, while private corporations disdain such formula for economic reasons. That is, public pension funds are frequently administered by elected political officials who are potentially subject to media and political criticism for conferring "windfall" fees on their attorneys. Necessarily, they seek to avoid criticism, and the declining percentage formula seems primarily a defensive strategy to protect political officials from such criticism.[1]

Although I do not mean to impugn anyone's motives, the substantial difference between the fees paid by sophisticated businesses and those used by public pension funds requires some explanation.

I now return to a topic mentioned above: the need to tailor fee terms to the risks that lawsuits require lawyers to bear. Although all securities class actions are risky, from an ex ante perspective it is clear that some are harder to win than others. One indicator of risk is the absence of a contest for the lead plaintiff position. In the dataset we studied in *Is the Price Right?*, lead plaintiff competitions occurred in 70.77% of the cases (305 of 431), and the average number of appointment motions was 3.22 per case. The existence of competition, and of more competition rather than less, reflects the attractiveness of a case. As we wrote, "the cases with competition turn out to yield significantly larger

[1] *Declaration of John C. Coffee, Jr.*, submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, MDL 1087 (C.D. Ill. Oct. 7, 2004).

settlements, suggesting that prospective lead counsel may have the ability to identify the more lucrative or otherwise higher quality cases at the earliest stages of litigation." *Is the Price Right?*, at 1391-1392.

When this case started, there was no competition for control. The Fund was the only investor that ran for the Lead Plaintiff position, and RGRD was the only law firm that wanted the case. The obvious inference is that, when the lawsuit started six years ago, everyone thought it was exceptionally risky.

Reviewing the fee award in the securities litigation involving Motorola, Judge Frank Easterbrook took note of the fact that, there too, only one law firm wanted the case. "When this suit got under way," he wrote, "no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Motorola Solutions, Inc*., 739 F.3d at 958. Judge Easterbrook followed this observation with the conclusion that "[t]he district judge did not abuse her discretion in concluding that the risks of this suit justified a substantial award, even though compensation in most other suits has been lower." *Id*. The fee awarded below was 27.5% of $200 million.[2]

Why did no other lead plaintiff or law firm compete for control of this case? They probably wanted no part of the case because Wal-Mart was the defendant. As Jason Forge observes, this settlement is Wal-Mart's "first-ever securities settlement, the largest confirmed settlement ever obtained in a single case against Walmart, and . . . the largest securities settlement every achieved in any Arkansas federal court." Declaration of Jason

[2] I provided an expert witness report on fee awards in the trial court.

A. Forge in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and for an Award of Attorneys' Fees and Expenses and an Award to the Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4), p. 1. More generally, Wal-Mart is a famously aggressive defendant. This was noted back in 2001 in an article published in USA Today, which observed that "Wal-Mart . . . is helping change the nature of corporate litigation by aggressively fighting many cases even when it would be cheaper for the company to settle." Richard Willing, *Lawsuits a Volume Business at Wal-Mart*, *USA Today* (Aug. 13, 2001). A decade later, Wal-Mart showed that its reputation was well-deserved by having a class certification decision reversed by the Supreme Court. The case, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), sent shock waves through the class action bar. Confirming the impression that Wal-Mart's strategy is to defend liability claims aggressively, Paul A. Samakow, a lawyer who represents plaintiffs in personal injury cases, wrote: "Among [plaintiffs'] attorneys, it is well known that [Wal-Mart] rarely settles customers' claims for injuries, even in cases of overwhelming liability, because it can afford to fight and make the victim pay heavily for the costs of the litigation." Paul A. Samakow, *Suing Wal-Mart: Bad Business Practices Lead to Litigation*, Washington Times, Dec. 31, 2014, https://www.washingtontimes.com/news/2014/dec/31/suing-wal-mart-bad-business-practices-lead-litigat/.

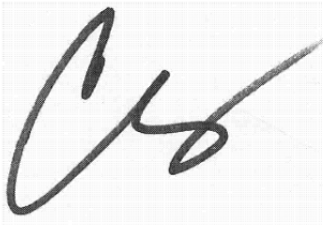
## III. CONCLUSION

For the reasons set out above, I believe that the findings in *Is the Price Right?* cited by the NYSCRF do not support its contention that Class Counsel's fee should be

reduced. My knowledge of fee practices that sophisticated business clients use when hiring attorneys to handle complex commercial cases on straight contingency leads me to believe that Class Counsel's request for 30% of the recovery is reasonable. Fee percentages should reflect the risks that class actions present, and the facts, especially the absence of competition for the lead plaintiff and lead counsel positions, suggest quite strongly that the odds of winning were poor when this case began. Sophisticated business clients routinely pay fees in the 25%-40% range in risky cases. I believe that Class Counsel's request in this case for a 30% fee is reasonable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:



March 26, 2019

Date

Charles Silver

# EXHIBIT A

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- Cecil D. Redford Professor
- Robert W. Calvert Faculty Fellow
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- Assistant Professor

University of Michigan Law School, Fall 2018
- Visiting Professor

Harvard Law School, Fall 2011
- Visiting Professor

Vanderbilt University Law School, Fall 2003
- Visiting Professor

University of Michigan Law School, Fall 1994
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## EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida BA (Political Science) 1979

## PUBLICATIONS

### SPECIAL PROJECTS

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

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Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 Rev. Litig. 459 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Mass Tort Litigation," 42 Tort Trial & Insurance Practice Law Journal 105 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Medical Malpractice Litigation," 25 Rev. Litig. 459 (2006).

PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the Defense Counsel J. (2004).

## BOOKS

MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (in progress).

OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (with David A. Hyman) (Cato Institute, 2018).

HEALTH LAW AND ECONOMICS, Vols. I and II (coedited with Ronen Avraham and David A. Hyman) (Edward Elgar 2016).

LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, (coedited with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (Foundation Press, 2nd Ed. 2012) (updated annually through 2018).

PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (with William T. Barker) (LexisNexis 2012) (updated annually through 2017).

## ARTICLES AND BOOK CHAPTERS BY SUBJECT AREA (* INDICATES PEER REVIEWED)

### Health Care Law & Policy

1. "There is a Better Way: Give Medicaid Beneficiaries the Money," (with David A. Hyman) Annals of Health Law (forthcoming 2019) (invited symposium on Health Care and Policy).

2. "Medical Malpractice," (with David A. Hyman) OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (forthcoming 2019).*

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3. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," (with David A. Hyman) OXFORD HANDBOOK OF AMERICAN HEALTH LAW, I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds. (2017).*

4. "Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act," (with Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, and Peter H. Weinberger)25 Annals of Health Law 35 (2016).

5. **"**Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," (with David A. Hyman) 63 DePaul L. Rev. 574 (2014) (invited symposium).

6. "Five Myths of Medical Malpractice," (with David A. Hyman) 143:1 Chest 222-227 (2013).*****

7. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (with David A. Hyman), 46 New England L. Rev. 101 (2012) (invited symposium).

8. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?" (coauthored with David A. Hyman) MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (Ken Oliphant & Richard W. Wright, eds. 2013)*; originally published in 87 Chicago-Kent L. Rev. 163 (2012).

9. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*****

10. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

11. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

12. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

13. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?" 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

14. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

15. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

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16. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).*****

**Empirical Studies of Medical Malpractice Litigation**

17. "Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB 4," Texas Tech L. Rev. (forthcoming 2019) (with David A. Hyman and Bernard Black) (invited symposium on the 15th anniversary of the enactment of HB4).

18. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010**,"** 13 J. Empirical Legal Stud. 183 (2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

19. "Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance," 5 U.C. Irvine L. Rev. 559 (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik) (invited symposium).

20. "Does Tort Reform Affect Physician Supply? Evidence from Texas," Int'l Rev. of L. & Econ. (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik), available at http://dx.doi.org/10.1016/j.irle.2015.02.002.*****

21. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage), Amer. L. & Econ. Rev. (2012), doi: 10.1093/aler/ahs017.*****

22. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik), 9 J. Empirical Legal Stud. 173-216 (2012).*****

23. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard S. Black and David A. Hyman).*****

24. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black).*****

25. **"**Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue).*****

26. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate (Texas) 25 (2008) (with Bernard S. Black and David A. Hyman) (invited symposium).

27. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 3 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*****

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28. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. S9 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*****

29. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*****

30. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard S. Black, David A. Hyman, and William S. Sage).*****

**Empirical Studies of the Law Firms and Legal Services**

31. "Screening Plaintiffs and Selecting Defendants in Medical Malpractice Litigation: Evidence from Illinois and Indiana," 15 J. Empirical Legal Stud. 41-79 (2018) (with Mohammad Rahmati, David A. Hyman, Bernard S. Black, and Jing Liu)*

32. "Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois," 13 J. Empirical Legal Stud. 603-636 (2016) (with David A. Hyman, Mohammad Rahmati, Bernard S. Black).*

33. "The Economics of Plaintiff-Side Personal Injury Practice," U. Ill. L. Rev. 1563 (2015) (with Bernard S. Black and David A. Hyman).

34. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

35. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard S. Black, David A. Hyman, and William M. Sage).*****

**Attorneys' Fees—Empirical Studies and Policy Analyses**

36. "The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions," RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, Sean Griffith, Jessica Erickson, David H. Webber, and Verity Winship, Eds. (forthcoming 2018).

37. "Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions," 115 Columbia L. Rev. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

38. "Regulation of Fee Awards in the Fifth Circuit," 67 The Advocate (Texas) 36 (2014) (invited submission).

39. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt L. Rev. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

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40. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

41. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, Ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

42. "Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider," 20 The NAPPA Report 7 (Aug. 2006).

43. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006).

44. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

45. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

46. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

47. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

**Liability Insurance and Insurance Defense Ethics**

48. "Liability Insurance and Patient Safety," DePaul L. Rev. (forthcoming 2018) (annual Clifford Symposium on Tort Law) (with Tom Baker).

49. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique," 68 Rutgers U. L. Rev. 83 (2015) (with William T. Barker) (symposium issue).

50. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds., RESEARCH HANDBOOK IN THE LAW & ECONOMICS OF INSURANCE 438-460 (2015).*****

51. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter 1 (Aug. 2014) (with William T. Barker).

52. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DePaul L. Rev. 617 (2014) (invited symposium).

53. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

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Papers on SSRN at: http://ssrn.com/author=164490

54. "Settlement at Policy Limits and The Duty to Settle: Evidence from Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard S. Black and David A. Hyman).*****

55. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

56. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

57. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

58. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

59. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

60. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

61. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 Coverage 47 (1996) (with Michael Sean Quinn).

62. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6 Coverage 21 (1996) (with Michael Sean Quinn).

63. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 Def. L. J. 1 (Spring 1997).

64. "Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

65. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

66. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994); reprinted in Practicing Law Institute, INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

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67. "A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*," 77 Va. L. Rev. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

**Class Actions, Mass Actions, and Multi-District Litigations**

68. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

69. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

70. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda).*****

71. "A Rejoinder to *Lester Brickman, On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

72. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

73. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

74. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

75. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*****

76. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

77. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

78. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

79. "Justice in Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman).*****

**General Legal Ethics and Civil Litigation**

80. "A Private Law Defense of the Ethic of Zeal" (in progress), available at http://ssrn.com/abstract=2728326.

81. "The DOMA Sideshow" (in progress), available at http://ssrn.com/abstract=2584709.

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82. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

83. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

84. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

85. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

86. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

87. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

88. "What's Not To Like About Being A Lawyer?" 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

89. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

90. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

91. "Bargaining Impediments and Settlement Behavior," in D.A. Anderson, ed., DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent D. Syverud).

92. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

93. "Do We Know Enough about Legal Norms?" in D. Braybrooke, ed., SOCIAL RULES: ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).

94. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with Amon Burton, John S. Dzienkowski, and Sanford Levinson,).

95. "Thoughts on Procedural Issues in Insurance Litigation," VII INS. L. ANTHOL. (1994).

**Legal and Moral Philosophy**

96. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987).*****

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Papers on SSRN at: http://ssrn.com/author=164490

97. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985).*****

98. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984).*****

**Practice-Oriented Publications**

99. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996).

100. "Getting and Keeping Clients," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

101. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

102. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

103. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

**Miscellaneous**

104. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro).*****

**PERSONAL**

Married to Cynthia Eppolito, PA; Daughter, Katherine; Step-son, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.

# EXHIBIT B

I received the following items in connection with the preparation of this Expert Report. In addition, I may have reviewed cases, treatises, law review articles, and other sources.

1. Objection submitted by New York State Common Retirement Fund ("NYSCRF") dated March 4, 2019;

2. Declaration of Walter Moore in Support of Settlement;

3. Notice of Proposed Settlement of Class Action;

4. Declaration of Jason A. Forge in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and for an Award of Attorneys' Fees and Expenses and an Award to Lead Plaintiff Pursuant to 15 U.S.C. Section 78u-4(a)(4);

5. Caption page;

6. *Recent Trends in Securities Class Action Litigation: 2018 Full Year Review* (NERA 2019);

7. *Securities Class Action Settlements – 2017 Review and Analysis* (Cornerstone Research 2018);

8. Materials from the *Cardinal Health, Inc. Securities Litigation*, No. C2-04-00575(ALM) (S.D. Ohio):

    a. Objection of NYSCRF dated September 13, 2007;

    b. Expert Report of Professor Charles Silver Concerning the Objections to Class Counsel's Request for an Award of Attorneys' Fees;

    c. Class Counsel's Memorandum of Law in Response to Objections to Application for an Award of Attorneys' Fees and Expenses;

    d. Response of NYSCRF dated October 17, 2007; and

9. Expert Report of Professor Charles Silver Concerning the Objections to Class Counsel's Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees and Reimbursement of Expenses dated June 12, 2005, submitted in *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K (N.D. Tex.).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 28, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

*/s/ Jason A. Forge*

JASON A. FORGE

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# Mailing Information for a Case 5:12-cv-05162-SOH City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc. et al

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### Manual Notice List

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