

מגמות בדין האמריקאי

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Outline

- Background
- Class homogeneity, certification standards
 - *Wal-Mart, Comcast*
 - Fraud on the market
 - Issue class actions
- Class action waivers
 - *Concepcion, AmEx*
- Ascertainability, *cy pres* (if time permits)

Background

- Federal Supreme Court
- En banc, >100 cases
- Politicized
 - 5:4 majority...

Homogeneity

- [Commonality
 - “questions of law or fact common to the class” (FRCP 23(a)(2))
- [Predominance
 - “questions of law or fact common to class members predominate over any questions affecting only individual members” (FRCP 23(b)(3))

Homogeneity—*Wal-Mart*

- *Wal-Mart*
 - Gender discrimination, pay and promotion decisions
 - Local managers' broad discretion
 - Plaintiffs—
 - Company-wide policy
 - (Statistical, anecdotal, sociological evidence)
 - Certification?

Homogeneity—*Wal-Mart*

- Class homogeneity + higher certification standard
 - “[There is no] authority to conduct a preliminary inquiry into the merits . . . to determine whether it may be maintained as a class action.” (*Eisen*, (1974))
 - “[R]igorous analysis” before certification

Homogeneity—*Wal-Mart*

- Majority—
- No common questions, “no convincing proof of a companywide discriminatory pay and promotion policy”
- Minority—
- The majority looks for “what distinguishes individual class members, rather than . . . what unites them.”

Homogeneity—*Comcast*

- ◉ *Comcast* (2013)—
- Antitrust, four different theories of damages
 - “*Comcast* . . . Deter[red] the entry of overbuilders . . .”
- Expert opinion showing “supra-competitive prices regardless of the type of anticompetitive conduct.”
- Certification?

Homogeneity—*Comcast*

- Majority—
- Predominance requirement—Plaintiffs didn't show that "damages are capable of measurement on a classwide basis"
- Minority—
- "[T]he predominance standard is generally satisfied even if damages are not provable in the aggregate"; a unique case

Homogeneity—Securities

- ◉ Individual v. common questions
- ◉ Fraud on the market—
 - Presuming (common) reliance
 - (*Basic v. Levinson* (1988))
- ◉ *Halliburton* (2014)

Issue Class Actions

- Higher certification standards
- The future ...
 - Constructing *Comcast*
 - Individual damages/causation?
 - *Butler v. Sears* (7th Cir. 2013) (Posner J.)
 - Issue class actions
 - FRCP 23(c)(4): "a class action [may be brought] with respect to particular issues."
 - Tobacco cases

Contractual Waivers

- Mandatory arbitration, class action waivers

under the standards for fee shifting provided by law. **YOU ACKNOWLEDGE THAT YOU ARE GIVING UP YOUR RIGHTS TO LITIGATE CLAIMS IN A COURT OR BEFORE A JURY OR TO PARTICIPATE IN A CLASS ACTION OR REPRESENTATIVE ACTION WITH RESPECT TO SUCH A CLAIM. OTHER RIGHTS THAT YOU**

Contractual Waivers

- *AT&T v. Concepcion*
 - Consumer claim, ~ \$30
 - Mandatory individual arbitration clause
 - (Pro-consumer)
 - Lower courts—
 - Unconscionable under California law

Contractual Waivers

- Majority—
- Previous holding contrary to the “federal [laws and] policy favoring arbitration agreements, notwithstanding and state . . . policies . . .”
- [“Requiring . . . classwide arbitration interferes with fundamental attributes of arbitration . . .”]

Contractual Waivers—*AmEx*

- *AmEx*
 - Antitrust claims
 - Proved that investment in litigation ~300K, plaintiff can gain 38K.
 - Majority—
 - “[The] laws do not guarantee an affordable procedural path to the vindication of every claim.”

Contractual Waivers

- In practice
- Political criticism

Ascertainability, *Cy Pres*

- Individual compensation unfeasible
 - Donations/ *cy pres*
 - Pro rata distribution to identified class members (ALI, § 3.07)
 - [Escheat to the state]

Ascertainability, *Cy Pres*

- *Carrera* (3d Cir. 2013)—
 - Consumer small claims, misrepresentation
 - “If class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate”
 - “[R]igorous analysis” before certification

Ascertainability, *Cy Pres*

- Defendants' records; class members' affidavits
- Other cases
 - *Hughes v. Kore* (ATM machines)
 - Given the small stakes, "the *cy pres* remedy may be the only one that makes sense"

Ascertainability, *Cy Pres*

- The Supreme Court
 - Facebook privacy issues, extreme *cy pres* distribution
 - "This Court has not previously addressed any . . . issues [relating to *cy pres*] . . . In a suitable case, this Court may need to clarify the limits on the use of [*cy pres*]" (*Marek*)

Summary

- Certification, higher standards
 - Predominance, common questions
 - [Higher pleading standards, in general
 - [*Twombly, Iqbal*]
- Politicized
 - 5:4, conservatives and liberals
 - But, other decisions (*Smith*)

Summary

- Alternatives
 - Issue class actions, MDLs
- Lessons??
 - Rules v. statutes
 - Costly discovery
 - No fee-shifting provisions
 - Issues of federalism, centralization (CAFA)

List of Cases

- Supreme Court
 - *Comcast v. Behrend*, 133 S.Ct. 1426 (2013)
 - *American Exp. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013)
 - *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011)
 - *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011)
 - *Smith v. Bayer*, 131 S. Ct. 2368 (2011)
 - [*Ashcroft v. Iqbal*, 556 U.S. 678 (2009)]
 - [*Bell v. Twombly*, 550 U.S. 570 (2007)]

List of Cases

- Supreme Court (Cert.)
 - *Halliburton Co. v. Erica P. John Fund*, 134 S.Ct. 636 (2013) (Mem.)
 - *Marek v. Lane*, 134 S.Ct. 8 (2013) (Mem.)
- Appellate courts
 - *Butler v. Sears*, 727 F.3d 796 (7th Cir. 2013)
 - *Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013)
 - *Hughes v. Kore*, 731 F.3d 672 (7th Cir. 2013)