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"Fighting to protect the right to jury trial and an independent judiciary for all Americans."

CUTTING CLASSES: The Slow Demise of Class Actions in America

By Jocelyn Bogdan, Associate Director

INTRODUCTION

Class action lawsuits are among the most important tools that individuals and small businesses have to protect their rights, hold large corporations accountable and deter future misconduct. When a company has received a large windfall through small injuries to large numbers of people, a class action lawsuit is often the only way harmed individuals can afford to challenge this wrongdoing in court. Suing over a single small claim would be prohibitively expensive and even if it were possible, such a lawsuit would do little to change widespread corporate misconduct. Therefore, class actions are also critically important for the deterrence function of the tort system to work. Without the class action tool, corporations and businesses could ignore the law far more easily and operate with impunity.

Class actions have historically been one of the most powerful mechanisms to secure justice in America. They have been used to protect citizens from a wide array of abuses, from consumer fraud to civil rights violations to environmental harm to automotive defects to health care abuses. This country would be a very different place without them. For example, *Brown v. Board of Education*, which outlawed school segregation and set the stage for the entire civil rights movement, was a class action lawsuit. The case portrayed in the movie *North Country*, which involved sexual harassment in the workplace, was a class action.¹ Police departments brought a successful class action against the manufacturer of defective bulletproof vests used by the secret service after the fatal shooting of a California police

officer.² Users of social media have benefited from class actions. One recent case ended Facebook's use of the advertising program, Beacon, which had tracked what users were purchasing online and was denounced for privacy abuses.³ The list goes on.

As this paper explains, the rules for bringing class actions are strict and complex. Yet corporate lobbyists and litigators continuously try to increase the burdens on those seeking to use the class action tool. In recent years, they have achieved considerable success. Between legislative acts and a series of Supreme Court decisions, the availability of class actions has been limited to a point where now, in some areas, they are headed for extinction.

THE HISTORY AND RULES OF CLASS ACTIONS

Class actions were not the invention of the U.S. plaintiffs' bar. In fact, legal historians say that class actions are actually rooted in 17th century English law.⁴ And even before the 17th century there was a tradition in England of bringing complaints about communal harm in organized groups.⁵

In 1938, the United States adopted the Federal Rules of Civil Procedure (FRCP). Rule 23 spelled out the requirements for bringing a class action lawsuit. In 1960, a new Advisory Committee was appointed to look at the FRCP, and in 1966 the Supreme Court issued a new version of Rule 23.⁶ This paper will briefly examine the federal rules to illustrate the burdens that class action plaintiffs already face in trying to bring class action cases. Notably, while class actions can be brought in both state and federal court, the rules are often similar so this analysis sheds light on state class action practice as well.

Federal Class Action Requirements

Bringing a class action is not easy. It is not as simple as finding a group of other wronged individuals and declaring oneself a class. Before a class action suit can move forward on its merits, the class needs to be "certified" by the court. There are several components to Rule 23, but for certification purposes, the most important are Rule 23(a) and Rule 23(b). Every element of Rule 23(a) and one element of Rule 23(b) must be met for a class action to move forward.

Rule 23(a) Requirements

- **Numerosity.** The numerosity requirement deals with class size. A class that is too small will not be certified as a class. While there is no strict test for how many people are necessary, generally 40 people or more satisfy the requirement.⁷ However, since the U.S. Supreme Court ruled in 2011 that a class size of 1.5 million people was *too* big, attorneys must now be concerned with both whether the class size is large enough *and* whether it is too large. (*See* discussion of the Supreme Court case, *Wal-Mart v. Dukes*, below.⁸)
- **Commonality.** Class members must share common questions of law or fact. According to the U.S. Supreme Court, this means that the class must have

suffered the same injury.⁹ This is a high standard and may be difficult to prove. In *Wal-Mart v. Dukes*, for example, the U.S. Supreme Court found that a class of female employees who had been discriminated against because of their gender at Wal-Mart stores throughout the country did not meet the commonality requirement.¹⁰ But what about state or regional stores? These questions are now being tested in different states.¹¹ In California, a statewide discrimination class action against Wal-Mart is now at the certification level.¹²

- **Typicality and adequacy.** These requirements concern the class representative, who is designated to represent the class in the lawsuit. The “typicality” requirement means that the class representative must be typical of the class itself. As put by the U.S. Supreme Court, the class representative should “possess the same interest and suffer the same injury as the class members.”¹³ “Adequacy” requires that the class representative fairly and adequately protect the interests of the class. In other words, the class representatives cannot have interests that conflict with other members of the class.

Rule 23(b) Requirements

In addition to satisfying the above Rule 23(a) requirements, at least one of the following criteria must also be met:

- If having claims proceed individually would risk inconsistent outcomes or impose different standards of conduct on defendants or would mean that certain individuals bringing a claim would “take all the funds available for compensating losses, leaving nothing for” [future victims] who may bring claims after them.¹⁴
- The defendant has acted in a way that affects the entire class, so that injunctive relief (*i.e.*, seeking an order to stop the wrongdoer’s actions) is appropriate for everyone.¹⁵
- The court decides that the common questions shared by everyone in the class are more important than any questions affecting individuals and that a class action is the best way to bring the case. This is usually used when the class is trying to get monetary relief.¹⁶

THE MYTH OF EXCESSIVE ATTORNEYS’ FEES

Class actions are sometimes attacked for resulting in excessive fees for the attorneys who bring them. This notion was disputed in an extremely comprehensive empirical study by Professors Theodore Eisenberg, Cornell University Law School, and Geoffrey P. Miller, New York University Law School, who examined 689 class action lawsuits that settled between 1993 and 2008.¹⁷ Among their major findings:

- The median attorney fee was only 24 percent of the class recovery.¹⁸

- In consumer class action suits, the median attorney fee was only 20 percent of the class award.¹⁹
- In tort class action suits, the median attorney fee was only 20 percent of the class recovery.²⁰
- There is no strong evidence of significant differences between attorneys' fees as a percentage of class recoveries in federal and state courts.²¹ In fact, the median fee to class recovery ratio for state court cases was 20 percent, slightly lower than the overall median ratio of 24 percent,²² which "suggests somewhat less encouragement of class action activity by state courts compared to federal courts."²³
- Attorneys' fees have a significant correlation with the risk of pursuing a case.²⁴
- Class recovery and fee amount are strongly correlated.²⁵ But as class recovery increases, the fee percentage for attorneys actually decreases, which provides more money for clients.²⁶

THE FEDERAL "CLASS ACTION FAIRNESS ACT"

After years of lobbying by business interests,²⁷ in 2005 Congress enacted the so-called "Class Action Fairness Act" (CAFA).²⁸ The law essentially provides reckless corporations with the authority to decide, in most cases, which court will hear a class action case that accuses them of wrongdoing. Specifically, the law makes it easier for defendants in state class actions to "remove," or transfer, cases to the much smaller and already clogged federal court system²⁹ – a system now struggling with severe budget cuts due to the sequester.³⁰ Every consumer, environmental and civil rights group was against CAFA, as were many state Attorneys General.³¹ Civil rights groups tried to fight CAFA precisely because the law would cause federal courts to be overburdened with consumer class actions more appropriate for the larger state court system, inevitably pushing out federal civil rights cases that should be heard in federal courts.³²

The results have been what one might expect: federal court judges have been unable to deal with cases, and they are bouncing even meritorious ones out of court using a technical procedural rule known as "manageability." Specifically, when attorney Thomas M. Sobol – whose practice focuses on pharmaceutical and medical device litigation for consumer classes – testified before the U.S. House of Representatives in 2012, he explained that CAFA has caused the routine denial of multistate class certification, especially when multiple states' laws are at play.³³ One reason for this is that CAFA had no accompanying increase in resources for the federal judiciary to deal with the "increased caseload and substantially more of these potentially complex cases. ... Single federal judges are now expected to do the work of multiple state court judges (and in the same amount of time)."³⁴

And given the fact that these federal judges are “hamstrung by the increased attention to state law that these cases require,”³⁵ with no guidance on how to proceed with multiple state laws, it is no surprise they are reluctant to grant class certification. Sobol testified,

Worse yet, these certification refusals deny American citizens their Constitutional guarantee to a day in court and the opportunity to have their claims adjudicated. If consumers must band together in a class action to seek redress for their injuries, because any single individual’s claim is too small to justify the costs of litigation, and if such class actions can only proceed in federal courts that will not certify their claims, the courthouse doors effectively close, leaving consumers with no remedy.³⁶

Several years before CAFA was enacted, Cornell University Law Professor Theodore Eisenberg did a study that showed “that removals of cases from state to federal courts greatly improved defendants’ chances. He concluded that the federal forums were ‘more favorable [to defendants] in terms of biases and inconveniences.’”³⁷ This may be true as well. But it seems that the bigger problem today is that the federal court system cannot handle these cases – period.

New Legislative Developments

Not satisfied with this result, however, the business community is lobbying today for changes to CAFA so that even more state class actions will be tossed into federal court. For example, while testifying on March 13, 2013 before Congress on behalf of the U.S. Chamber of Commerce’s “tort reform” wing, the Institute for Legal Reform (ILR), Skadden, Arps attorney John Beisner complained about the \$5 million “amount in controversy” threshold that Congress requires before a state class action can be tossed into federal court.³⁸

Six days after Beisner testified, the U.S. Supreme Court made sure that ILR would have little more to complain about. Greg Knowles had filed a class action against his insurance company after suffering property damage to his Arkansas home during a hailstorm. The case dealt with underpayment of claims. With only state law issues and only Arkansas residents, this was exactly the type of class action that belonged in state court. Knowles had signed a document stipulating that the class recovery would be no more than \$5 million. Knowles said that as “master of his complaint,” he could limit the damage claim. The Supreme Court said no, he could not,³⁹ and tossed the case into federal court.

As this case illustrates, while businesses have succeeded in lobbying Congress to limit class action lawsuits through CAFA, the U.S. Supreme Court has been imposing the same restrictions and far more expansively.

THE SUPREME COURT AND CLASS CERTIFICATION

Wal-Mart v. Dukes

In 2011, the U.S. Supreme Court threw out a civil rights sex discrimination class action brought on behalf of over 1 million women who worked at Wal-Mart stores around the country, saying that the plaintiffs did not have enough in common to proceed as a class.⁴⁰ The named plaintiff in the case was Betty Dukes, an African American woman who, after advancing from cashier to customer service manager, found herself stuck without any real opportunity to move higher.⁴¹ When she complained to supervisors about the situation, her managers retaliated against her. They wrote her up for behavior identical to what male colleagues engaged in daily.⁴² Instead of a promotion, she received a demotion, and instead of a pay increase, she received a 5% pay cut.

In 2001, Dukes brought a lawsuit, and not just any lawsuit. Joining with other women who faced similar discrimination, she brought the largest employment class action lawsuit in history, which involved 1.5 million current and former Wal-Mart employees who worked in different stores, under different managers, all around the country, all of whom faced discrimination. They alleged that this conduct violated the 1964 Civil Rights Act.

Women at Wal-Mart made up only one-third of management despite being 70% of hourly jobs. Women were paid less than men at Wal-Mart stores throughout the country – and, over time, men and women hired for the same positions saw their salary gaps grow even wider.⁴³ In fact, a statistical expert in the case found that women at Wal-Mart were paid less than men every year, in every job, in every region of the country.⁴⁴

In addition to allegations of unequal pay and unfair promotions, the plaintiffs presented evidence of blatant sex discrimination in Wal-Marts throughout the country, demonstrating a corporate culture of discrimination. For example, at executive meetings, senior management often referred to women as “girls” and “Janie Qs.” Women were given outrageous, sexist excuses for pay disparities such as: “You don’t have the right equipment...you aren’t male, so you can’t expect to be paid the same,” and “God made Adam first, so women would always be second to men.” One woman was told to “doll up” and “blow the cobwebs off” her makeup. A common refrain from managers was that men received larger raises because they had families to support.⁴⁵

The lawsuit Betty Dukes brought against Wal-Mart has repeatedly been described as David versus Goliath – ordinary women, mistreated in the workplace, banding together to fight one of the largest corporations in the country. As Alliance for Justice explains, “If our Nation’s largest employer...can avoid liability for systemic discrimination across its nationwide chain of stores, it will undermine the equal rights of all women workers.”⁴⁶

Unfortunately, that’s exactly what happened. The Supreme Court never reached the merits of Betty Dukes’s argument. Instead, it determined that her lawsuit could not move forward because the members of the “class” did not share “common questions of law or fact.”

As noted earlier, for a class action lawsuit to be certified, the members of the class must all have suffered from the same injury. While Betty Dukes and the women who worked at Wal-Mart all claimed to suffer from discrimination, the Supreme Court said this was not enough – for their claims to be “common” they would have had to show that they suffered from discrimination by the same supervisor or because of the same policy, some “glue”⁴⁷ holding them together. The Court said that the women failed to offer “significant proof”⁴⁸ that Wal-Mart “operated under a general policy of discrimination.”⁴⁹ In fact, according to the Court, the fact that local supervisors had discretion over employment matters showed that Wal-Mart had a policy *against* uniform employment practices.⁵⁰

In making their decision, the Supreme Court did more than just take away a remedy from Betty Dukes and her female colleagues. By raising the threshold for a class to have “common questions of law or fact,” they made it much more difficult for people to bring class action lawsuits. Indeed, the decision has had a significant impact on class actions already. The case was decided in June 2011, and by the end of 2011 it had been cited 541 times in lower court rulings.⁵¹ Defendants are using the decision to have cases thrown out, specifically, “they’re challenging discrimination cases and violations of labor laws, often trying to have claims dismissed before the certification issue is even addressed.”⁵²

Its impact doesn’t end there. As Betty Dukes herself explains, “That ruling has devastated the Civil Rights Act of 1964 – not just for the women in Wal-Mart, but for men, for women, for minorities across the country. It will scuttle many, many more [cases].”⁵³ The Court seized “an opportunity to give corporate America a huge advantage over everyday American citizens.”⁵⁴

Dukes, who still works at Wal-Mart (she is four years from retirement), hasn’t given up. She and her attorneys have filed a new lawsuit against Wal-Mart on behalf of the 45,000 California women who have worked at Wal-Mart.⁵⁵ By decreasing the size of the class and keeping it all within one state, they are trying to avoid the problems the larger class action faced. While Wal-Mart attempted to dismiss the case, arguing that the new class suffers the same problems as the class before the Supreme Court, U.S. District Court Judge Charles R. Brayer said the class should be able to present evidence that they deserve certification.⁵⁶

However, he also said that a showing of commonality may be unlikely and while the plaintiffs “have focused their challenge on the allegedly biased decisions made by a group of regional, district and store managers, they must still prove that every decision-maker in that group – perhaps 400 or so under the corporate structure alleged...operated under a common policy or mode of decision making.”⁵⁷ After the *Wal-Mart* Supreme Court decision, this will be hard to do. Similar claims have been filed in other states, such as Texas and Wisconsin, but it is unclear whether they will succeed.⁵⁸

Comcast v. Behrend

Comcast v. Behrend was a 5-4 decision where the Court found that a class of Philadelphia cable subscribers could not proceed as a class action in their lawsuit against the cable company Comcast. The subscribers alleged that Comcast was overcharging for basic cable packages after taking control of the Philadelphia market by “swapping” subscribers and territory with other cable companies.⁵⁹

This was an antitrust case based on several complicated economic theories. The Court found that the cable subscribers’ expert witness – who presented an evaluation of individual cable subscriber damages showing that they were similar enough to constitute a class – fell short of “establishing that damages are capable of measurement on a classwide basis.”⁶⁰

As noted above, in *Wal-Mart* the Court held that there needed to be some type of “glue” holding the employees’ claims together to show commonality. In *Comcast*, the Court ruled that the economic theory on how to award damages is “another type of essential ‘glue’ holding [the cable subscribers] together, which must be established at the front end of a class action.”⁶¹ And the bottom line is this: at the very early stage of litigation, before the class is even certified and all the evidence has been gathered, there must be a new focus on damages calculations. Specifically, plaintiffs must now prove that their process for calculating common, class-wide damages won’t be “overwhelmed” by individual damage calculations.

The majority’s decision triggered the unusual reading of parts of the harsh dissent in open court by both Justices Ruth Bader Ginsburg and Stephen Breyer. In his May 4, 2013 *New York Times* article, Adam Liptak wrote,

Justice Ginsburg accused the justices in the majority of unseemly judicial gamesmanship. She said they had reframed the legal issue in the case so they could rule for Comcast. “Thus the plaintiffs had no unclouded opportunity to brief and argue with precision the issue the court decides against them,” she said. “And that’s not cricket.”⁶²

The dissent advised that the scope of the *Comcast* decision be limited to this one specific case. However, that hope was dashed days later when the Court sent two class actions back to lower courts to be evaluated in light of *Comcast v. Behrend*.⁶³ And as the *New York Times*’ Adam Liptak recently wrote,

The Comcast decision is just over a month old. But lower courts have already relied on it to reject class actions contending harm from defective trucks, poisoned drinking water, discrimination against disabled workers, misrepresentations in insurance policies and improperly docked wages.⁶⁴

It is interesting to contrast this case with the recent Supreme Court decision on class actions, *Amgen v. Connecticut Retirement Plans*.⁶⁵ This 6-3 decision dealt with whether, in a securities fraud case, plaintiffs must prove that an issue is material (*i.e.*, whether it impacted how a shareholder would vote) before the class can be certified. The Court held

that they do not. Justice Ruth Bader Ginsburg explained that the early stages of class action litigation are not intended to judge the potential outcome of the case but to find a method to ensure the case is fairly and efficiently litigated.⁶⁶ That clearly should be so. Unfortunately, however, the Court majority usually seems to disagree.

THE SUPREME COURT AND CLASS ACTION BANS

AT&T v. Concepcion

In September 2011, University of Wisconsin Law School Professor David S. Schwartz wrote this about the *Concepcion* case:

Without minimizing, *Wal-Mart v. Dukes*, getting upset about that case is like flipping out over a brief thundershower a few weeks after having slept through Hurricane Irene. The implications of *Concepcion* are staggering.... It entirely kills most class actions.⁶⁷

In *Concepcion*, the U.S. Supreme Court held that corporations accused of wrongdoing can simply do away with judges and juries and force injured or violated individuals (or businesses) to resolve disputes against them via private, corporate-designed “arbitration.”⁶⁸ In addition, corporations are allowed to ban class actions against them through this forced arbitration clause. Notably, a year before *Concepcion*, the Court ruled in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.* that class action arbitration is permitted only if all parties specifically agree to it.⁶⁹ With *Concepcion*, the Court went farther by upholding class action bans altogether.

Most people have probably never noticed forced arbitration clauses and bans on class actions, which are now written into most consumer contracts – cell phones contracts, bank and credit card agreements and countless retail contracts. People rarely know they have “agreed” to these clauses and, even if they have noticed them, there is rarely a choice but to agree. Employers are starting to force employees to sign them. They are in virtually all nursing home admission contracts. They can be found in fracking agreements. It is only a matter of time before this practice spreads even more wildly. If people have not yet noticed these clauses, it’s hardly their fault. They are usually outlined in tiny print, buried in documents and paragraphs and written in legalese that is incomprehensible to most people.

The *Concepcion* case itself arose when Vincent and Liza Concepcion bought a service plan that offered free cell phones from AT&T Mobility. When the Concepcions bought their service plan, like most people they unknowingly “agreed” to a forced arbitration clause that also waived their right to bring a class action. Agreeing to this service contract was a condition of receiving their service plan. There was no choice. But after being charged \$30.22 in taxes for their “free” phones, the Concepcions decided to bring a class action lawsuit over AT&T’s false advertising and fraud for charging sales tax.

In California, the state where the Concepcions sued, the law⁷⁰ stated that class action waivers like this were “unconscionable” and could therefore not be imposed on the

Concepcions.⁷¹ But the Supreme Court, in a 5-4 decision, sided with AT&T, holding that despite what California law said, the class action ban was legal. The impact has been enormous.

In recent comments to the Bureau of Consumer Financial Protection, Public Justice noted that the abusive arbitration process – while horrible – is “comparatively less significant an issue than the huge number of cases that have been erased”⁷² as a result of class action bans. Public Citizen explains why:

In his dissenting opinion in *Concepcion*, Justice Stephen Breyer, writing for four Justices, described the consequences of the Court’s decision using the example of a case in which a company cheated 17 million people out of \$30 each. “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30,” Justice Breyer wrote, quoting Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.⁷³

In March 2013, Public Citizen updated its 2012 study⁷⁴ and found that, since *Concepcion*, over 100 potential class actions have been dismissed.⁷⁵ The numbers are likely much higher since Public Citizen only counted cases where a posted opinion appeared in Westlaw’s database. Many dismissed cases would not appear there.

In its most recent *Workplace Class Action Litigation Report*, the class action defense firm Seyfarth Shaw wrote that the widespread use of class action bans in employment contracts is coming:

Although mandatory arbitration and class action waiver provisions are already common in retail contracts, the next major step is likely to be their broader introduction into employment contracts (where only collective bargaining agreements, at least in unionized companies, may impede their use).⁷⁶

Indeed, in March 2013, the 2nd Circuit Court of Appeals refused to allow a sex discrimination class action to proceed against Goldman Sachs because the victims’ employment contract contained a forced arbitration clause with a class action ban. The court essentially acknowledged that employers can now “curtail class actions against them, even when they’re accused of violating employees’ civil rights.”⁷⁷

American Express v. Italian Colors Restaurant

While *Concepcion* seems to close most doors to class actions lawsuits, at least where arbitration clauses exist, it may not close all doors. Past U.S. Supreme Court decisions have held that victims who have federal law claims (antitrust claims, civil rights claims, etc.) must be able to “effectively vindicate their rights.”⁷⁸ One might think that for this to mean anything, an arbitration clause with a class action ban cannot impose “prohibitive costs” on victims seeking to vindicate their federal rights.⁷⁹ However, this is exactly what restaurant owners, storeowners and merchants are claiming in the *American Express* case – that the cost of bringing their individual case is so high that their federal rights cannot be vindicated through individual arbitration. Together, small business owners brought a

class action against American Express, claiming that the company was violating federal antitrust law by forcing restaurants, stores and other merchants to accept American Express credit cards from their customers as a condition of accepting American Express's corporate charge cards.⁸⁰

However, like in *Concepcion*, American Express had a forced arbitration/class action ban clause in the merchant contract to which business owners were forced to agree. The business owners argued that they should be allowed to move forward with their class action because it would be too difficult and costly to bring their claims individually. They argued that to bring their claims, they needed at least one "detailed antitrust market study," the cost of which could easily exceed \$1 million.⁸¹ When compared to what each individual restaurant owner, storeowner and merchant was expected to recover – a little over \$5,000 – it is clear that such a cost would be prohibitively expensive.

The 2nd Circuit decided in favor of the small business owners, holding that they had shown that bringing their claims together was their only feasible means of recovery. However, the Supreme Court decided to hear the case and, if the oral argument is any guide, the plaintiffs should be concerned. Justice Scalia, who wrote the opinion in *Concepcion*, said he saw no reason to rule for the small businesses. He remarked, "I don't see how a federal statute is frustrated or is unable to be vindicated if it's too expensive to bring a federal suit."⁸² Justice Breyer, who has been in favor of limiting arbitration clauses in the past, said, "It is an odd doctrine that just says...you can ignore an arbitration clause if you can get a case that's expensive enough."⁸³

If American Express prevails at the Supreme Court, and the small business owners are forced into arbitration, it will be disastrous for consumer class actions. As Public Justice notes, if the Court adopts American Express's position, arbitration will lose all legitimacy since "arbitration clauses need only offer parties the chance to *hypothetically* vindicate their substantive statutory rights while in reality requiring [consumers] simply to forfeit those rights...."⁸⁴ The purpose of arbitration is to achieve justice.⁸⁵

CONCLUSION

In January 2006, production started on the Oscar-nominated George Clooney movie *Michael Clayton*, a film about a corporation's violent reaction to a class action lawsuit filed by sick people suffering health effects from one of the company's lethal pesticides. Of all the issues raised by that film, undoubtedly the last thing anyone would imagine would be that class actions themselves may be on the path to extinction in America.

In fact, just months before production started, Congress passed legislation that has severely limited class actions in this country. And since then, the U.S. Supreme Court has continued to strike deadly blows to this critical tool for justice. It is time for Congress to take action, and it can begin by restricting the use of forced arbitration and class action bans. Congress must amend the Federal Arbitration Act of 1924⁸⁶ to restrict forced arbitration and class action bans.

NOTES

¹ Maud Dillingham, “The evolution of sexual harassment awareness,” *Christian Science Monitor*, November 14, 2011, <http://www.csmonitor.com/USA/Society/2011/1114/The-evolution-of-sexual-harassment-awareness/Lois-E.-Jenson-v.-Eveleth-Taconite-Co>

² American Association for Justice, “Bulletproof vest maker settles defect claims,” *Class Action Law Reporter*, June 5, 2012, <http://www.justice.org/cps/rde/justice/hs.xsl/18467.htm>

³ Pete Cashmore, “RIP Facebook Beacon,” *Mashable*, September 19, 2009, <http://mashable.com/2009/09/19/facebook-beacon-rip/>

⁴ Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. Santa Monica, CA: Rand Corporation, 2000 at 10, http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR969/MR969.ch2.pdf

⁵ *Ibid.*

⁶ *Id.* at 12.

⁷ *See, e.g.*, Shriver Center, “7.2 rule 23 class certification requirements,” *Federal Practice Manual for Legal Aid Attorneys*, <http://federalpracticemanual.org/node/42> (viewed May 3, 2013); *Mulvania v. Sheriff of Rock Island County*, Case No. 4:10-cv-4080-SLD-JAG (C.D. Ill., August 15, 2012), http://il.findacase.com/research/wfrmDocViewer.aspx/xq/fac.20120815_0000379.CIL.htm/qx (“general rule that a class of 40 is sufficient to satisfy the numerosity requirement of Rule 23(a)(1),” citing *George v. Kraft Foods Global*, 270 F.R.D. 355, 365 (N.D. Ill. 2010)); American Bar Association Labor and Employment Law Section, “Introduction to Class Actions and Collective Actions” (2008) at 20, <http://apps.americanbar.org/labor/lcl-annualcle/08/materials/data/papers/119.pdf>.

⁸ *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Employees are attempting to bring similar cases in California, Texas, Tennessee, Florida and Wisconsin, http://www.walmartclass.com/public_home.html (viewed May 3, 2013).

¹² Carlyn Kolker, “Wal-Mart plaintiffs, in second try, hope to distinguish case,” *Reuters*, April 17, 2013, http://newsandinsight.thomsonreuters.com/Legal/News/2013/04_-_April/Wal-Mart_plaintiffs_in_second_try_hope_to_distinguish_case/

¹³ *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

¹⁴ Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. Santa Monica, CA: Rand Corporation, 2000 at 13, http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR969/MR969.ch2.pdf

¹⁵ *Ibid.* In *Wal-Mart v Dukes*, the Court held unanimously that the plaintiffs’ “claims for backpay were improperly certified under FRCP 23(b)(2)” and claims for monetary relief cannot be certified under that provision when they are not incidental to injunctive or declaratory relief.

¹⁶ *Ibid.*

¹⁷ Theodore Eisenberg and Geoffrey P. Miller, “Attorneys’ Fees and Expenses in Class Action Settlements: 1993-2008,” NYU Law and Economics Research Paper No. 09-50, Cornell Legal Studies Research Paper No. 1497224, October 30, 2009 at 4, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1066&context=clsops_papers.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 15.

²⁰ *Ibid.*

²¹ *Id.* at 3, 28, 32.

²² *Id.* at 12, 14.

²³ *Id.* at 14.

²⁴ *Id.* at 3, 18, 28, 29, 30, 32.

²⁵ *Id.* at 12, 28.

²⁶ *Id.* at 3, 16, 17, 18, 31, 32.

²⁷ Legislative attacks on class actions are also occurring at the state level, often spearheaded by the conservative corporate group, American Legislative Exchange Council (ALEC). These include ALEC's so-called "Class Actions Improvements Act" that would limit class actions to residents of the state in which the class action is filed, heighten state certification requirements and impose other burdens victims. *See*, http://www.alecexposed.org/w/images/8/8b/0C2-Class_Actions_Improvements_Act_Exposed.pdf (viewed May 3, 2013).

²⁸ 28 U.S.C. § 1332(d).

²⁹ According to CAFA, defendants in class actions that involve more than \$5 million when any class member resides in a different state than any defendant (unless two thirds of the class and the primary defendants are in the state where the case was originally filed) can remove them to federal court. 28 U.S.C. Sections 1332(d). *See also*, Terry Carter, "A Step Up in Class," *ABA Journal*, May 1, 2008, http://www.abajournal.com/magazine/article/a_step_up_in_class

³⁰ Todd Ruger, "Sequestration outlook bleak for federal courts," *National Law Journal*, March 8, 2013, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202591488315>

³¹ Amanda Griscom Little, "Erin Brockovich, drop dead," *Salon.com*, February 12, 2005, http://www.salon.com/2005/02/12/class_action/

³² Thomas Henderson, Chief Counsel and Senior Deputy for the Lawyers' Committee for Civil Rights, testified against CAFA noting it "would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively tiny federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation." Testimony of Thomas Henderson, Chief Counsel and Senior Deputy, Lawyers' Committee for Civil Rights, U.S. Senate Judiciary Committee, "Class Action Litigation," July 31, 2002.

³³ Testimony of Thomas M. Sobol, Partner, Hagens Berman Sobol Shapiro LLP, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, "Class Actions Seven Years After the Class Action Fairness Act," June 1, 2012, <http://judiciary.house.gov/hearings/Hearings%202012/Sobol%2006012012.pdf>

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Terry Carter, "A Step Up In Class," *ABA Journal*, May 1, 2008, http://www.abajournal.com/magazine/article/a_step_up_in_class/

³⁸ Testimony of John H. Beisner on behalf of the U.S. Chamber Institute for Legal Reform, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, "Class Actions Seven Years After the Class Action Fairness Act," June 1, 2012, <http://judiciary.house.gov/hearings/Hearings%202012/Beisner%2006312012.pdf>

³⁹ The Court held that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." In other words, at this stage of the lawsuit, Knowles does not have the ability to bind the rest of the class to his stipulation limiting damages to below \$5 million. *Standard Fire v. Knowles*, 568 U.S. ____ (2013).

⁴⁰ *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011).

⁴¹ Alliance for Justice, *Wal-Mart v. Dukes: Will the Supreme Court Protect Wal-Mart's Discrimination Against Women?*, <http://www.afj.org/connect-with-the-issues/the-corporate-court/wal-mart-v-dukes-report-final.pdf> (viewed May 3, 2013).

⁴² Monee Fields-White, "She's Taking on Wal-Mart," *TheRoot.com*, June 24, 2010, <http://www.theroot.com/views/shes-taking-walmart>

⁴³ *Wal-Mart v Dukes*, 131 S.Ct. 2541 (2011), dissent.

⁴⁴ Alliance for Justice, *Wal-Mart v. Dukes: Will the Supreme Court Protect Wal-Mart's Discrimination Against Women?*, <http://www.afj.org/connect-with-the-issues/the-corporate-court/wal-mart-v-dukes-report-final.pdf> (viewed May 3, 2013).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

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- ⁴⁷ *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2552 (2011).
- ⁴⁸ *Id.* at 2553.
- ⁴⁹ *Ibid.*
- ⁵⁰ *Id.* at 2555.
- ⁵¹ Seyfarth Shaw, “Ninth Annual Workplace Class Action Litigation Report” (January 2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf
- ⁵² Andrew Longstreth, “Wal-Mart v. Dukes shakes up employment class actions,” *Reuters*, January 9, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/Wal-Mart_v__Dukes_shakes_up_employment_class_actions/
- ⁵³ Dave Jamieson, “Betty Dukes, Renowned Dukes v. Walmart Plaintiff, Takes Her Fight Back To Capitol Hill,” *Huffington Post*, June 20, 2012, http://www.huffingtonpost.com/2012/06/20/betty-dukes-walmart-supreme-court_n_1613305.html
- ⁵⁴ *Ibid.*
- ⁵⁵ *Ibid.*
- ⁵⁶ Judy Greenwald, “*Dukes* lawsuit against Wal-Mart in California can attempt class status: Judge,” *Business Insurance*, September 24, 2012, http://www.businessinsurance.com/article/20120924/NEWS07/120929968#full_story
- ⁵⁷ *Ibid.*
- ⁵⁸ Employees are attempting to bring similar cases in California, Texas, Tennessee, Florida and Wisconsin, http://www.walmartclass.com/public_home.html (viewed May 3, 2013).
- ⁵⁹ Respondents’ Brief, *Comcast v. Behrend*, 569 U.S. ___ (2013), No. 11-864 (September 25, 2012), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-864_respondent.authcheckdam.pdf
- ⁶⁰ *Comcast v Behrend*, 569 U.S. ___ (2013).
- ⁶¹ Daniel Fisher, “Class-Action Lawyers Face Triple Threat At Supreme Court,” *Forbes*, October 1, 2012, <http://www.forbes.com/sites/danielfisher/2012/10/01/class-action-lawyers-face-triple-threat-at-supreme-court/>
- ⁶² Adam Liptak, “Corporations Find a Friend in the Supreme Court,” *New York Times*, May 4, 2013, http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&_r=0
- ⁶³ Lawrence Hurley, “Supreme Court sends back consumer lawsuit on Whirlpool washers,” *Reuters*, April 1, 2013, <http://www.reuters.com/article/2013/04/01/us-usa-court-whirlpool-idUSBRE9300AB20130401>
- ⁶⁴ Adam Liptak, “Corporations Find a Friend in the Supreme Court,” *New York Times*, May 4, 2013, http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&_r=0
- ⁶⁵ *Amgen v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. ___ (2013).
- ⁶⁶ Jonathan Stempel et al., “Update 3-Amgen loses as top U.S. court backs class actions,” *Reuters*, February 27, 2013, <http://www.reuters.com/article/2013/02/27/usa-amgen-ruling-idUSL1N0BR5PF20130227>
- ⁶⁷ David Schwartz, “Do-it-yourself tort reform: How the Supreme Court quietly killed the class action,” *SCOTUSBlog*, September 16, 2011, <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/>
- ⁶⁸ 131 S. Ct. 1740, 1748 (2011).
- ⁶⁹ 130 S. Ct. 1758 (2010).
- ⁷⁰ *Discover Bank v Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005).
- ⁷¹ Jean R. Sternlight, “Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice,” 90 *Oregon L. Rev.* 703, 705 (2012).
- ⁷² Public Justice, “Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements,” Docket No. CFPB-2012-0017, June 23, 2012, http://publicjustice.net/sites/default/files/downloads/PublicJusticeCommentsToCFPB_ReMandatoryArbitration_Jun2012.pdf

⁷³ Public Citizen and National Association of Consumer Advocates, *Justice Denied – One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident* (April 2012), <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>

⁷⁴ *Ibid.*

⁷⁵ Public Citizen, “During National Consumer Protection Week, Consumer Advocates Warn About Harms of Forced Arbitration,” March 7, 2013, <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3830>

⁷⁶ Seyfarth Shaw, “Ninth Annual Workplace Class Action Litigation Report” (January 2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf

⁷⁷ Alison Frankel’s On the Case, “2nd Circuit squelches Title VII exception to mandatory arbitration,” *Reuters*, March 21, 2013, http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/2nd_Circuit_squelches_Title_VII_exception_to_mandatory_arbitration/

⁷⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

⁷⁹ Respondent’s Brief, *American Express Co. v. Italian Restaurant*, No. 12-133, January 22, 2013, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_resp.authcheckdam.pdf (argued February 27, 2013, citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S.79, 91-91 (2000)).

⁸⁰ The charge cards, which are typically used by corporations and wealthy individuals, require full payment at the end of each month, whereas the credit cards allow customers to carry a balance. Businesses strongly favor the charge card.

⁸¹ Respondent’s Brief, *American Express Co. v. Italian Restaurant*, No. 12-133, January 22, 2013, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_resp.authcheckdam.pdf (argued February 27, 2013).

⁸² Binyamin Appelbaum, “Justices Appear Skeptical Over a Challenge to Required Arbitration,” *New York Times*, February 27, 2013, <http://www.nytimes.com/2013/02/28/business/justices-appear-skeptical-about-challenge-to-arbitration-requirements.html>

⁸³ *Ibid.*

⁸⁴ Brief of Public Justice as *Amici Curiae*, *American Express Co. v. Italian Colors Restaurant*, No. 12-133, January 29, 2013, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_affirm_bpj-et-al.authcheckdam.pdf

⁸⁵ *Ibid.*

⁸⁶ 9 U.S.C. §§ 1-16.