Recent Developments in Class Action Law and Impact on MDL Cases

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Class Action Trilogy

- ***Wal-Mart v. Dukes***
  - *Common issues standard*
  - *No (b)(2) certification when money damages*
- ***AT&T v. Concepcion***
  - *FAA pre-empts state unconscionability standards thereby permitting waivers of class actions*
- ***Smith v. Bayer***
  - *MDL forum's rejection of class certification not ground to enojoin state court's later consideration of certification by different litigants*

Wal-Mart v. Dukes

131 S. Ct. 2541

June 20, 2011

Wal-Mart Facts

- class of 1.5 million current and former female Wal-Mart employees allege that
- Wal-Mart's common policy of delegating discretion in pay and promotions to local store managers led to sex discrimination in violation of Title VII
- sought injunctive and declaratory relief, as well as back pay and punitive damages
- N.D. Cal certified a (b)(2) class and Ninth Circuit affirmed

Wal-Mart Supreme Court Holding

The Supreme Court reversed certification on both grounds

- *Commonality:* the Court (5-4) held that the commonality requirement was not met
  - Scalia wrote for majority (Kennedy, Roberts, Alito, Thomas)
  - Ginsburg wrote for dissent (Kagan, Sotomayor, Breyer)
- *(b)(2) Certification: t*he Court (9-0) held that, as the class sought significant monetary relief, certification under Rule 23(b)(2) was inappropriate

Wal-Mart POINT 1 – Commonality

- ***One common question enough***:
  - FRCP 23(a)(2) states that there must be "question**S** of law or fact common to the class"
  - "For purposes of Rule 23(a)(2) even a single [common] question will do"

Wal-Mart POINT 2 – Commonality

- ***Merits May be Considered***

  - "*Sometimes* it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . Frequently [the] rigorous analysis [required at certification] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."

Wal-Mart POINT 3 – Commonality

- ***Daubert* Likely Relevant**

  - "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . ."

Wal-Mart POINT 4 – Commonality

- ***Commonality Narrowly Defined***
  - "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII . . . can be violated in many ways. . .
  - "Their claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor.
  - "That common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
  - "What matters to class certification is not the raising of common questions . . . but rather the capacity of a classwide proceeding to generate common answers . . ."

Wal-Mart POINT 5 – 23(b)(2) Certification

- ***At Most, Incidental Damages Only in a (b)(2) Class Action***
  - "[We have] expressed serious doubt about whether claims for monetary relief may be certified under [(b)(2)]. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."
  - "The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections"
  - Incidental relief defined as
    - "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief – such incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations."

Wal-Mart POINT 6 - Trial Management

- "Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. . . . The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula.
- "A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.
- "We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims."

Wal-Mart Ramifications – Commonality

More litigation of the commonality prong in future certification decisions. ***Except***:

- *Wal-Mart* contained the Rule 23(b)(2) anomaly – in the more common Rule 23(b)(3) suits, courts may continue to sort out cases inappropriate for aggregate treatment using the *predominance* analysis.
- *Wal-Mart* class was exceptional – 1.5 million female workers throughout the United States, all challenging de-centralized decision-making by the nation's largest private employer
- Plaintiffs attempted to prove commonality in what struck the Court's majority as a paradoxical fashion: alleging common issue was decentralized discretion - this approach is somewhat more complex than, say, the common contract, single product, shared hiring test, or unitary misrepresentation at issue in more run-of-the-mill class suits
- *Wal-Mart* is an employment discrimination precedent and employment discrimination class actions have long challenged Rule 23 (*Rodriguez*, *Falcon*)

Wal-Mart Ramifications – Merits

- ***Two possible readings of "the necessity of touching aspects of the merits"***
  - At certification, trial judge must look to see if the case has merit
  - At certification, the trial judge must look at the substance of the claims to ascertain whether the certification requirements have been met
- Court mouthed second and did first
- Better reading is second
  - Other motions for first
  - Parallel to jurisdiction shows second, not first

Wal-Mart In Court

- **About 160 reported decisions cite *Wal-Mart;* of these about 42 actually discuss/apply *Wal-Mart***
- **In 2/3 of the 42 cases courts have either certified or denied motions for decertification distinguishing WM:**
  - No inquiry into subjective intent necessary / there is no discretion, unlike in WM where discretion is exercised by many individual managers.
  - Plaintiffs identify a specific corporate policy, unlike in WM where there is no uniform policy
  - Common questions in the case have common answers.
- **In 1/3 of the 42 cases courts have denied certification or decertified based on WM's commonality prong**
  - Prospect of substantial individual testimony
  - Many officers using discretion
  - While there may be common questions in the case, the answers to those questions are not common but individualized

Wal-Mart In MDL Courts

- In re Countrywide Fin. Mort. Corp. Mortg. Mktg. & Sales Practices Litig., MDL No. 1988, 2011 WL 4809846 (S.D. Cal. Oct. 11, 2011) (Sabraw, J.) (denying motion for class certification and rejecting commonality under *Wal-Mart*)

- In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation, MDL No. 1967, 2011 WL 2634248 (W.D. Mo. July 5, 2011) (Smith, J.) (denying motion for class certification and rejecting commonality under *Wal-Mart* (and prior precedent))

- In re Wells Fargo Loan Processor Overtime Pay Litig., MDL No. 1841, 2011 WL 3352460 (N.D. Cal. Aug. 2, 2011) (Chen, J.) (noting that *Wal-Mart* adds "an additional layer of uncertainty to the question to commonality," which favored settlement in this case).

- In re Aftermarket Auto. Lighting Prods. Antitrust Litig., MDL No. 2007, 2011 WL 3204588 (C.D. Cal. July 25, 2011) (Wu, J.) (certifying class in antitrust case, distinguishing *Wal-Mart* because existence of a "general policy" undisputed).

*AT&T Mobility LLC v. Concepcion**

131 S. Ct. 1740

April 27, 2011

*I authored a law professors' *amicus* brief in support of Respondent arguing that class actions serve important purposes and that their eradication (through contractual waiver) would be bad public policy

AT&T v. Concepcion - Facts

- Concepcions bought cell service advertised to include "free phones" but were charged $30.22 in sales tax
- Sued in federal court in the Southern District of California; complaint consolidated with a putative class action alleging false advertising and fraud
- AT&T moved to compel arbitration – contract provided for arbitration of all disputes between the parties *and* required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."

AT&T v. Concepcion - Facts

The arbitration agreement provision include:

- AT&T to pay all costs for non-frivolous claims;
- Arbitration to take place in customer's county;
- For claims of $10,000 or less, the customer could choose whether the arbitration proceeds in person, by telephone, or based only on submissions
- Arbitrator could award any form of individual relief.
- AT&T could not seek reimbursement of attorneys' fees, and
- If a customer received an arbitration award greater than AT&T's last settlement offer, AT&T was required to pay a $7,500 minimum recovery and twice the amount of the claimant's attorneys' fees

AT&T v. Concepcion - Facts

- Concepcions argued arbitration clause unconscionable under California law because it represented an attempt to escape the deterrent effects of the class action

- AT&T argued not unconscionable (given details noted above) AND that the Federal Arbitration Act pre-empted California's unconscionability rule because that rule discriminated against arbitration

- The District Court and the Ninth Circuit ruled for Concepcion, finding no pre-emption

AT&T v. Concepcion – Supreme Court Holding

- The Supreme Court (5-4) reversed the lower courts, holding that the FAA pre-empted California's unconscionability rule
  - Scalia wrote for majority (Kennedy, Roberts, Alito, Thomas)
  - Breyer wrote for dissent (Kagan, Sotomayor, Breyer)
- Court acknowledged that the FAA does not preempt ALL state contract law – so long as the state's law did not discriminate against arbitration but was generally applicable, it could be applied to arbitration clauses.
- But the Court held that the particular contract doctrine at issue in *AT&T* was preempted because it conflicted with the FAA

AT&T v. Concepcion – Supreme Court Holding

- Specifically, California's unconscionability doctrine would require the option of class action arbitration and such arbitration is inherently contrary to the FAA's streamline litigation goal:
  - class action arbitration sacrificed informality and
  - class action arbitration rules are ill-suited to protecting defendants given no review
- Justice Breyer's dissent argued that class action arbitration was more streamlined than judicial class actions and than multiple individual arbitrations, hence not at odds with FAA

AT&T v. Concepcion – Ramifications

- *Concepcion* is likely to incentivize companies to include arbitration clauses and no class action clauses in contracts and seek to enforce these clauses judicially so as to forestall class suits
- This is a bad outcome as few consumers ever take advantage of arbitration
- But:
  - Public enforcement fills void
  - Congress amends FAA - Arbitration Fairness Act of 2011, H.R. 1020 would amend FAA to emphasize that it is meant to apply only to business-to-business disputes and hence to exempt from its reach employment, consumer, and franchise disputes
  - Courts limit holding

AT&T v. Concepcion – Ramifications

- So does *Concepcion* invariably compel arbitration?
- Judge King, in In re Checking Account Overdraft Litig., MDL No. 2036:
  - "*Concepcion* has changed everything, in that class action waivers have historically been a major factor in the unconscionability analysis under state law, and now, they can no longer be considered. And yet, *Concepcion* has changed nothing in that a thorough, case-by-case analysis of the applicable state law doctrine of unconscionability, applied to the specific terms of an arbitration agreement, is still required."
- *Concepcion* states that the savings clause still "permits agreements to arbitrate to be invalidated by generally applicable contract defenses including unconscionability" and courts have proceeded to go through an unconscionability analysis - though few actually find that the arbitration agreements are unconscionable

AT&T v. Concepcion In Court

- 90% (37/41) cases applying *Concepcion* have compelled arbitration
  - FAA preempts [other state]'s law
  - Strong policy favoring arbitration
  - Public interest cannot override FAA's objectives
  - That the contract at issue in *Concepcion* was an adhesion contract did not affect the analysis;
- 10% (4/41) cases applying *Concepcion* distinguish it
  - Different issue of whether FAA's objectives are as paramount when rights created by federal statute (Title VII) would be infringed
  - Agreement confusing
  - *Concepcion* does not apply to representative actions under PAGA

AT&T v. Concepcion In MDL Courts

- In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig., MDL No. 2093, 2011 WL 4090774 (C.D. Cal. Sept. 6, 2011) (Guilford, J.) (applying *Concepcion* and compelling arbitration of some claims but distinguishing *Concepcion* and not compelling arbitration of others, namely claims for broad, private attorney general, injunctive relief that California law deems non-arbitratable)

- In re Checking Account Overdraft Litig., MDL No. 2036, 2011 WL 4454913 (S.D. Fla. Sept. 1, 2011) (King, J.) (noting, in rejecting renewed motions to compel arbitration following *Concepcion*, that *Concepcion* does not preclude consideration of all unconscionability defenses, but simply narrows the permissible factors for consideration in the unconscionability analysis)

Smith v. Bayer Corp.

131 S. Ct. 2368

June 16, 2011

Smith v. Bayer – Facts (MDL)

- Baycol (also known as Lipobay, Cholstat or Cerivastatin) within a class of drugs referred to as "statins", which are commonly prescribed for high blood pressure and heart disease.
- The plaintiffs allege that Baycol caused rhabdomyolysis, a disease which causes damage to muscle, kidney failure or other injuries.
- Baycol has been linked to over 100 deaths.
- It was withdrawn from the market in August 2001.
- Baycol MDL 1431 - established December of 2001 - the U.S. District Court for the District of Minnesota (Hon. Michael Davis)

Smith v. Bayer – Facts (W. Va.)

Two West Virginia Cases

- August 2001: McCollins files a putative statewide class action against Bayer in WV state court alleging violations of state law
- September 2001: Smiths file a putative statewide class action against Bayer in WV state court asserting similar state claims. The *Smith* suit also named as defendants a West Virginia doctor and corporation.
- January 2002, *McCollins* action removed and transferred to the MDL
- *Smith* action not removable

Smith v. Bayer - Facts (MDL)

- 40,000 plaintiffs filed Baycol cases, 22,500 in federal court, one of the largest MDLs
- Nearly a decade, MDL court coordinated the extensive pretrial processes for Baycol litigation
  - MDL docket ultimately encompassed close to 1,000 separate entries and 150 pretrial orders.
  - MDL court appointed lead counsel and a plaintiffs' steering committee ("PSC")
  - Judge Davis coordinated state and federal proceedings, hosting a Baycol Litigation Conference
  - MDL court supervised discovery, ruled on *Daubert* motions, and oversaw motions for summary judgment.
  - The MDL court denied a motion for nationwide class certification brought by PSC early in action (Sept 2003)
  - The MDL process successively resolved most Baycol claims:
    - in 2010, the parties reported to the MDL court that only 168 cases remained outstanding (only three of those in federal court) and that they had settled 3,144 cases with a total value of $1,169,646,335 (or, roughly $375,000 per settlement)

Smith v. Bayer – Facts (W.Va.)

- MDL winding down, *McCollins* moved to remand action back to the S.D. West Virginia
  - Defendants responded with a cross-motion to deny certification of a West Virginia state class and to enter judgment against the *McCollins* plaintiffs.
  - On August 25, 2008, the MDL court granted the defendants' motion
  - McCollins did not appeal and the decision became final on September 25, 2008.
- 5 days later, *Smith* plaintiffs seek certification of the same state class in state court
  - Bayer asked the MDL court to enjoin *Smith* parties from (re)litigating the certification in West Virginia state court.
  - The Anti-Injunction Act, 28 U.S.C. §2283, bars federal courts from enjoining state court proceedings, but the "relitigation exception" permits injunctions necessary to "protect or effectuate its judgments," that is, to stop relitigation of questions finally decided in the federal court.
  - The MDL court granted the injunction, noting that the relitigation exception is properly invoked when, as in the case before it, the requirements of issue preclusion had been met
  - The Eighth Circuit affirmed

Smith v. Bayer – Supreme Court Ruling

- The Supreme Court unanimously reversed with opinion by Justice Kagan
- Requirements of issue preclusion not met:
  - *Different issue*. FRCP 23 diffreent than WVRP 23 - language identical, but West Virginia courts interpret predominance requirement more broadly
  - *Different parties*. Named plaintiffs in *Smith* not parties to the *McCollins* litigation. Putative class actions that merely propose a class, or putative class actions in which certification has been denied, cannot bind nonparties, including unnamed members of the proposed or denied class.
- The Court therefore reversed the Eighth Circuit's affirmance of the trial court's anti-suit injunction. The *Smith* class action may now proceed in West Virginia state court.

Smith v. Bayer Analysis: Case Seems Straightforward

- ***The decision is doctrinally solid***. Since certification decides whether the proposed representative can speak for the class, if certification is denied, it seems odd to bind the class to the court's decision saying the representative could *not* represent the class
- ***The decision is good public policy***. The opposite result – binding all potential class members to the first class certification attempt – would place too much power in the hands of the initial plaintiffs' attorneys and create opportunities for collusive proceedings.
- ***The decision is good for the plaintiff's bar***. It enables multiple bites at the class certification apple.
- Outcome of *Smith* seems so obvious that the Supreme Court appeared surprised that the MDL court and the Eighth Circuit got it so wrong, writing that while:
  - "***close cases have easy answers . . . this case does not even strike us as close***."
- So what were the MDL court and Eighth Circuit thinking?

Smith v. Bayer Analysis: Nuance 1 – It's an MDL!

Supreme Court noted that the *McCollins* was an MDL, but it failed to appreciate that context

- The Court stated that for six years after their filings in 2002, the two cases "proceeded along their separate pretrial paths at roughly the same pace."
  - Federal judge was managing an MDL comprised of tens of thousands of Baycol cases
  - *Smith* case was languishing in West Virginia state court.
    - *Smith* plaintiffs took seven years to get a class certification motion teed up,
    - Case barely logged any docket entries in most of those years
    - There were more pretrial ***orders*** in the MDL than there were total docket ***entries*** in the West Virginia matter.

Smith v. Bayer Analysis: Nuance 1 – It's an MDL!

- Court wrote that "[b]y 2008, both courts were preparing to turn to their respective plaintiffs' motions for class certification." *Id.*
  - The MDL court had considered and rejected nationwide class certification motion years earlier; by the time of the *McCollins* remand motion, the MDL court was winding down and had resolved thousands of Baycol cases.
  - *McCollins* certification motion came at the behest of the defendants (who sought an order denying class certification)
- All of this demonstrates that the Supreme Court did not completely appreciate either the nature of the MDL or the procedural history of the MDL proceeding.

Smith v. Bayer Analysis: Nuance 2 – Enjoining Litigation

- When is injunction against satellite proceedings appropriate?
- MDL courts are likely to be tempted to enjoin, especially late in the game
- Third Circuit's statement in *Fen-Phen*:
  - "Complex cases in the later stages – where, for instance, settlement negotiations are underway – embody an enormous amount of time and expenditure of resources. It is in the nature of complex litigation that the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding. These cases are especially vulnerable to parallel state actions that may frustrate the district court's efforts to craft a settlement in the multi-district litigation before it, thereby destroying the ability to achieve the benefits of consolidation. In complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court"

Smith v. Bayer Analysis: Nuance 3 – Who IS Precluded?

Key question not literally at issue in *Smith*:

- Who is bound by MDL certification denial?
  - All 10,000 plaintiffs in MDL (later-filed cases)?
  - Most of these have no control or participation – bound because of the work of the PSC
  - That means that they are effectively ***bound to the certification denial by representation***
  - And of course, this is precisely what the *Smith* Court said could NOT happen
  - The very purpose of MDL proceedings is to bind many to work of few – and this is accomplished by virtue of appointed representatives litigating on behalf of the multitude without any class ever being certified

Smith v. Bayer – In The Courts

- In re Sears, Roebuck & Co. Tools Mktg. and Sales Practices Litig., MDL 1703, 2011 WL 2745772 (N.D. Ill. July 11, 2011) (Grady, J.) (holding that Court's decision in *Smith* barring injunction against state proceeding is equally applicable to relitigation in federal court and denying defendant's motion to enjoin members of uncertified putative classes from certifying a class given court's previous denials of class certification)
- Thompson v. Northstar Cos., 2011 US Dist LEXIS 100830 (S.D. Cal. Sept. 7, 2011) (following *Smith* and refusing to bind non-party from re-litigating certification motion)
- Brown v. Am. Airlines, Inc., 2011 US Dist LEXIS 99495 (C.D. Cal. Aug. 29, 2011) (following *Smith* and refusing to bind non-party from re-litigating certification motion)

Class Action Trilogy

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