Duking It Out: 
Key Litigation Developments in 2011

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Wal-Mart v. Dukes

Commonality and Evidence
Required for Class Certification
Proposed Class

• “All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices”

• Over 1.3 million potential class members
Supporting Evidence

- Salary and promotion statistics
- Anecdotes from 120 employee affidavits
- Sociologist report
Commonality and Evidentiary Bar Requirements

• “Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored.”

• “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . .”
The Wal-Mart Ripple Effect

Federal courts curb frivolous class-action suits against lenders.

Wall Street Journal
Review and Outlook
October 18, 2011
Commonality Post-Wal-Mart

• *In re Wells Fargo Residential Mortg. Lending Discrimination Litig.*, 2011 WL 3903117 (N.D. Cal. Sept. 6, 2011)
  – Discriminatory lending practices alleged
  – Corporate policy prohibited discrimination
  – Decision making used objective and discretionary factors
  – Following *Wal-Mart*, class certification was denied

Commonality Sufficient for Claims Involving

- Retailers: Price guarantees and contract terms reflecting corporate policies
- Employers: Prevailing wage and overtime violations because employers had routines and policies suggesting widespread impact in the class
- Insurers: Denial of coverage for certain autism treatments because denial was based on consistently applied corporate policy
- Securities: Pension funds alleging misrepresentation in an offering that would affect each class member similarly
- Financial Service Providers: Credit card provider using system-wide policies affecting fees and rates
Commonality Post-Wal-Mart

• Is there a corporate policy governing the challenged action?
• Does the corporation routinely engage in the challenged action?
• What level of discretion do employees have in making individualized decisions?
• Is the what, when, and where of the challenged action measurable?
Evidentiary Burden Post-Wal-Mart

- Eighth Circuit: Examine the reliability of the expert opinions in light of the available evidence and the purpose for which they are offered
- Third Circuit: Plaintiffs bear the burden of establishing each element of Rule 23 by a preponderance of the evidence
- Ninth Circuit: Evidence in support of certification should be subjected to a “rigorous analysis”
Limits on Classes

• Rule 23(b)(1) and (b)(2) classes vs. Rule 23(b)(3) “opt-out” classes

• *Wal-Mart*: Monetary relief not “incidental” when individually calculated

• See also *Boeing* and *International Paper* in Seventh Circuit vacating classes of 401(k) mutual fund investors; classes too “vague” and had “breathtaking scope”

• Plaintiffs must show “predominance” and “superiority” under Rule 23
Future Class Actions

- Class actions becoming more localized
- Evidentiary challenges are made earlier in the litigation
- Corporate policies mandating legal compliance and decentralized decision making reduces class action exposure
- Limits impose higher hurdles and expenses for plaintiffs
Leahy-Smith
America Invents Act
America Invents Act

- Enacted September 16, 2011
- Most comprehensive reform of U.S. Patent System since 1952
- Intended to encourage innovation and economic growth
- Changes to take place over the next two years
First to File Replaces First to Invent

- Creates a race to the Patent Office
- Patent applications should be filed ASAP
- Brings U.S. patent system in line with most foreign patent systems
- Eliminates rare, but expensive, patent interference proceedings to determine first inventor
Post Grant Review, Inter-Partes Review, Supplemental Examination

- New procedures allow 3rd parties to challenge patents and patent owners to amend patents after issuance
- Ability to challenge issued patents restricted after 9 months (printed documents only)
- Easier to clear “bad” patents out of the system
- Facilitates resolution of patentability issues without litigation
Expanded Prior Use Rights

- New defense against patent infringement (was previously only available for business method patents)
- Provides greater trade secret protection
- Invention protected by trade secret no longer infringes a later issued patent on the same invention
Restrictions on Patent Litigation Abuse

• Eliminates most “False Marking” suits (i.e., failure to remove patent mark from product after patent expires)
  – Three year grace period after expiration
  – Suit can only be brought by competitor, not consumer
  – $500 per unit penalty eliminated (except for U.S. government)
Restrictions on Patent Litigation Abuse

• Curtails wholesale patent enforcement trend
  – Blocks growing number of “patent trolls” or “patent aggregators” who monetize patents by suing dozens of unrelated defendants in a single lawsuit
  – Very limited opportunities to join unrelated parties as defendants in patent litigation
AT&T Mobility v. Concepcion

Class waivers in arbitration clauses
AT&T’s Arbitration Clause

“[The customer and AT&T] agree to arbitrate all disputes and claims . . . . [and] agree that each may bring claims against the other only in . . . its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”
The Conflict

- The Federal Arbitration Act:
  - An agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

- California’s Discover Bank rule:
  - “[W]hen the [class-action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . . such waivers are unconscionable.”
Federal Arbitration Act Preemption

• Case holds:

“Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ . . . California’s Discover Bank rule is preempted by the [Federal Arbitration Act].”
Class Waivers Upheld Post-Concepcion

- Consumer Contracts
  - *Cruz v. Cingular Wireless*, 648 F.3d 1205 (11th Cir. 2011).

- Franchise Contracts

- Employment Contracts
Refusals to Extend Concepcion

- **Private Attorney General Actions**

- **Substantive Unconscionability**

- **Federal Law**
Opportunities for Business

- Although commentary calling *Concepcion* the “death knell of the consumer class-action” probably goes too far, *Concepcion* is widely regarded as good for business.

- The Supreme Court’s holding affects any jurisdiction that has singled out class-action waivers for special treatment.

- Even without class-action waivers, *Concepcion* effectively leads to the same result.
Using Concepcion Today: Litigation

- Courts allowing motions to compel where they would otherwise be late

- Preserve record on appeal

- Removal to federal court
Emerging Issues

• Does the FAA apply in state courts?

• What traction will plaintiffs gain in challenging arbitration clauses on unconscionability grounds?

• To what extent is Concepcion equally applicable to arbitration clauses outside the realm of consumer contracts?

• The Court has expressed a strong inclination to rule in favor of arbitration clauses, and the businesses who use them.
The Supreme Court’s Preemption Decisions 2011
Overview

• Supremacy Clause, U.S. Const., Art. VI, cl. 2:
  – Federal law “shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”
• Intent of Congress is the “ultimate touchstone”
• Presumption against preemption
• Express preemption
• Implied preemption
Business Implications

- Regulations: National uniformity vs. differing state regulations, and enforcement
- State tort actions in subject matter areas regulated by federal government
- Product liability actions
2010-2011 Term

- AT&T Mobility v. Concepcion
- Chamber of Commerce v. Whiting
- PLIVA, Inc. v. Mensing
- Bruesewitz v. Wyeth
- Williamson v. Mazda Motor Corp.
Bruesewitz v. Wyeth LLC
131 S. Ct. 1068 (February 22, 2011)

• Vaccines: A history of controversy and litigation.
  – National Childhood Vaccine Injury Act (NCVIA):
    • Provides claimants with streamlined, administrative remedies for known side effects.
    • Provides vaccine manufacturers with tort-liability protection.
    • So long as vaccines were properly prepared and accompanied by proper warnings, manufactures could not be held liable based on unavoidable side effects.
Bruesewitz v. Wyeth (cont’d)

• Parents sue for alleged design defects in DTP vaccine which allegedly led to side effects.

• BUT—The NCVIA disallows tort claims for unavoidable side effects, unless the vaccine was improperly prepared or included inadequate warnings.

• Defense: Such claims are expressly preempted
Result: Bruesewitz v. Wyeth

• A 6-to-2 decision with implications for design defect claims related to vaccines.

• Justice Scalia delivered the opinion of the Court. The case holds:

  – “[T]he National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.”
Practical Implications: *Bruesewitz v. Wyeth*

- Vaccine manufacturers are “immunized” against design-defect claims based on vaccine side effects.
  - Takes a thorny and highly scientific inquiry out of juries’ hands.
  - Victory for an industry at high risk of litigation, but “closes the door” to many consumers, advocates say—a notable trend in the Court’s preemption jurisprudence.

- A meticulous textual analysis.
  - Disagreements between majority and dissent were largely over such things “called concessive subordinate clause[s] by grammarians”.

**PLIVA, Inc. v. Mensing**  
131 S. Ct. 2567 (June 23, 2011).

- Plaintiffs allege injury from generic drug; claim “failure to provide adequate warning labels.”

- Federal drug labeling requirements are far more complex.
  - A generic drug MUST have the *same* label as its brand-name counterpart.
  - There is a “[f]ederal duty of ‘sameness,’” but the 5th and 8th Circuits said the state duty to warn was still in effect.
PLIVA v. Mensing, cont’d

• Defense: Implied preemption; “impossible” for generic manufacturer to comply with both state and federal law.
  – Federal law required metoclopramide have the same labeling as Reglan. State law required metoclopramide to have better (different) labeling.
Result: 
**PLIVA v. Mensing**

- A 5-to-4 split with implications for the liability of generic drug manufacturers for failure to warn.
- Justice Thomas delivered the opinion of the Court. The case holds:
  - “[F]ederal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, . . . state-law claims [based on alleged failure to provide adequate warning labels].”
  - Explicitly rejects “presumption against preemption” – even in implied preemption case
  - “Non obstante” view of Supremacy Clause
Practical Implications: PLIVA v. Mensing

• “Impossibility” now means “whether the private party could *independently* do under federal law what state law requires of it.”
  – Another victory for manufacturers, but not necessarily for consumers who want to (or must) take generic drugs.

• Court splits on validity of “presumption against preemption.”
Chamber of Commerce v. Whiting
131 S. Ct. 1968 (May 26, 2011)

• In 2007, Arizona famously launched its own version of immigration reform—the Legal Arizona Workers’ Act.
  – “[L]east controversial” portion allows Arizona to revoke a business license if an employer intentionally employed an unauthorized alien, and mandates use of E-Verify.
  – Defining “unauthorized alien” remains in the hands of the federal government.

• A “comprehensive federal statutory scheme” exists for regulating immigration, but states still possess certain important police powers.
  – For example, exercising control through licensing laws.
The Chamber of Commerce sued Arizona officials, **arguing only the federal government could regulate immigration.**

- And, only the federal government could punish employers for immigration violations.

**BUT**—The Immigration Reform and Control Act (IRCA) allows states to enforce their licensing laws.

- States cannot impose civil or criminal sanctions for immigration violations, but they can exercise their police power.
Result:

Chamber of Commerce v. Whiting
131 S. Ct. 2846

- A 5-to-3 split with implications for state regulation of immigration-related employment practices.

- Chief Justice Roberts delivered the opinion of the Court.

The case holds:

- “[The portion of the Legal Arizona Workers Act, providing for revocation of the licenses of state employers who knowingly or intentionally employ unauthorized aliens and mandating use of the E-Verify database,] fits within the confines of IRCA’s savings clause and does not conflict with federal immigration law.”
Practical Implications: 
*Chamber of Commerce v. Whiting*

- Businesses can now suffer at least some state-law consequences for immigration violations.
- Continuing importance of federalism.
  - States’ rights to experiment with policy-making and exercise their rightful police power are protected.
In Summary

• Three of the major preemption cases of the October 2010 term:
  – Arguably expand the reach of the preemption doctrine – meaning federal law may ‘win’ more often.
  – Value federal limitations on liability over state tort law.
  – Contract, rather than expand, plaintiffs’ access to litigation.
  – Side with business over consumer interests.

• The outlier – Whiting – is notable for its relative inattention to business interests and deference to state law.
PERSONAL JURISDICTION

Goodyear and McIntyre
Personal Jurisdiction

  - Foreign defendants; accident in Paris; defective tire manufactured in Turkey
  - Unanimous reversal of state court decision – stream of commerce theory may be used to bolster an affiliation relevant to specific jurisdiction, but does not establish continuous and systematic business contact necessary to support general jurisdiction
Personal Jurisdiction

- **J. McIntyre Machinery, Ltd. V. Nicastro**, 131 S. Ct. 2780 (June 27, 2011)
  - Defendant British corporation; defective machine manufactured in England; injury occurred in New Jersey
  - Defendant had no sales directly to New Jersey; attended trade shows in the U.S., but not in New Jersey
  - Defective machine entered stream of commerce through sale to independent U.S. distributor; defendant had no control over sales by distributor
  - One machine sold by distributor into New Jersey
  - New Jersey courts relied on “stream of commerce” theory to support specific personal jurisdiction
Personal Jurisdiction

• McIntyre v. Nicastro, cont’d

  - Justice Kennedy opinion (with Scalia and Thomas, JJ.):
    
    “[T]he sovereign’s exercise of power requires some act by which the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’”

  - Foreseeability, based on stream of commerce, is not by itself enough to establish jurisdiction.

  - Justice Breyer concurrence (with Alito, J.): No jurisdiction, based on “single isolated sale” into New Jersey.
Personal Jurisdiction

• Personal Jurisdiction Post- *McIntyre*
  – 50+ cases citing *McIntyre*
  – Common approaches
    • Follow Kennedy plurality – foreseeability and stream of commerce are not enough
    • No majority – follow Asahi precedent consistent with prior Circuit precedent
Personal Jurisdiction

- **Practical Implications of *McIntyre***
  - Independent distributor – not a subsidiary
  - No control over end user sales
  - No targeted marketing
  - No interactive website
The Supreme Court and the Benefits of Employment
Federal Healthcare Reform

- PPACA provides mandates, penalties, and opportunities for employers; implementation underway
- Constitutional challenges
  - Circuit courts have split on whether the “individual mandate” is within Congress’ commerce clause authority
  - Challenge dismissed under the Tax Anti-Injunction Act (Fourth Circuit)
  - The individual mandate found to be severable from remaining portions of the law (Eleventh Circuit)
- Supreme Court will likely review this term
Communications to Employees About Benefits

- **Cigna Corp. v. Amara, 131 S. Ct. 1866 (2011)**
  - Class action alleging misstatements about change in retirement program actionable as a fiduciary violation

- **Consequences**
  - Represents shift from contract to fiduciary theories of liability
  - Relief for fiduciary violations previously limited to non-monetary, equitable relief, but now includes “surcharge” and similar remedies

- **Take away - ensure discipline in verbal and written plan communications**
Fiduciary Decisions

• Employer Hat vs. Fiduciary Hat

• George v. Kraft Foods Global, Inc., 641 F.3d 786 (7th Cir. 2011)
  – Claim for $82 million in losses because company stock option in 401(k) structured as unitized stock fund
  – Even though no “right” choice, failure of benefits committee to deliberate, decide and document precludes summary judgment on fiduciary claim
  – Failure to conduct periodic (three year) RFPs stated fiduciary claim

• Fiduciary claims involving health and retirement benefits increasing

• Take away – attention to plan fiduciary structure, and deliberating, negotiating and documenting decisions