Threats to the Role of the Class Action in Private Law Enforcement in the United States*

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Abstract

The class action is an integral tool for enforcing private rights in the United States. It is not, however, an unvarnished good. Aggregate litigation is subject to abuse and rife with conflicts of interest. Courts endeavor to strike the proper balance, which accounts for cyclical development in the law of class actions. The Supreme Court has decided an unprecedented number of class action cases over the past five Terms. Reflecting the policy clashes inherent in aggregate litigation, some of the decisions augur well for plaintiffs and some do not.

Overall, though, the trend is negative for plaintiff classes. This paper focuses on two areas exemplifying this trend. First, the Court has expanded the scope of litigation at the certification stage, which requires the contingent-fee plaintiff's lawyer to invest more heavily in the case without guarantee of recovery. Second, the Court's fulsome embrace of freedom of contract under the Federal Arbitration Act opens the door for businesses to combine arbitration clauses with class waivers in their contracts with consumers. As a result, businesses can effectively shield themselves from being brought before any dispute resolution forum for an increasing scope of claims.

Keywords: class action, private enforcement, access to justice, class waiver

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1. Introduction

In the United States, the class action is an integral tool for the enforcement of private rights. It permits a representative to sue on behalf of a group of similarly-situated persons and permits the court to bind those people to a single judgment. The drafters of the "modern" version of Federal Rule of Civil Procedure 23 ("Rule 23"), which governs

* For comprehensive discussion of recent United States Supreme Court case law, see R.D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, forthcoming at 48 AKRON LAW REVIEW ____ (2015).

class practice in the federal courts,[1] understood that their creation would be used to enforce civil rights by securing injunctive and declaratory relief, for example, against segregation.[2] The Rule also permits assertion of damages claims, with procedural protections that permit class members to pursue their rights individually.[3] Aggregate litigation permits the holders of "negative value" claims – those for which the cost of litigating individually would exceed the expected recovery – to bring a defendant to court. By promoting the assertion of these claims, the class action promotes access to justice and the enforcement of rights. In particular, we are concerned with the rights of consumers or investors – rights that in times of budget cuts may not be enforced by the criminal law or administrative state. Indeed, the promise of aggregate litigation to enforce securities and other laws has been cited as a reason for European countries to adopt American-style class practice.[4]

The United States Supreme Court has been extremely active in this area lately, having decided thirteen class action cases in the past five Terms.[5] Two of these posed

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[1] The Rule was amended to its present general form in 1966 as part of major reform to emphasize pragmatism in the use of joinder rules. Rule 23(a) prescribes four prerequisites for all class actions: numerosity, commonality, typicality, and adequacy of representation. (We will focus on commonality in Part 3 of this paper.) Rule 23(b) recognizes three types of class. (We will discuss two of these types – Rule 23(b)(2) and (b)(3) – throughout this paper. Regarding the requirements for class actions under Rule 23, *see generally* R.D. Freer, CIVIL PROCEDURE 776-801 (3d ed. 2012). Rule 23 applies only in federal court. States are free to provide for class actions as they see fit. All but two states (Mississippi and Virginia) have a general class action rule, most of which are modeled on Rule 23.

[2] *See* D. Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

[3] The class action under Rule 23(b)(3) is frequently called the "damages" class action. Certification requires showing (in addition to the prerequisites under Rule 23(a)) that common questions predominate over individual questions and that class litigation is superior to other alternative methods of dispute resolution. Members are provided notice of their membership in the class and the right to opt out of the class, so they may pursue their claims individually. Failure to opt out results in members' being bound by the class judgment.

[4] S.M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281 (2006).

[5] Halliburton Co. v. Erica P. John Fund ("Halliburton II"), 134 S.Ct. 2398 (2014); Chadbourne & Parke, LLP v. Troice, 134 S.Ct. 1058 (2014); and Mississippi ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736 (2014); American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013); Oxford Health Plans

significant threats to the federal class action, but it survived. In *Shady Grove* (2010), the Court applied Rule 23 to permit a class action asserting consumer claims based upon state law – even though state law forbade aggregate litigation of those claims.[6] Following state law would have resulted in a large-scale failure of enforcement, because the claims (averaging a few hundred dollars) generally would not have been pursued individually. More importantly, following state law would have permitted states to pass legislation that would eviscerate the class practice even in federal court.[7]

In *Halliburton II* (2014), the Court literally saved the securities-fraud class action by refusing to overrule 1988 authority that endorsed application of the "fraud-on-the-market" theory.[8] That theory creates a rebuttable presumption of reliance by all class members. Without the presumption, each member would be required to show reliance, which would preclude class certification because individual questions would overwhelm common questions.[9]

LLC v. Sutter, 133 S.Ct. 2064 (2013); Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013); Standard Fire Insurance Co. v. Knowles, 133 S.Ct. 1345 (2013); and Amgen v. Connecticut Retirement Plans, 133 S.Ct. 1184 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011); Smith v. Bayer Corp. 131 S.Ct. 2368 (2011); Erica P. John Fund v. Halliburton Co. ("Halliburton I"), 131 S.Ct. 2179 (2011); and AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011); Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010). Throughout this article, the text will refer to the case name of the case addressed, without formal citation. For discussion of all 13 cases, see R.D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, forthcoming at 48 AKRON LAW REVIEW ____ (2015).

[6] The Court held that Rule 23 is valid under the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules must not modify any substantive right.

[7] Because of this, Professor Mullenix concludes that Rule 23 survived a "near-death experience." L.M. Mullenix, *Federal Class Actions: A New-Death Experience in a* Shady Grove, 2010, 79 GEO. WASH. L. REV. 448.

[8] Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

[9] A "damages" class under Rule 23(b)(3) is proper only if, inter alia, common questions predominate over individual questions. *See supra* note 1. Recent case law brought other good news for securities-fraud plaintiffs. In *Halliburton I* (2011), the Court held that plaintiffs need not show loss causation at the certification stage. 131 S.Ct. at 2186. In *Amgen* (2013), it held that plaintiffs need not show materiality at the certification stage. 133 S.Ct. at 1203-04.

While this recent spate of Supreme Court cases thus has brought some good news for plaintiffs, it brings two profound threats to federal class practice. First, the Court has expanded the scope of litigation at the certification stage, which generally will require extensive discovery, development of evidence, and retention of experts.[10] While both parties must pay for this expansion, the burden falls more profoundly on the plaintiff class because the class lawyer will likely be handling the case on a contingent fee basis. The increased litigation at the early stages forces the lawyer to invest more time and money in the case with no guarantee of return.

Second, and more importantly, the Court's arbitration jurisprudence permits businesses to require their customers not only to agree to arbitrate but to waive the right to arbitrate as a class. Because negative-value claims are not viable individually, this class "waiver" may mean that claims are never asserted. When this is so, obviously, rights are not asserted and the policy underlying the substantive law is not enforced. What look like procedural rules thus have a very substantive effect: they shield businesses not simply from liability, but from being called upon to respond in any dispute-resolution forum.

This paper proceeds as follows. Part 2 sets the context for the discussion of these developments by addressing the policy tensions inherent in aggregate litigation. Part 3 discusses the Court's recent expansion of the scope of class certification litigation. Part 4 assesses the Court's dogged embrace of arbitration clauses in combination with class

[10] A class suit is merely a "putative" aggregate action until the court "certifies" the class under Federal Rule 23 and its state-law counterparts. To gain certification, the class representative must demonstrate compliance with the four prerequisites of Rule 23(a) and that the case satisfies at least one of the types of class permitted under Rule 23(b). *See supra* note 1.

waivers, which poses a profound threat to the central goal of enforcement of private rights.

2. Policy Issues Inherent in Aggregate Litigation

Though the class action is an important tool for enforcement of rights, it is not a pancea. Aggregate litigation it is rife with conflicts of interest and subject to abuse. Consider the facts of *Concepcion* (2011). There, a cellphone provider, AT&T, advertised that persons signing up for a particular plan would receive a free cellphone. AT&T then charged subscribers $30 apiece as the sales tax on the cellphone. Arguably, assessing this $30 charge constituted common law fraud and violated state consumer protection law. The case presents the classic negative-value claim, because, as Judge Posner reminds us, no one but a lunatic or a fanatic sues for $30.[11]

One of the historic justifications for the class action is efficiency: it is more efficient to have a single class action than numerous separate cases. In the *Concepcion* negative-value fact pattern, however, the justification does not hold. Because individuals will not sue individually for $30, use of aggregate process will create litigation that otherwise would not exist. Ordinarily, creation of litigation is not favored. But if there is no litigation, the law underlying substantive law will not be vindicated. Some might argue that enforcement of the law is the government's job. But the United States has long accepted the role of private litigation to enforce the law.

If aggregation is allowed, though, the defendant may face devastating liability as the result of a single decision. For example, there were 1,000,000 subscribers in the *Concepcion* class. AT&T will not roll the dice in one case with $30,000,000 on the line.

[11] Carnegie v. Household Intl., Inc., 376 F.3d 656, 661 (7th Cir. 2004).

Its incentive to settle will become irresistible. We must admit that this is true *even if the claims are weak on the merits.*[12] Because the merits are not decided at the certification stage, it is possible that granting class status creates leverage to coerce a "blackmail" settlement from the defendant.

When a class is certified, incentives change on the other side as well. When a $30 case became a $30,000,000 case, the universe of possible plaintiffs' lawyers expands, particularly given the American contingent-fee award structure. We worry that the defendant may strike a deal with the plaintiffs' lawyer to settle on terms that are generous to that lawyer, buy peace for the defendant, but do little to compensate the class members.[13] Perhaps with such a result we can say that the deterrent purpose of the law has been vindicated, (assuming the defendant was worthy of being deterred), but its compensatory purpose has not been met.

The potential conflict of interest between counsel and class members forces the judge to assume an unaccustomed fiduciary position. Ordinarily, parties are free to compromise their claims on any terms they see fit. In the class action, however, the court must approve settlements. Thus, the judge is responsible for ensuring that the class members' rights are protected. This role is especially important in cases involving negative-value claims, since it is not clear that individual class members, with only $30 at stake, will adequately police the class lawyers' efforts.[14]

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[12] Some studies in the securities field suggest that defendants will settle class actions regardless of the strength of the class claims on the merits. *See, e.g.,* J.C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

[13] Such abusive possibilities underlay passage of the Class Action Fairness Act, which vastly expanded federal court jurisdiction over class actions asserting state-law claims. *See generally* R.D. Freer, *supra* note 1, at 824-31.

[14] One preeminent scholar argues that the conflicts of interest inherent in class litigation, coupled with lack of meaningful oversight by class members, renders the class action unconstitutional in some circumstances.

The tensions are manifold and palpable, and the law must balance the competing interests. Parsimonious use of class litigation thwarts enforcement of the law, while overzealous use of class litigation creates litigation and could impose unfair coercion on defendants to compromise even weak claims. Not surprisingly, given these clashes, the history of the class action is a history of cycles. Sometimes courts are more accepting and sometimes they are more restrictive. We are now in a period of constriction.

3. The Imposition of Increased Procedural Hurdles to Certification

Wal-Mart (2011) is the most significant of the decisions interpreting Rule 23. There, lower courts certified a nationwide class of 1,500,000 female employees of the retail giant. The class asserted Title VII sex discrimination claims regarding pay and promotion. Managers in each of the 3,400 Wal-Mart stores have great discretion over pay and promotion decisions, with limited central oversight. Plaintiffs argued that this discretion was exercised in favor of men. The Ninth Circuit upheld class certification under Rule 23(b)(2) for injunctive and monetary relief (in the form of back pay).[15]

The Supreme Court reversed on two grounds. First, unanimously, the Court held that individualized monetary relief, such as that sought in the case, cannot be recovered in a Rule 23(b)(2) class.[16] Second, by a five-to-four margin, the Court held that the class

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M.H. Redish, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

[15] Many believe that the Ninth Circuit harmed the plaintiffs in *Wal-Mart* by certifying such a stunningly broad class and ignoring obvious problems of manageability. The Ninth Circuit decision largely ensured that the Supreme Court had to take jurisdiction over the case to reverse. S. Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1.

[16] Rule 23(b)(2) applies when the defendant has treated class members in a similar manner, rendering appropriate final "injunctive or declaratory relief." It is aimed at entering a single indivisible order binding all class members. On the facts of *Wal-Mart*, which involved persons at different levels of employment for differing times, there was no injunctive or declaratory order that would adjudicate the rights of all. Indeed, the class included *former* employees, for whom injunctive relief would be irrelevant. Because back pay claims were not liquidated, but were individualized, they could be sought only in a "damages" class action under Rule 23(b)(3). When individual monetary determinations predominate, there is "the serious

failed to satisfy the prerequisite of "common questions" under Rule 23(a)(2).[17] This holding was a stunner. The commonality requirement had simply never been significant in practice.[18] In *Wal-Mart*, the Court fundamentally shifted the focus of the commonality inquiry. The key is not whether one can posit common *questions*, but whether the class litigation will generate common *answers* that drive resolution of the case. The class members must suffer the *same injury* and not simply a violation of the same law. Their claims "must depend upon a common contention," such as bias on the part of the same supervisor.[19] The majority concluded that there was no such "glue"[20] binding the class members' claims. Litigation of no single issue could generate an answer for the entire class because any discrimination was the result of thousands of individual judgment calls.

Some lower courts opine that *Wal-Mart* constitutes a significant break from earlier practice. In *M.D. ex rel. Stukenberg v. Perry*,[21] for instance, the Fifth Circuit rejected its earlier precedent that "the test for commonality is not demanding"[22] and explained that *Wal-Mart* "heightened the standards for establishing commonality under

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possibility" that due process requires that class members be given notice and the opportunity to opt out of the class 131 S.Ct. at 2559. *See supra* note 3.

[17] Rule 23(a)(2) requires that any class action present common questions of law or fact. It is one of the four prerequisites for any class action imposed by Rule 23(a). *See supra* note 1.

[18] This is not to be confused with the requirement in Rule 23(b)(3) that common questions *predominate*. Many class actions have failed because of that requirement. In Rule 23(a)(2) the question is merely whether there are common questions – not that they predominate.

[19] 131 S.Ct. at 2551.

[20] 131 S.Ct. at 2552–57.

[21] 675 F.3d 832, 839 (5th Cir. 2012). *See also* Reyes v. Julia Place Condominium Homeowners' Ass'n, 2014 U.S. Dist. LEXIS 175111 *19 n.1 (E.D. La. 2014)("Although plaintiffs claim that the bar is low for commonality, the case they cite to has been superceded by the U.S. Supreme Court's decision in *Wal-Mart*."); Baughman v. Roadrunner Communications, LLC, 2014 U.S. Dist. LEXIS 120983 *8 (D. Ariz. 2014)(citing *Wal-Mart*, the court said: "The purpose of the rigorous commonality standard is to require that class members' claims depend upon a common contention whose truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

[22] Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5th Cir. 1999).

Rule 23(a)(2)."[23] Though finding that a single issue would affect a *significant* number of class members would have sufficed to show commonality before *Wal-Mart,* now resolution of some issue must be central to the validity of *each* claim.[24] In a later case, however, the Fifth Circuit seemed to moderate its view. It emphasized that the new standard does not mean that there cannot be differences in the harm suffered by class members. Showing a common instance of injurious *conduct* – even in the light of differing harms to class members – will suffice.[25] Thus, according to another court, *Wal-Mart* does not require that every question be common; rather, Rule 23(a)(2) is satisfied by "a single *significant* question of law or fact."[26]

Even if we conclude that *Wal-Mart* worked negligible change to the commonality *standard* under Rule 23(a)(2),[27] the case imposes significant new litigation hurdles to class certification.

- First, the Court established, "Rule 23 does not set forth a mere pleading standard."[28] Instead, plaintiff must "be prepared to *prove* that . . . in fact" the

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[23] 675 F.3d at 839.

[24] 675 F.3d at 840. In *In re Whirlpool Corporation Front-Loading Washer Products,* 678 F.3d 409, 418 (6th Cir 2012), the court characterized the *Wal-Mart* commonality requirement: "The . . . inquiry focuses not on whether common questions can be raised, but on whether a class action will generate common answers that are likely to drive resolution of the lawsuit."

[25] In re Deepwater Horizon, 739 F.3d 790, 810-11 (5th Cir. 2014). *See also* Serna v. Transportation Workers Union of America, 2014 U.S. Dist. LEXIS 181701 *9 (N.D. Tex. 2014)("There is no requirement under the commonality prong that Plaintiffs establish the nonexistence of a conflict of interest.")

[26] Mazza v. American Honda Motor Co., 666 F.3d 581, 589 (9th Cir. 2012)(emphasis added).

[27] Some district courts continue to rely upon pre-*Wal-Mart* authority to determine whether commonality is satisfied. *See, e.g.,* In re Air Cargo Shipping Services Antitrust Litigation, 2014 U.S. Dist. LEXIS 180914 *187 (E.D. N.Y. 2014)("Unlike the related inquiry into 'predominance' posed by Rule 23(b)(3), commonality does not present plaintiffs with a particularly exacting standard."); Cunningham v. Multnomah County, 2014 U.S. Dist. LEXIS 180960 *18 (D. Or. 2014)("The commonality standard is not strictly construed . . ."; fact that claims of each class member required individual inquiry into reasonableness of search did not defeat commonality of challenge to practices of county allegedly subjecting prisoners to unconstitutional searches). On the other hand, it seems clear that the Court's focus on common *answers* as opposed to common *questions* results in denials of certification on the basis of commonality. *See, e.g.,* DL V. District of Columbia, 713 F.3d 120, 126-28 (D.C. Cir. 2013).

[28] 131 S.Ct. at 2551.

requirements are met.[29] Indeed, the representative must produce "significant proof" on this point.[30] Certification thus is not to be decided on the pleadings, but on *evidence*.

- Second, that evidence may overlap directly to the merits of the case. This directive rejects the historic reluctance of lower courts to consider at the certification stage factual issues that related to the merits.[31] Certification hearings thus may be expanded to such questions as injury and damages whenever they are relevant to the issue of whether the class status should be granted.[32]
- Third, the Court in *Wal-Mart* suggested that expert testimony offered at certification must be fully vetted for admissibility under Federal Rule of Evidence 702, which requires a showing of reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[33] Making that showing can be extremely expensive.
- Fourth, plaintiffs must demonstrate that damages will be susceptible to proof *en masse* at trial.

On this latter point, the Court in *Wal-Mart*, rejected "trial by formula," under which a subset of cases would be tried, and other class members' back pay would be

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[29] 131 S.Ct. at 2551 (emphasis added). The Court reiterated the need for presentation of evidence in *Comcast* (2013). 133 S.Ct. at 1432.

[30] 131 S.Ct. at 2553, *quoting* General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982).

[31] The reluctance was based upon a misinterpretation of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). 131 S.Ct. at 2552 n.6.

[32] But the court should not decide merits-based issues unrelated to certification. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S.Ct. at 1194-95.

[33] 509 U.S. 579 (1993). In *Wal-Mart*, the district court expressly concluded that expert testimony at certification did not have to be qualified under *Daubert*. The Supreme Court "doubt[ed] that this is so." 131 S.Ct. at 2554. Typical of the response to *Wal-Mart* on this issue is: "[i]f a district court has doubts about whether an experts' opinions may be critical for a class certification decision, the court should make an explicit *Daubert* ruling." Messner v. Northshore University Healthsystem, 669 F.3d 802 (7th Cir. 2012).

extrapolated from those results. Such a procedure would improperly rob defendants of the right to present and litigate defenses to individual claims.[34] The Court addressed the need for aggregate proof of damages again in *Comcast* (2013). This was an antitrust case in which the plaintiffs asserted that Comcast unlawfully "clustered" cable television providers in the Philadelphia area, thereby excluding entities that could provide competitive alternatives for cable service. The focus at certification was whether antitrust injury and damages could be demonstrated on a class-wide basis.[35] The plaintiffs asserted four theories of antitrust impact. The district court rejected three of these. The plaintiffs' proffered expert testimony on damages, however, purported to show damages under all four of the original theories of antitrust impact; it was not limited to the one theory the court upheld. This disconnect was fatal. As a result of *Comcast*, plaintiffs must hew their substantive theory of liability precisely to their expert evidence that damages may be proved *en masse*. And defendants must be permitted to challenge whether the class has satisfied any of these steps.

These decisions, based upon Rule 23, increase the scope of litigation at class certification. They make certification a longer and more expensive process. The class lawyer must advance expenses for expert testimony and develop an evidentiary record supporting class status. As burdensome as this may be, it pales, however, in comparison to the remaining development, which thwarts use of class litigation altogether.

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[34] The proposed trial by formula would arguably modify the defendant's substantive right under Title VII to present defenses to individual claims. This would run afoul of the Rules Enabling Act, which requires that Federal Rules of Civil Procedure not modify substantive rights. *See generally* A.D. Lahav, *The Case for "Trial by Formula,"* 2012, 90 TEXAS L. REV. 571.

[35] Plaintiffs need not prove the antitrust injury or damages themselves at certification. Rather, they must demonstrate that at trial they will be able to prove "to the satisfaction of a jury that 'all putative class members suffered an injury and that the injury resulted from anti-competitive harms to the market as a whole.'" In re Sulfuric Acid Antitrust Litigation, 847 F.Supp.2d 1079 (N.D. Ill. 2011).

4. Class Action Avoidance

The Supreme Court's embrace of arbitration clauses is well chronicled.[36] The Federal Arbitration Act (FAA), passed in 1925, decreed an end to judicial hostility to the enforcement of arbitration agreements.[37] At the time, arbitration clauses applied to contractual claims between business entities. In the past generation, arbitration clauses have been inserted into innumerable contracts of adhesion. Arbitration clauses now routinely apply to a wide variety of consumer, employment, tort, and federal statutory claims. The Court has been willing to uphold them in these new contexts, emphasizing the freedom of parties to contract on such matters. More recently, many adhesion contracts have added another provision: a "waiver"[38] of aggregate litigation – that is, a clause that forbids plaintiffs from joining to assert their claims in arbitration.

This combination sets up a collision course between the pro-contract policy of the FAA, on the one hand, and enforcement of private rights, on the other. The clash is illustrated by *Concepcion* (2011), in which AT&T billed cellphone subscribers for the tax on their "free" phones. The AT&T agreement contained an arbitration clause and a waiver that forbade claimants from aggregating to assert their rights. Despite these provisions, the plaintiffs brought a class action in federal court, based upon state fraud and consumer-protection laws. AT&T moved to compel arbitration, which the district court denied. The Ninth Circuit affirmed. It relied upon *Discover Bank v. Superior*

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[36] *See, e.g.,* 13D C.A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3569 (discussing case law and citing literature).

[37] Courts traditionally rejected arbitration clauses (and forum selection clauses, for that matter) on the theory that they constituted improper private efforts to "oust" courts of jurisdiction. *See generally* 13D C.A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2569 (3d ed. 2008).

[38] Because the prohibition of aggregate assertion of claims is typically contained in a contract of adhesion, "waiver" – at least insofar as it implies voluntary relinquishment – is something of a euphemistic term.

Court,[39] in which the California Supreme Court held that waivers of the right to collective arbitration are unconscionable if included in adhesion contracts involving negative-value consumer fraud claims. The effect of the *Discover Bank* case would be to permit customers to arbitrate as a class.[40]

The Court reversed. It relied upon Section 2 of the FAA provides for enforcement of arbitration clauses, "save upon such grounds as exist at law or in equity for the revocation of any contract."[41] This "savings clause" allows state law to invalidate arbitration agreements only on grounds applicable to contracts generally (such as fraud or unconscionability), and not on grounds that apply *only* to arbitration clauses. Thus, state-law rules that "stand as an obstacle to the accomplishment of the FAA's objectives"[42] are preempted.

According to the Court, the California decision in *Discover Bank* creates such a rule. One purpose of the FAA is to ensure enforcement of arbitration clauses according to their terms. Another is to foster efficient, speedy dispute resolution. The California law obstructed the latter objective because it would (1) replace bilateral arbitration with an expensive, procedurally complicated method "more likely to generate procedural morass than final judgment,"[43] (2) place the arbitrator in the unaccustomed position of having to protect absentees' interests, and (3) expose the defendant to enormous potential liability based upon the outcome of a single case; this risk is exacerbated by the limited appellate

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[39] 36 Cal.4th 148 (2005).

[40] Interestingly, as noted, the representatives sought to bring class litigation, not arbitration. 131 S.Ct. at 1744.

[41] 9 U.S.C. § 2.

[42] 131 S.Ct. at 1748.

[43] 131 S.Ct. at 1751.

review available in arbitration cases. Thus, after Concepcion, state determinations about the appropriate mechanism for enforcing state-created rights can be swept aside by the preemptive power of the FAA.[44]

As a result, the customers in *Concepcion* were required to arbitrate their claims individually, and not in the aggregate. The Court thought it likely that they would vindicate their claims through individual arbitration because the arbitration provision was consumer-friendly: it required the hearing to be in the customer's home county, AT&T paid all costs, and if the arbitration award was higher than AT&T's offer, the customer would recover $7,500 and double attorney's fees.

But what would happen if the arbitration were not so consumer-friendly? The Court said that a state "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[45] This phrase suggests that waivers of class arbitration will be upheld even if it is clear that no one in the putative class will bring an individual claim. This implication is consistent with Court's relentless theme that arbitration agreements are to be enforced by their terms.[46]

After *Concepcion*, lower courts generally held that the FAA's preemptive power is not readily tempered by the need to facilitate civil enforcement of the law.[47] Bucking

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[44] *See, e.g.,* Pendergast v. Sprint Nextel Corp., 691 F.3d 1224 (11th Cir. 2012)(court did not have to reach issue of whether Florida law invalidated class action waiver; to the extent it would, it is preempted by FAA); Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir, 2012)(Washington law); Kilgore v. Keybank National Ass'n, . 673 F.3d 947 (9th Cir. 2012)(California law requiring court litigation, and not arbitration, for "private attorney general" claims preempted by FAA).

[45] 131 S.Ct. at 1753.

[46] *See, e.g.,* CompuCredit Corp. v. Greenwood, 132 S.Ct. 665, 669-673 (2012)(because Credit Repair Organizations Act was silent regarding arbitration, agreement to arbitrate claims is enforceable); Stolt-Nielsen S.A. v. Animal Feeds International Corp., 130 S.Ct. 1758 (2010)(when contract was silent regarding permissibility of class arbitration, arbitrator may not infer consent to aggregation).

[47] *See, e.g.,* Ferguson v. Corinthian Colls., Inc., 733 F.3d 928 (9th Cir. 2013); Litman v. Cellco P'ship, 655 F.3d 225 (3d Cir. 2011); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011). *See* M. Gilles, *After Class: Aggregate Litigation in the Wake of* ATT v. Concepcion, 2012, 79 U. CHI. L. REV. 623.

this trend, however, the Second Circuit went the other way in *Italian Colors.*[48] There, a class of restaurant owners sued American Express, alleging that the credit card company violated federal antitrust laws by using monopoly power to force them to accept credit cards at high interest rates.[49] The agreements required arbitration and forbade aggregation. Each claimant alleged damage in the tens of thousands of dollars. While these are not de minimus, they were negative-value claims because the cost of retaining expert witnesses on the complex economic issues would be prohibitive. Only if the merchants could litigate en masse would it be feasible to retain experts and prove the case.

The Second Circuit struck the class action waiver. It distinguished *Concepcion* because that case featured a consumer-friendly arbitration provision. Noting the absence of such terms in the American Express agreement, the Second Circuit concluded that individual pursuit of claims was economically infeasible. Thus, it held, the class waiver would be ignored – to allow "effective vindication" of the antitrust laws. In other words, unless the merchants could aggregate their claims, de facto the claims would not be asserted.

The Court reversed in *Italian Colors* (2014). The five-justice majority was willing to accept that individual arbitration of the antitrust claims would be infeasible economically. Still, *Concepcion* governed. After noting that parties may waive their rights to assert aggregate claims, the Court turned to the "effective vindication" argument

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[48] Italian Colors Restaurant v. American Express Travel Related Servs. Co., 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom* American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013). The Supreme Court had earlier remanded the case to the Second Circuit for reconsideration in light of *Stolt-Nielsen, supra* note 46. While the case was pending at the Second Circuit on remand, the Court decided *Concepcion*.

[49] The class asserted argued that the American Express agreement constituted an illegal tying arrangement in violation of Section 1 of the Sherman Act. 133 S.Ct. at 2308.

embraced by the Second Circuit. The Court recognized that public policy can invalidate agreements that operate "as a prospective waiver of a party's right to pursue statutory remedies."[50] But nothing in the American Express agreement impeded the plaintiffs' ability to pursue statutory remedies. The Court noted that the substantive damages claim asserted under the Sherman Act was created 48 years before promulgation of the original Rule 23 made it possible to pursue such claims through class litigation. The fact that it is not worth the expense of proving the claim "does not constitute the elimination of the right to pursue that remedy."[51] In short, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[52] In other words, a prohibitively expensive path to the vindication of one's rights is not the equivalent to the elimination of those rights.

The animating force in the Court's interpretation of the FAA is the primacy of contract. The goal of enforcing the contract as written is not tempered by the needs of access to justice or private enforcement of the law. Neither is it moderated in the interest of federalism, to respect states' determinations of how state-created rights ought to be enforced. Plaintiffs in *Concepcion* and *Italian Colors* entered a contract requiring them (1) to arbitrate instead of litigate and (2) to arbitrate alone. Unless Congress provides that aggregate litigation is necessary for vindication of particular claims, the parties will be bound by their contract.

Of course, parties remain free to contract to arbitrate *en masse*. Presumably, in the era of *Concepcion* and *Italian Colors*, however, such agreements will be rare. A few

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[50] 133 S.Ct. at 2310, *quoting* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

[51] 133 S.Ct. at 2311.

[52] 133 S.Ct. at 2309.

agreements may not address the issue of group vindication expressly. In those cases, *Oxford Health* (2014) gives some solace to plaintiffs. There, the arbitrator interpreted the arbitration clause to manifest an agreement to class treatment.[53] Applying the FAA's limited provision for judicial review of arbitration decisions, the Court upheld the order.[54] *Oxford Health* is consistent with the pro-contract policy of the Court's other decisions.[55] Though *Oxford Health* opens the door for class arbitration proceedings, it's not much of an opening. Businesses can simply insert class waivers into their arbitration provisions.

The state of affairs under *Concepcion* and *Italian Colors* is not encouraging for private enforcement of law through the class mechanism. Interestingly, though, this problem is not the result of class action jurisprudence. It is a result of the Court's FAA jurisprudence, which uncritically has applied that Act to contracts and claims not envisioned when it was passed. There is, however, no indication that the Court is willing to retreat from its position. Efforts for legislative change have failed.

5. Conclusion

For the most part, however, these are difficult times for federal class practice. Under *Wal-Mart*, commonality under Rule 23(a)(2) is getting increased scrutiny, with the focus on common answers instead of common questions. In *Wal-Mart*, the Court expanded the scope of litigation at the certification stage. The issue is to be determined based upon evidence, and not merely pleadings. The representative must offer

[53] The parties agreed to submit any "civil action" to arbitration. Because class actions are civil actions, the arbitrator concluded, the parties intended to permit class proceedings.

[54] The arbitrator did not "exceed [his] powers" under 9 U.S.C. § 10(a)(4), so a court is powerless to vacate the order. As the Court explained in *Oxford Health*, the question under that provision is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." 133 S.Ct. at 2068.

[55] The case is to be distinguished from Stolt-Nielsen, S.A. v. Animal-Feeds Int'l Corp., 559 U.S. 662, 684 (2010). There, the arbitrator exceeded his powers by ordering class arbitration in light of the parties' stipulation that they did not agreement on the issue of class proceedings.

"convincing proof" that the class requirements are satisfied. This will focus, inter alia, on whether merits issues (such as injury and damages) can be proved at trial en masse. Whether they can be shown en masse will usually entail a battle of experts, and *Wal-Mart* strongly suggests that expert evidence considered at certification must pass muster under *Daubert*. Under *Comcast*, the plaintiffs must be careful that their expert model is in synch with their theory of damages. All of this increases the cost of certification litigation and puts greater stress on plaintiff's lawyers, who are working on contingent fee and must advance their time and pay for the experts.

The far greater threat to class practice, however, comes not from interpretations of Rule 23, but from the FAA. *Concepcion* and *Italian Colors* emphatically restate that arbitration is a matter of contract, and that the parties are to be taken at their word. It is one thing to say this when commercial ventures of comparable strength have entered such agreements. It is another, however, to do so in contracts of adhesion between businesses and their consumers, investors, or employees. But even if the arbitration provisions in contracts of adhesion should routinely be enforced, waivers of aggregate vindication are a separate step. The Court reflexively has applied the goal of enforcing contracts not only to the arbitration clauses but to the waivers as well. Combining the two clauses, in too many cases, will leave claimants without access to justice, leave states unable to declare the means by which their laws will be enforced, and leave rights unenforced.

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