INTRODUCTION

In a twenty-first century America marked by instantaneous communications and increased economic consolidation, the Supreme Court has defined and policed the boundaries of class action litigation with notable vigor. This circuit-by-circuit treatise is intended to serve a need by, in part, examining how the holdings of the Supreme Court have played out, and how the procedural common law of class actions continues to develop, in the lower courts, as they apply both Supreme Court and Circuit-level decisions to emerging issues and particular circumstances. We conceived and developed the treatise with the goal of creating a resource both for newcomers to class actions—welcome to the practice!—and for the veterans among us who may find themselves litigating in unfamiliar circuits.

Our judicial system continues to feel the effects of the Class Action Fairness Act of 2005 (“CAFA”), which generally expanded original and removal federal subject-matter jurisdiction to cover large class actions. In the years since CAFA’s enactment, federal judges have considered a broad range of procedural and case management issues, in addition to substantive questions of state law. The increase in class cases proceeding through federal courts has, unsurprisingly, yielded a great deal more federal class action precedent, prompting this book.

The Supreme Court, for its part, has seized several opportunities to flex its class action muscles since CAFA’s enactment:

• The Roberts Court’s seminal class action decision, Wal-Mart Stores, Inc. v. Dukes, overturned certification of a nationwide class of female employees alleging employment discrimination. 564 U.S. 338 (2011). The Court held the statistical evidence proffered by the plaintiffs insufficient to show companywide discrimination in pay and promotion. Id. at 356–59. In an important passage, the Court held that the assessment of commonality under Rule 23(a)(2) looks at whether common answers are apt to drive the litigation, and whether determination of the truth or falsity of a common contention will, “in one stroke,” resolve an issue central to the validity of each of the claims. Id. at 350–51. Though often overlooked, the Court’s unanimous section addressing injunctive relief classes under Rule 23(b)(2) merits close study as well. Id. at 360–63.

• The Supreme Court applied another key analytical concept in Tyson Foods v. Bouaphakeo, recognizing that a permissible method for submitting evidence in an individual action should generally be available in a corresponding class action. 136 S. Ct. 1036, 1046–47 (2016). Tyson is a key resource when considering trial structure and process in class actions and common question trials.

• In AT&T Mobility LLC v. Concepcion, the Court held that the Federal Arbitration Act preempted a California rule disfavoring arbitration provisions with class action waivers. 563 U.S. 333, 352 (2011).

• In Comcast Corporation v. Behrend, the Court reversed an antitrust class certification, holding that a damages model submitted in support of class certification under Rule 23(b)(3) must align with—and cannot sweep beyond—the plaintiff’s theory of injury. 133 S. Ct. 1426, 1434 (2013).

• In the securities fraud arena, the Supreme Court held in Amgen Inc. v. Connecticut Retirement Plans and Trust Funds that investor classes may be certified in the absence of proof that the alleged misrepresentations or omissions were material, recognizing that the issue of materiality itself presented a significant common question of fact for classwide determination. 568 U.S. 455, 459 (2013). The Court clarified that
the standard of proof at class certification remains focused on the express requirements of the rule: “the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case,” and “Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.” 568 U.S. at 459.

• Also in the area of securities fraud, the Court in 2014 refused to disturb the Basic fraud-on-the-market presumption, holding that class certification does not require direct evidence of investor reliance on alleged misrepresentations or omissions. 


The Supreme Court’s recent class action decisions—especially Wal-Mart, Concepcion, Comcast, and Amgen—have not only influenced federal class action practice, but also have spawned various differences of opinion among the lower courts, which our distinguished contributors highlight in the chapters that follow. Other doctrinal developments have occurred without much guidance from the high court: As of this writing, the Supreme Court has stayed out of the heated debates among bench and bar regarding the extratextual issues of ascertainability and absent class member standing, as those issues continue to percolate among the Circuits.

In the end, the dual mandates of fairness and efficiency frequently animate the conduct of class actions as modern Rule 23 moves into its second half-century. What specifically lies ahead for class action practitioners will, of course, depend on any Congressional legislation and how the Supreme Court, drawing from existing jurisprudence, defines the contours of this significant litigation mechanism.

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