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Cornell Law

Aggregate Litigation – A Global Perspective

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In a world of mass production, mass harm often follows. A defective product might injure numerous consumers; a false report might mislead multiple investors, and a discriminative practice might impact a large number of employees. In such cases, litigation by each plaintiff might prove ineffective, and often impractical. To resolve this problem, legal systems have devised various forms of aggregate litigation and collective redress procedures.

This introductory course discusses the essential characteristics of these procedures, using a comparative framework. Class actions and alternative collective redress regimes in the U.S., Canada, Australia, Israel and Europe will be studied, and the potential for multi-national aggregate litigation, in a single or in multiple forums, will be explored.

Grading

Grading will be based on a Final Paper. Students will be expected to study an aggregate proceeding, describe its background, participants, process and outcomes, and analyze it according to the normative criteria studied in class.

Communication

If you have any questions you would like to discuss, things you did not understand in class or anything else you wish to talk about, you may email me at klement@tauex.tau.ac.il and we will schedule a meeting

Readings

Throughout the course we will discuss various aggregate litigation case studies from the book *CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION* (Hensler et al. eds., Elgar, 2016). Hereinafter *CLASS ACTIONS IN CONTEXT*.

Assigned readings also include chapters from *THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS* (Brian T. Fitzpatrick and Randal S. Thomas eds., Cambridge, 2021). Hereinafter *HANDBOOK OF CLASS ACTIONS*.

Each class also has some optional reading which you are not obliged to read.

Course Outline

Class 1: Aggregate Litigation: Distinguishing Characteristics

- Parties and represented claimants
- Closure and finality – claim and issue preclusion
- Types of remedies: monetary or injunctive, private or public
- Aggregation techniques:
 - Contractual:
 - Lawyers
 - Funders
 - Claim assignment
 - Non-Contractual:
 - Joinder
 - Consolidation and Group Litigation Orders
 - MDL
 - Parens Patriae
 - Citizen suits
 - Class actions
 - Test case/Bellwether trials

Required Reading:

Deborah R. Hensler, *The Global Expansion of Class Actions: Power, Politics and Procedural Evolution* in *HANDBOOK OF CLASS ACTIONS*

ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, §1.02 Types of Aggregate Proceedings, p. **10-15**

Optional Reading:

Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, **386-417** (2000)

Assaf Hamdani and Alon Klement, *The Class Defense*, 93 CAL. L. REV. 687, **687-709** (2005)

Class 2: Aggregate Litigation: Normative Considerations

- Specific and general deterrence
- Prevention and law enforcement
- Compensation
- Insurance
- Access to justice
- Finality
- Saving public and private resources
- Judicial economy
- Litigation v. Regulation
- Scale efficiencies
- Common issues and economies of scale
- Non-marketable claims
- Collective action problems: free-riding and hold-outs (both on the plaintiff and the defendant side)

Required Reading:

Alon Klement and Keren Winshall-Margel, *Cost-Benefit Analysis of Class Actions*, 172 J. THEORETICAL & INSTITUTIONAL ECONOMICS 75, **77-82** (2016)

David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, **393-402** (2000)

Optional Reading:

Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, Ch. 8 in THE CONSERVATIVE CASE FOR CLASS ACTIONS (Chicago, 2020) **100-113**

Class 3: Financing Aggregate Litigation: Contingent Fees, Litigation Funding, and Claim Assignment

- Financing and control
- Absent markets
- Funding and agency problems
- Settlement v. Litigation
- Fee shifting: one way / two way
- Litigation cost insurance / funding
- Class representative
 - Incentive fees
 - Size of financial interests in the relief (PSLRA)
- Attorneys
 - Contingent – percentage - fees
 - Conditional fees + lodestar
- Litigation funders
- Public v Private funding
- Control of the class action
- Types of funding agreements
 - With lawyers
 - With claimants
- Claim assignment

Required Reading:

Case Study: Camille Cameron, *Litigation as ‘Core Business’: Analyzing the Access to Justice and Regulatory Dimensions of Commercially Funded Class Actions in Australia*, Ch. 16 in *CLASS ACTIONS IN CONTEXT*

Camille Cameron, Jasminka Kalajdzic, and Alon Klement, *Economic Enablers*, Ch. 7 in *CLASS ACTIONS IN CONTEXT*

Optional Reading:

John C. Coffee, *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 *COL. L. REV.* 669 (1986)

Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 *DEPAUL L. REV.* 561 (2014)

Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 *AM. J. COMP. L.* 93 (2013)

Class 4: Class Actions: The American Model

- Attorney driven
- Common fund
- Class representative = class member (v. government or organization)
- Opt-out (v. opt in)
- Certification stage
- Certification Requirements
 - Numerosity
 - Commonality
 - Typicality
 - Adequacy of Representation
 - Predominance + Superiority
- Notice
- Trans-substantive
- Settlement certification
 - Fairness hearing
 - Objectors
- Cy-Pres

Required Reading:

Case Study: *Insurance Premium Double Rounding Litigation: Martinez v. Allstate and Sendejo v. Farmers*, Ch. 10 in Deborah Hensler et. al., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (RAND, 2000) **255-291**

https://www.rand.org/pubs/monograph_reports/MR969.html

Janet Cooper Alexander, “An Introduction to Class Action Procedure in the United States,” Duke University Conference on Aggregate Litigation (2000)

<https://law.duke.edu/grouplit/papers/classactionalexander.pdf>

Optional Reading:

Alon Klement and Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19(1) *THEORETICAL INQUIRIES IN L.* 151, **154-169** (2018)

Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19(1) *THEORETICAL INQUIRIES IN L.* 1, **1-34** (2018)

Class 5: Class Actions: Alternative Models

- Australia
 - Funder driven
 - Open and Closed class
 - No certification stage
- Canada
 - Competing class actions and Carriage
 - Public funding
- Israel
 - Substance specific
 - Alternative representatives
 - Regulatory class actions
 - Cy-Pres

Required Reading:

Case Study: Jasminka Kalajdzic, *The Engine that Drives: Fees, Costs and the Canadian Class Action*, Ch. 11 in *CLASS ACTIONS IN CONTEXT*

Alon Klement and Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 *THEORETICAL INQUIRIES IN LAW* 151, **152-153, 170-202** (2018)

Michael Legg and Samuel J. Hickey, *Class Actions in Australia*, ch. 19 in *HANDBOOK OF CLASS ACTIONS*

Optional Reading:

Shay N. Lavie, *Class Actions and the Regulatory State: Lessons from Israel*, ch. 25 in *HANDBOOK OF CLASS ACTIONS*

Jasminka Kalajdzic and Catherine Piche', *Cold Facts from the Great White North: Empirical Truths, Contemporary Challenges and Class Action Reform*, ch. 7 in *HANDBOOK OF CLASS ACTIONS*

Vicki Wayne and Vince Morabito, *Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions*, in *LITIGATION, COSTS, FUNDING AND BEHAVIOR: IMPLICATIONS FOR THE LAW* (van Boom ed., Routledge, 2017)

Class 6: Consolidation Mechanisms: American MDL and English GLO

Group litigation Orders

Multidistrict Litigation

Required Reading:

Case Study: Elizabeth Thornburg, *Public as Private and Private as Public: MTBE litigation in the United States*, Ch. 16 in *CLASS ACTIONS IN CONTEXT*

Neil Andrews, *English Systems of Multiparty Litigation*, ch. 9 in *HANDBOOK OF CLASS ACTIONS* p. **155-163**

Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PENN. L. REV. 831, **842-847** (2017)

Class 7: European Models of Collective Redress

- Aversion to US attorney driven model – preference for representation by organizations
- Regulation v litigation
- Redress and compensation v Deterrence
- ADR v Litigation
- Regulation and deterrence v. Self Regulation
- Netherlands
 - Collective litigation v. Settlement class
 - Representation by special purpose foundation (SPV)
 - Remedy: Injunctive, declaratory or monetary?
 - Reverse auctions?
- Germany – Model case
- Belgium - Partie civile – piggy back on criminal proceedings

Required Reading:

Axel Halfmeier, *Collective Litigation in German Civil Procedure*, ch. 13 in *HANDBOOK OF CLASS ACTIONS*

C.F. Van Der Elst and W.C.T. Weterings, *The Dutch Mechanisms for Collective Redress: Solid, and Excellent within Reach*, ch. 15 p. **272-294** in *HANDBOOK OF CLASS ACTIONS*

Optional Reading:

John C. Coffee, *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL AND FUTURE* (Harvard, 2015), Ch. 10: *The Globalization of the Class Action: Can the Private Attorney General Be Exported?*

Samuel Issacharoff and Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 177 (2009).

Class 8: Multinational Aggregate Litigation: Private International Law Considerations

- Jurisdiction:
 - Extraterritorial Jurisdiction
 - Jurisdiction Rules
 - Forum Non Conveniens
 - Lis Alibi Pendant
 - Anti-suit Injunctions
- Choice of Law
- Enforcement and Recognition of Foreign Judgments
- Limitation Periods
- Most Favored Nation Settlements
- Cooperation among enforcers

Required Reading:

Case Study: Deborah Hensler, *A Class Action ‘Mash-Up’: In Re Royal Dutch/Shell Transport Securities Litigation*, Ch. 8 in *CLASS ACTIONS IN CONTEXT*

Zachary D. Clopton, *The Global Class Action and Its Alternatives*, 19(1) *THEORETICAL INQ. IN LAW* 125 (2018)

Morrison v. National Australia Bank Ltd., 561 U. S. 247

Class 9: The VW Dieselgate Litigation

Required Reading

The Globalization of Mass Civil Litigation: Lessons from the Volkswagen “Clean Diesel” Case (RAND, 2021), p. **25-57**

Optional Reading:

John C. Cruden et. al., *Dieselgate: How the Investigation, Prosecution and Settlement of Volkswagen’s Emissions Cheating Scandal Illustrates the Need for Robust Environmental Enforcement*, 36 VA. ENVTL. L. J. 118, **118-135** (2018)

Classes 10-11: Student Presentations

Class 12: Change and Reform

- [Directive of the European Parliament and the Council on Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC](#)
- [Law Commission of Ontario: Class Actions: Objectives, Experiences and Reforms](#)
- [Parliament of Australia: Litigation Funding and the Regulation of the Class Action Industry.](#)