COMPLEX LITIGATION
General Information and Syllabus
Fall 2010

This course examines the wide variety of procedural methods used to litigate and resolve related civil claims on an aggregate basis. The need for our justice system to deal with related claims arises from a core reality of modern industrial society: the potential for mass harm that arises from increasingly integrated economic markets and from the substantial role played by modern government. We will look at a number of ways in which these complex claims are handled, focusing on class actions, multi-district litigation, and aggregate settlements. You will learn to approach the prospects and perils of aggregation in the same way sophisticated lawyers do – as a choice among different formats, subject to different manners of regulatory oversight and with different advantages and disadvantages for clients.

We will be using a new textbook, *The Law of Class Actions and Other Aggregate Litigation*, written by Richard Nagareda. Professor Nagareda was one of three law professors who were the Reporters for the American Law Institute's recent *Principles of the Law of Aggregate Litigation*, and his book reflects the big-picture vision of that project. After an introductory chapter that reminds students of the underlying principles of preclusion and the techniques of aggregation, the book focuses first on class actions, always mixing the legal principles with the incentives they create for the parties. We will examine questions of when and how a case can be certified as a class action, the role of class counsel, and the coordination of multiple overlapping cases. The book then turns to issues of settlement (as so few of these complex cases actually go to trial), both in the context of class actions and the more recent non-class vehicles for settlement.

In order to help put these issues in context, we will also be studying the rapidly-developing litigation surrounding the Gulf oil spill. Individual and class claims have already been filed in state and federal court on behalf of injured workers, fishermen, shrimpers, property owners, restaurant owners, hotel owners, fishing boat charterers, government entities, and environmental groups against BP (operator and majority owner of the well), Transocean (owner of the drilling rig), Cameron (builder of the blowout preventer), and Halliburton (which had been doing cementing operations on the well). There are also claims against the government, alleging that it failed to provide proper enforcement of environmental laws. There are disputes about whose insurance will cover what. There are investigations at every level of government, including both criminal and civil investigations. In addition to these tort claims, there are also scores of securities derivative claims filed on behalf of BP shareholders, complaining about the impact of the disaster on the value of the company's stock. The federal Judicial Panel on Multidistrict Litigation has just decided to consolidate many of these claims for pretrial in the Eastern District of Louisiana (New Orleans), and the transferee judge will have a number of decisions to make about how to handle what he's got, and federal judges will no doubt be encouraged to cooperate with their state court counterparts. It should be interesting!

By the end of this class, you should be familiar with and be able to apply these legal doctrines in the context of complex litigation:

- Due process limits on class actions
- Preclusion doctrines (including limitations on re-litigation by class members and the impact of multiple overlapping class actions)
- Rule 23 and its state counterparts and their requirements for class certification
- Multi-district litigation procedures
- Settlement of class actions and non-class aggregate litigation
- The impact of pre-dispute arbitration clauses on the availability of class actions

From a policy perspective, you should be able to identify the risks and opportunities presented by litigation aggregating numerous individual claims, including conflicts of interest, allocation of the "global peace" premium, litigation finance options, federalism concerns, "negative value" claims, the impact on the courts of different procedural choices, and the ability of courts to protect the interest of absent parties.

From a lawyering perspective, you should be able to apply the knowledge discussed above to help a client choose among competing processes, choose a litigation venue, and make decisions about procedural settlement options.

GENERAL CLASS INFORMATION

1.   Meeting Times

        Our class meets on Mondays and Wednesdays from 1:30 – 2:45 in 107 Florence.

2.   Required Reading

        Our textbook for this class is RICHARD NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION (2009). In addition, there will sometime be reading assignments and other supplementary information on the class TWEN course page. You should sign up for this TWEN page, as in addition to posting assignments I will use this to email announcements and other materials to the class.

        There is also a webpage designed for the class that consolidates information about the BP litigation. More information about how to access that page will be provided.

3.   Communication

        Please feel free to email or call to sign up for an appointment. My office is Storey Hall room 204, my office phone number is 214-768-2613, and my email address is ethornbu@smu.edu.

4.   Grading

        Your grade will be based primarily on the final examination, which will be a take-home final distributed on the first day of the exam period and due no later than the time scheduled for the exam on the law school exam schedule (December 13th at 8:30 a.m.). More information will be provided later in the semester. In addition, your grade may be raised for superior class participation or lowered for lack of attendance or lack of preparation.

5.   Classroom Etiquette

        Normally, a student is expected to arrive on time for class, to remain throughout the class, and to leave only when class has ended. If you need a trip to the restroom or a drink, take care of that before class. It's distracting to everyone if students come and go during class. If an emergency, illness, or other circumstance makes it impossible for you to meet these expectations, please let me know, either before class begins, or as soon as possible after it ends.

6.   Noisy Toys

        Before each class begins, please disconnect all audible signals on watches, computers, cell phones, beepers, or any other noisemaking device. If you are using a computer in class, you should be using it only for class work. No texting, no reading email, no checking your Facebook

postings, and no surfing the net during class time is permitted. This is a small class, and if it turns out that computers become a distraction, their use may be limited.

7.   Disability Accommodations

        Students needing academic accommodations for a disability must first contact Disability Accommodations & Success Strategies (DASS) at 214-768-1470 or www.smu.edu/alec/dass.asp to verify the disability and to establish eligibility for accommodations.   They should then contact Steve Yeager, the Assistant Dean for Student Affairs, to make appropriate arrangements.

8.   Religious Observance

        Religiously observant students wishing to be absent on holidays that require missing class should notify me in writing before the class that will be missed. This will be counted as an excused absence in accordance with University policy.

READING ASSIGNMENTS[*]

For class, you will be assigned a role to play in our discussions of the issues raised by the BP cases, and this will give you a chance to use the materials to think strategically from a particular client's standpoint. How exactly this will unfold depends a bit on what happens in the real cases during the semester, and so it does not generally appear on the syllabus, and the simulations may easily result in adjustments to the time schedule below. We will, however, assign and begin to flesh out the roles during the second week of class.

Topic	Read
Week 1: Introduction to Aggregate Litigation ▪ Principles of Preclusion ▪ Techniques of Aggregation	 1-25 25-41 Enrichment Options (TWEN): 1. Ratliff, *Offensive Collateral Estoppel & the Option Effect* 2. Silver & Baker, *Mass Lawsuits & the Aggregate Settlement Rule* 3. Erichson, *Informal Aggregation* 4. Silver & Baker, *I Cut, You Choose*
Week 2: Introducing the BP Litigation ▪ Background information ▪ Litigant Roles	Introduction to the Law Underlying the BP Tort Claims MDL Order (TWEN) Create and report on litigant role
Week 3: The Significance of Class Certification ▪ For Plaintiffs: *Hansberry v. Lee* ▪ For Defendants: *Rhone-Poulenc Rorer*	 42-52; The Story of Hansberry (TWEN) 52-67; Silver, *We're Scared to Death* (TWEN)

Weeks 4 & 5:
-- General Requirements for Class Certification
-- What Type of Class?
▪ Opt Out Classes
   o *The Two Faces of Due Process*
   o *Intra-Class Conflicts*
   o *Timing*
   o *Choice of Law as a Barrier*
	
	67-79
	
	79-94
	94-122
	122-35
	135-54

Week 6: Mandatory Classes under 23(b)(1) & (2)	193-240
Week 7: Issues Classes	251-73
Week 8: The *Eisen* Rule and the Parameters of Judicial Inquiry in Class Certification	273-91
Week 9: Class Counsel	

---

[*] All assignments are in the Nagareda text unless otherwise noted.