

COMPLEX LITIGATION
Syllabus – Fall 2017
Professor D. Theodore Rave

Class Hours: Tuesdays and Thursdays from 9:00am to 10:30pm, Room 209BLB

Office Hours: Wednesdays from 2:30-4pm. I am always happy to talk with students, so if that time is not convenient for you please feel free to email me to set up an appointment. My office is 142 BLB. My email address is dtrave@central.uh.edu. My assistant is Lillian White (lawwhite@central.uh.edu).

Required Casebook: NAGAREDA, BONE, BURCH, SILVER & WOOLLEY, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION (2d ed. 2013). I will also post required reading materials on the Blackboard website from time to time.

Supplemental Resources: You may find the following texts helpful throughout the course (and your careers) in understanding some of the issues in complex litigation. But except for excerpts that I assign and post on Blackboard, you are not responsible for these readings for the purposes of the exam.

- AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010), available on Westlaw in the ALI-AGGLIT database
- CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, available on Westlaw in the FPP database
- WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, available on Westlaw in the CLASSACT database
- DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) (2017), available on Westlaw in the MCL-ANN database
- ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL (4th ed. 2012)

Course Requirements

Exam: Your grade will be based primarily on a take-home final exam. The test will be open book. All answers must be exclusively your own work. You may not consult with others about the exam once the exam period has started. Please review the Honor Code

Class Participation: Participation in class discussion is necessary both for your own understanding of the material and for the benefit of your classmates. I expect you to be prepared for every class. If, for any reason, you are not prepared for a class I ask that you let me know in advance (either by email or by leaving a note on the lectern in class) and I will not call on you that day. If you are unprepared more than twice during the semester, it will affect your grade. Final grades may be modified up or down by one level (e.g., B+ to A- or A- to B+) based on class participation.

Attendance: You are expected to attend every class session. If you fail to attend at least 80% of class meetings you will be in violation of ABA and Law Center policy and may be dropped from the course. Late arrivals may be treated as absences.

Computer Policy: Use of laptops or other electronic devices is permitted for class-related purposes only. Violations of this policy will be treated as unpreparedness.

Recordings and Attribution: I find that class discussion is most productive when students feel free to try out positions with which they (or others) may not agree and to test the assumptions underlying their own (or others') views. For this reason, class discussion is strictly "off the record." Outside of the classroom, you may not attribute any statements made in class to any of your classmates. And any audio or visual recording of class is prohibited. The only exception to this policy is that I will arrange for the law school to record any make-up classes that might become necessary.

Accommodation: If you have a disability and require an accommodation, please contact the Center for Students with Disabilities.

Counseling: Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus.
http://www.uh.edu/caps/outreach/lets_talk.html

Reading Assignments: Reading assignments will be announced in class or emailed to all class members. I will provide you with an updated course outline and reading assignments before the semester begins. Unless otherwise noted, page numbers refer to the Nagareda et al. casebook. "ALI" refers to the AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (full text available on Westlaw, excerpts will be posted to Blackboard). "Supp." refers to the 2017 Supplement to the Nagareda casebook, which is posted on Blackboard. (BB) refers to other supplemental readings posted on Blackboard.

First Assignment: For the first class, please read pages 1-12 of the casebook, as well as Section 1.02 of the ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (including the Comments and Illustrations, but not the Reporters' Notes), which will be posted on Blackboard and is available on Westlaw.

Course Outline and Reading Assignments

- I. Introduction
 - A. Framing the Problem
 - Casebook pp. 1-3
 - ALI § 1.02 and Comments and Illustrations
 - B. Preclusion
 - Casebook pp. 3-6
 - Parklane Hosiery Corp. v. Shore* and notes, pp. 6-12
 - ALI § 1.01 and Comments and Illustrations
 - Taylor v. Sturgell* and notes, pp. 12-25
 - C. An Overview of Aggregation Techniques
 - Casebook pp. 25-44 (skim pp. 31-34)
 - ALI § 1.04 and Comments
 - ALI § 1.05, Comments a & b, Reporters' Note on Comment b
- II. Class Actions: Creating a Class
 - A. The Stakes
 - Hansberry v. Lee* and notes, pp. 42-56
 - In re Rhone-Poulenc Rorer, Inc.* and notes, pp. 56-69
 - Supplement note 9, pp. 7-9 (on *Spokeo*)
 - B. The Mechanics: Class Certification
 - 1. Overview
 - Federal Rule of Civil Procedure 23, pp. 30-34
 - 2. Numerosity
 - Casebook pp. 69-70
 - 3. Commonality & Typicality
 - General Telephone Co. v. Falcon* and notes 1&3, pp. 70-76
 - Supplement note 2, pp. 10-12
 - Wal-Mart Stores, Inc. v. Dukes* and notes, pp. 76-89
 - ALI § 2.01 and Comments and Illustrations
 - ALI § 2.02 and Comments a, b, e, f, and h
 - 4. Adequate Representation
 - Casebook pp. 89-91
 - In re Aqua Dots Product Liability Litigation* (BB)
- III. The Types of Classes
 - Casebook pp. 91-92
 - A. The Opt-Out Class
 - 1. Due Process
 - Phillips Petroleum Co. v. Shutts* and notes, pp. 93-109
 - Supplement notes 3.a & 10, pp. 13-15
 - 2. Predominance & Superiority
 - Amchem Products, Inc. v. Windsor* and notes, pp. 109-35
 - 3. Future Claimants
 - Stephenson v. Dow Chemical Co.* and notes, pp. 135-44
 - Uhl v. Thoroughbred Technology & Telecom., Inc.*, pp. 145-47
 - In re NFL Players Concussion Litigation* (BB)

4. Choice of Law
 - Casebook pp. 147-51
 - Cole v. General Motors Corp.* and notes, pp. 152-60
 - In re St. Jude Medical, Inc.* and notes, pp. 161-68
5. Challenging Class Certification
 - Klay v. Humana, Inc.* and notes, pp. 168-90
 - Supplement Notes 4 & 10, pp. 16-18
- B. The Mandatory Class
 1. Overview
 - Casebook pp. 190-93
 - ALI § 2.07 and Comments e, h, i, and j
 2. Indivisible Claims
 - ALI § 2.04 and Comments and Illustrations
 - Barnes v. American Tobacco Co.* and notes, pp. 193-203
 - Brown v. Ticor Title Insurance Co.* and notes, pp. 203-10
 - Wal-Mart Stores, Inc. v. Dukes* and notes, pp. 210-19
 - Supplement Note 5, pp. 18-19
 3. Claims Against a Limited Fund
 - Ortiz v. Fibreboard Corp.* and notes 1-4, pp. 219-33
- C. The Issue Class
 1. Overview
 - Casebook pp. 242-44
 2. The Seventh Amendment
 - In re Rhone-Poulenc Rorer, Inc.* and notes, pp. 244-47
 3. Predominance
 - In re Nassau County Strip Search Cases*, pp. 247-54
 4. Mandatory Classes
 - McReynolds v. Merrill Lynch, Pierce, Fenner & Smith* and notes pp. 255-64 (with particular attention to Note 5 on *Engle*)
- D. Class Certification and the Merits
 - The *Eisen* Rule, pp. 264-67
 - In re Hydrogen Peroxide Antitrust Litigation* and notes, pp. 267-84
 - Supplement Notes 2, 7, 7.a & 8, pp. 19-21 (on *Halliburton*, *Amgen*, *Comcast*, and the aftermath)
 - Butler v. Sears* (BB)
- IV. Class Counsel
 - A. Selecting Class Counsel
 - B. Fee Awards
 - C. Strategic Considerations
- V. The Coordination of Aggregate Litigation
 - A. The Class Action Fairness Act (CAFA)
 - B. The Multidistrict Litigation Act (MDL)
 - C. Intersystem Coordination
 1. The Full Faith and Credit Act
 2. The Anti-Injunction Act
- VI. Class Settlements

- A. Direct Review of Class Settlements
- B. Collateral Attack on Class Settlements
- C. Settlement Design and Opt-Out Rights
- D. *Cy Pres* Distributions
- E. Attorney-Client Conflicts
- VII. Private Aggregation
 - A. The Private Aggregator
 - B. Aggregate Settlements
- VIII. Aggregation and Alternative Dispute Resolution
 - A. Class Arbitration
 - B. Contractual Prohibition of Class Arbitration
 - C. Voluntary Compensation Schemes

Classes:

1. August 22 (T) – Intro and *Parklane* (12 + 2 ALI)
2. August 24 (Th) – *Taylor v. Sturgell* and aggregation techniques (32 + 2 ALI)
3. August 29 (T) – *Hansberry* and *Rhone-Poulenc* (27)
4. August 31 (Th) – Rule 23 basics, *Falcon*, *Wal-Mart*, adequate rep. (27 + 2 ALI)
5. September 5 (T) – *Shutts* (18)
6. September 7 (Th) – *Amchem* (26)
7. September 12 (T) – *Stephenson*, *Uhl* (12) and *NFL Concussion*
8. September 14 (Th) – Choice of law, *Cole* and *St. Jude* (21)
9. September 19 (T) – *Klay v. Humana* and Review Exercise (22)
10. September 21 (Th) – *Barnes*, *Ticor*, *Wal-Mart* (26 + 2 ALI)
11. September 26 (T) – *Ortiz* (16)
12. September 28 (Th) – Issue classes, *Rhone-Poulenc*, *Strip Search*, *McReynolds* (22)
13. October 3 (T) – *Eisen* rule, *Hydrogen Peroxide*, *Comcast*, *Amgen* (26) and *Butler* ()
14. October 5 (Th) – 23(g), *Auction Houses*, PSLRA (27)
15. October 10 (T) – *Van Gemert*, *Cendant PRIDES*, *Staton* (33 + ALI)
16. October 12 (Th) – CAFA, *Anderson*, *Standard Fire* (21); MDL, *Breast Implants* (6)
17. October 17 (T) – *Lexecon*, *DeLavventura* (12 + *Lexecon*)
18. October 19 (Th) – *Matsushita*, start *Smith v. Bayer* (30)
19. October 24 (T) – *Smith*, *Corrugated Container*, *Eagle-Picher*, *Carlough* (10)
20. October 26 (Th) – *Reynolds*, *Sullivan*, (11 + *Sullivan* + 4 ALI)
21. October 31 (T) – *Devlin*, *Epstein II & III* (29)
22. November 2 (Th) – *Inter-Op*, (11); cy pres (5 + *Baby Products*); *Lazy Oil* (6)
23. November 7 (T) – *APCC Services*, *Huber*, *Jackson Hewitt* (13 + APPC + ALI)
24. November 9 (Th) – *Zyprexa*, *WTC*, *Chevron* (15 + *WTC*)
25. November 14 (T) – Quasi class continued, *Vioxx* (4 + settlement docs)
26. November 16 (Th) – *Concepcion*, *Italian Colors* (39), Voluntary Compensation
27. November 21 (T) – Review