SEYFARTH SHAW LLP
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Annual Workplace Class Action Litigation Report

2008 Edition

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Dear Clients:

The last few years have seen an explosion in class action and collective action litigation involving workplace issues. The stakes in such employment litigation can be extremely significant, as the financial risks of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and impact its reputation in the marketplace. It is a legal exposure which keeps corporate counsel and business executives awake at night.

Defense of employers in complex, high-stakes workplace litigation is one of the hallmarks of Seyfarth Shaw's practice. Through that work, our attorneys are on the forefront of the myriad of issues confronting employers in class action litigation.

In order to assist our clients in understanding and avoiding such litigation, we are pleased to present the 2008 edition of the Seyfarth Shaw Annual Workplace Class Action Litigation Report. This edition, authored by the class action attorneys in our Labor & Employment Department, contains a circuit-by-circuit and state-by-state review of significant class action rulings rendered in 2007, and analyzes the most significant settlements over the past twelve months in class actions and collective actions. We hope this Annual Report will assist our clients in understanding class action and collective action exposures and the developing case law under both federal and state law.

Very truly yours,

J. Stephen Poor
Firm Managing Partner

Authors' Note

Our Annual Report analyzes the leading class action and collective action decisions of 2007 involving claims against employers brought in federal courts under Title VII of the Civil Rights of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act ("FLSA"), the Employee Retirement Income Security Act ("ERISA"), and a host of other federal statutes applicable to workplace issues. The Report also analyzes class action and collective action rulings involving claims brought against employers in all fifty state court systems, including decisions pertaining to employment laws, wage & hour laws, and breach of employment contract actions. The key class action and collective action settlements over the past year are also analyzed, both in terms of gross settlement dollars in private plaintiff and government-initiated lawsuits as well as injunctive relief provisions in consent decrees. Finally, the Report also discusses important federal and state court rulings in non-workplace cases which are significant in their impact on the defense of workplace class action litigation. In total, there are 508 decisions analyzed in the Report.

The cases decided in 2007 foreshadow the direction of class action litigation in the coming year. One certain conclusion is that employment law class action and collective action litigation is becoming ever more sophisticated and will continue to be a source of significant financial exposure to employers well into the future. Employers also can expect that class action and collective action lawsuits increasingly will combine claims under multiple statutes, thereby requiring the defense bar to have a cross-disciplinary understanding of substantive employment law as well as the procedural peculiarities of opt-out classes under Rule 23 of the Federal Rules of Civil Procedure and the opt-in procedures in FLSA and ADEA collective actions.

This report represents the collective contributions of a significant number of our colleagues at Seyfarth Shaw LLP. We wish to thank and acknowledge those contributions by Richard L. Alfred, Lorie Almon, Raymond C. Baldwin, James L. Banks, Brett C. Bartlett, Edward W. Bergmann, William M. Brown, Rob J. Carty, Jr., Mark A. Casciari, John L. Collins, Ariel Cudkowicz, Catherine M. Dacre, Christopher J. DeGroff, Gilmore F. Diekmann, Jr., Brigitte Duffy, William F. Dugan, Brenda H. Feis, Noah A. Finkel, Michael Gallion, Timothy F. Haley, David D. Kadue, Joel H. Kaplan, Lynn Kappelman, Thomas R. Kaufman, Raymond R. Kepner, Mary Kay Klimesh, Ronald J. Kramer, Richard B. Lapp, Kari Erickson Levine, Sam T. McAdam, Richard P. McArdle, John F. Meyers, Ian H. Morrison, Jim M. Nelson, Camille A. Olson, Andrew Paley, Kate Perrelli, Thomas J. Piskorski, George E. Preonas, David Ross, Jeffrey K. Ross, David J. Rowland, Fred L. Sanderson, Fredrick T. Smith, Diane M. Soubly, Edwin Sullivan, Kenneth D. Sulzer, Joseph S. Turner, Tim M. Watson, Robert Whitman, Thomas Wybenga, and Kenwood C. Youmans.

Our goal is for this Report to guide clients through the sticky thicket of class action and collective action decisional law, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find the Seyfarth Shaw Annual Workplace Class Action Litigation Report to be useful.

Gerald L. Maatman, Jr./General Editor
Co-Chair, Complex Discrimination Litigation
Practice Group of Seyfarth Shaw LLP

A Note On Class Action And Collective Action Terms And Law

References are made to Rule 23 of the Federal Rules of Civil Procedure and 29 U.S.C. § 216(b) throughout this Report. These are the two main statutory sources for class action and collective action decisional law. Both are procedural devices used in federal court for determining the rights and remedies of litigants whose cases involve common questions of law and fact. The following summary provides a brief overview of Rule 23 and § 216(b).

Class Action Terms

The Report uses the term *class action* to mean any civil case in which parties indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit at some point prior to the final resolution of the matter. This definition includes a case in which a class was formally approved by a judge (a *certified* class action), as well as a *putative* class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was a distinct possibility (such as a statement in a complaint that plaintiffs intend to bring the action on behalf of others similarly situated).

Although certified class actions may receive considerable attention if they are reported publicly, defendants also must confront putative cases that contain the potential for class treatment as a result of filing a motion for certification or because of allegations in the original complaint that assert that the named plaintiffs seek to represent others similarly situated. Even if such cases are never actually certified, the possibility of the litigation expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive (and costlier) defense or resulting in a settlement on an individual basis at a premium.

Rule 23

Rule 23 governs class actions in federal courts, and typically involves lawsuits that affect potential class members in different states or that have a nexus with federal law. Rule 23 requires a party seeking class certification to satisfy the four requirements of section (a) of the rule and at least one of three conditions of section (b) of the rule. Under U.S. Supreme Court precedent, a district court must undertake a "rigorous analysis of Rule 23 prerequisites" before certifying a class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). More often than not, plaintiffs will support their motion for class certification with deposition testimony, declarations of putative class members, and expert opinions in the form of affidavits of expert witnesses. Courts often observe that the appropriate analysis in reviewing this evidence is not equivalent to an examination of the merits or a battle between the parties'

experts. Rather, the salient issue is whether plaintiffs' legal theories and factual materials satisfy the Rule 23 requirements.

The Rule 23(a) requirements include:

- Numerosity – The individuals who would comprise the class must be so numerous that joinder of them all into the lawsuit would be impracticable.
- Commonality – There must be questions of law and fact common to the proposed class.
- Typicality – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.
- Adequacy of Representation – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.

Once a plaintiff establishes the four requirements of Rule 23(a), he or she must satisfy one of the three requirements of Rule 23(b). In practice, a plaintiff typically establishes the propriety of class certification under either Rule 23(b)(2) or Rule 23(b)(3) in an employment-related case.

Because application of each rule depends on the nature of the injuries alleged and the relief sought, and imposes different certification standards on the class, the differences between Rule 23(b)(2) and Rule 23(b)(3) are critical in employment-related class action litigation. In the words of the rule, a class may be certified under Rule 23(b)(2) if the party opposing the class "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In other words, plaintiffs seeking to certify class actions under Rule 23(b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory in nature. Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Rule 23(b)(2) provides for a binding litigation order as to all class members without guarantees of personal notice and the opportunity to opt-out of the suit.

Rule 23(b)(3) is designed for circumstances in which class action treatment is not as clearly called for as in Rule 23(b)(1) and Rule 23(b)(2) situations, when a class action may nevertheless be convenient and desirable. A class may be certified under Rule 23(b)(3) if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pertinent considerations include the interest of the members of the class in individually controlling the prosecution of separate actions; the extent and nature of any litigation concerning the

controversy already commenced by members of the class; the desirability of concentrating the litigation of the claims in the particular forum; and the difficulties likely to be encountered in the management of a class action.

To qualify for certification under Rule 23(b)(3), therefore, a class must meet not only the requirements of Rule 23(a), but also two additional requirements: "(1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Products, Inc. v. Windso*r, 521 U.S. 591, 615 (1997). While the common question requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) overlap, the predominance requirement is more stringent than the common question requirement. Thus, even though a case may present common questions of law or fact, those questions may not predominate, and class certification would be inappropriate.

Rule 23(b)(3) applies to cases where the primary relief sought is money damages. The Supreme Court has determined – in *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999) – that unlike in Rule 23(b)(2) class actions, each class member in Rule 23(b)(3) actions for money damages is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action. Accordingly, Rule 23(c)(2) guarantees those rights for each member of a class certified under Rule 23(b)(3). There are no comparable procedural guarantees for class members under Rule 23(b)(2).

29 U.S.C. § 216(b)

This statute governs multi-plaintiff lawsuits under the ADEA and the FLSA. Generally, such lawsuits are known as collective actions (as opposed to class actions).

Under 29 U.S.C. § 216(b), courts generally recognize that plaintiffs and other "non-party" individuals may not proceed collectively until they establish that that they should be permitted to do so as a class. Under § 216(b), courts have held that "similarly situated" individuals may proceed collectively as a class. The federal circuits have not agreed on the standard according to which such a class should be certified. Two competing standards for certification are recognized.

The first approach adopts the view that the "similarly situated" inquiry is co-extensive with the procedure used in class actions brought pursuant to Rule 23. Using this methodology, the court analyzes the putative class for factors including numerosity, commonality, typicality, and adequacy of representation. This typically occurs after some discovery has taken place. This approach is unusual and is not favored.

The second approach is a two-tiered approach involving conditioned certification and a potential decertification process. It is more commonly used and is the prevailing test in federal courts. It is a "plaintiff-friendly" standard.

In the context of the first stage of conditional certification, plaintiffs typically move for conditional certification and permission to send notices to prospective class members. This generally occurs at an early stage of the case. Courts have held that a plaintiff's burden at this stage is light. A ruling at this stage of the litigation often is based upon the complaint's allegations and any affidavits submitted in favor of or in objection to conditional certification.

Courts have not clearly defined the qualitative or quantitative standards of evidence that should be applied at this stage. Courts are often reluctant to grant or deny certification on the merits of a plaintiff's case. This frustrates defendants with clearly meritorious arguments in defense of the litigation, such as those based on compelling proof that would establish the exempt status of a plaintiff and other employees alleged to be similarly situated.

Instead, courts appear to find the most convincing proof that certification is improper based on evidence that putative class members perform different jobs in different locations or facilities, under different supervisors, and potentially pursuant to differing policies and practices. Courts also have held that certification is inappropriate when individualized inquiries into applicable defenses are required, such as when the employer asserts that the relevant employees are exempt.

Where conditional certification is granted, a defendant has the opportunity to request that the class be decertified after discovery is wholly or partially completed in the subsequent, second stage of certification. Courts engage in a much more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the second certification stage. The scrutiny is based upon a more developed, if not entirely complete, record of evidence. Upon an employer's motion for decertification, a court assesses the issue of similarity more critically and may revisit questions concerning the locations where employees work, the employees' supervisors, their employment histories, the policies and practices according to which they perform work and are paid, and the distinct defenses that may require individualized analyses.

Opt-In/Opt-Out Procedures

Certification procedures are different under Rule 23 and 29 U.S.C. § 216(b). Under Rule 23(b)(2), a court's order may bind the class; under Rule 23(b)(3), however, a class member must opt-out of the class action (after receiving a class action notice). If he or she does not do so, they are bound by the judgment. Conversely, under § 216(b), a class member must opt-in

to the lawsuit before he or she will be bound. While at or near 100% of class members are effectively bound by a Rule 23 order, opt-in rates in most § 216(b) collective actions typically run from 10% to 30%.

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I. Overview Of The Year In Workplace Class Action Litigation

The plaintiffs' employment bar filed and prosecuted significant class action and collective action lawsuits against employers in 2007. As this Report reflects, federal and state courts addressed a myriad of new theories and defenses in ruling on class action and collective action litigation issues.

Developments over the past year reveal three key trends.

First, the volume of wage & hour litigation continues to increase exponentially. Collective actions pursued in federal court under the Fair Labor Standards Act ("FLSA") produced more rulings in 2007 than did class actions for employment discrimination or under ERISA. The U.S. District Courts for the Southern and Middle Districts of Florida experienced more wage & hour filings than any other federal jurisdiction. The most significant growth in wage & hour litigation, however, centered at the state court level, and especially in California, Florida, Illinois, New Jersey, New York, Pennsylvania, and Texas. This trend is likely to continue in 2008. Significant FLSA decisions of 2007 are analyzed in Chapter V and the leading state wage & hour rulings over the past year are examined in Chapter VII.

Second, the Class Action Fairness Act of 2005 ("CAFA") continued to have significant effects on workplace litigation, primarily wage & hour class actions filed in state court. The past twelve months saw evolving case law developments on jurisdictional issues under CAFA. As the plaintiffs' bar continues to devise techniques to adapt to CAFA, rulings on the scope, meaning, and application of the law are already numerous for a statute of such recent vintage. The key rulings of 2007 interpreting CAFA are analyzed in Chapter VIII of this Report.

Third, the financial stakes in workplace class action litigation increased yet again in 2007. Plaintiffs' lawyers have continued to push the envelope in crafting damages theories to expand the size of classes and the scope of recoveries. These strategies resulted in a series of massive settlements in nationwide class actions. This trend is also unlikely to abate in 2008. The leading class action and collective action settlements for 2007 are discussed in Chapter II.

A. Trends In Workplace Class Action Litigation In 2007

While shareholder and securities class action filings experienced a slight uptick in 2007, employment-related class action filings increased significantly. Anecdotally, surveys of corporate counsel confirmed that workplace litigation – and especially class action and multi-plaintiff lawsuits – continues as the chief exposure driving corporate legal budget expenditures.

In terms of key decisions, there was no class action ruling in 2007 quite like *Dukes, et al. v. Wal-Mart Stores, Inc.,* a Title VII gender discrimination case challenging pay and promotions

involving 1.5 million class members. The U.S. Court of Appeals for the Ninth Circuit agreed to hear a discretionary appeal from the class certification decision and heard oral argument on the *Dukes* appeal on August 8, 2005. Many expected a ruling in 2006, but none came until nearly 18 months later on February 6, 2007, when a three-judge panel affirmed the certification order by a 2-to-1 vote. Wal-Mart subsequently filed a petition for rehearing *en banc* by the entire Ninth Circuit. On December 11, 2007, the panel mooted that petition by vacating its earlier ruling and issuing a new ruling that refined its Rule 23 analysis, while reaching the same result. A future ruling by the Ninth Circuit in *Dukes* on a subsequent rehearing *en banc* – and further appellate proceedings thereafter, including a possible appeal to the U.S. Supreme Court – likely will be one of the top class action developments in 2008 and beyond.

The certification order in *Dukes, et al. v. Wal-Mart Stores, Inc.* influenced many class action developments in 2007. The plaintiffs' bar increasingly used the theories endorsed in *Dukes* to seek certification of "punitive damages" only classes under Rule 23(b)(2), as well as pressing for certification of mega-classes involving pay and promotion claims of employees in multiple company facilities on a nationwide basis. Outside of the Ninth Circuit, employers fought these theories with good success, as 2007 witnessed many pro-employer victories in class certification battles.

FLSA collective action litigation increased again in 2007 and far outpaced employment discrimination class action filings. The increase in filings suggests that workers and their attorneys are bypassing the violations-reporting system at the U.S. Department of Labor and bringing private lawsuits in the pursuit of more lucrative resolutions. While plaintiffs continued to achieve initial certification of wage & hour collective actions, employers also secured several significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions. Of particular significance was a series of FLSA collective actions in the financial services industry. Plaintiffs' attorneys initiated lawsuits against many industry leaders on behalf of brokers and financial advisors. They alleged that while brokers and financial advisors were paid commissions and fees over the course of the year, they also received draws or monthly advances against commissions; further, because the draws do not qualify as a guaranteed salary and the employees act as salespeople, plaintiffs argued that they are not covered under the FLSA administrative exemption for overtime because the brokers and financial advisors were not paid on a salary basis. The pursuit of nationwide FLSA collective actions by the plaintiffs' bar is expected to continue in 2008.

Given the enormous financial stakes, trials of class actions continue to be rare. Accordingly, the key event and driver of risk and exposure in class actions is the court's decision on whether to certify a class. Nonetheless, several ERISA class actions, wage & hour collective actions, and

EEOC pattern or practice actions did proceed to trial or judgment in 2007. These trial verdicts and judgments included:

- The $62.25 million award of liquidation damages for wage & hour violations in *Braun, et al. v. Wal-Mart Stores, Inc.*, Case No. 3127 (Court of Common Pleas – Philadelphia, Penn. Oct. 3, 2007);

- The $6.7 million award in severance pay to workers at Phillips Petroleum upheld by the Tenth Circuit in *Flinders, et al. v. Workforce Stabilization Plan of Phillips Petroleum Co.*, Case No. 06-4133 (10th Cir. July 3, 2007);

- The $5.55 million award of back pay and liquidated damages to workers for wage & hour claims in *Chao v. Southern California Maid Services & Carpet Cleaning, Inc.*, Case No. 06-CV-3903 (C.D. Cal. Aug. 20, 2007); and,

- The $2.5 million award of back pay and penalties to workers for wage & hour claims in *Wang, et al. v. Chinese Daily News, Inc.*, Case No. 04-CV-1498 (C.D. Cal. Jan. 10, 2007).

If trials of class actions were rare, settlements of class actions in 2007 reflected a continuing trend from past years, in which significant monetary payments were made in mega-class actions. Settlements in FLSA collective actions and ERISA class actions outpaced employment discrimination class action settlements in terms of overall settlement values.

B. Impact Of Legislative Activity At The Federal Level

The Class Action Fairness Act of 2005 continues to play a large role in many class actions filed against employers. CAFA responded to the abuses of state court judges in certifying class action lawsuits involving plaintiffs who filed their claims in states with a reputation for a lack of fairness toward out-of-state defendants. CAFA modifies the rules for federal court jurisdiction over class actions based on the diversity of citizenship test. Before CAFA, *all* named plaintiffs in a class action had to be citizens of states differing from those of *all* defendants, a situation that typically would not be met in class actions seeking nationwide classes. In addition, there was a minimum monetary threshold of $75,000 to be met by every plaintiff in the case.

With CAFA, the rules for diversity jurisdiction have eased, though for class actions only, so that diversity of the parties can be achieved if *any* class member or *any* defendant is a citizen of a different state from any other defendant and if the aggregated, not individual, amount in controversy for all class members exceeds $5 million, and the class involves more than 100

people. As a result, CAFA relaxes the historic strict standard for diversity jurisdiction to allow defendants to remove what were formerly "non-diverse" state law-based class actions.

CAFA's impact over the past year has been significant. More class actions are being filed in federal courts, and more intrastate class actions are being heard in federal courts through the removal mechanisms under CAFA. Because the law's provisions are designed to prevent plaintiffs' counsel from keeping class actions in state court that are more appropriately litigated in federal court, CAFA forecloses the pleading tactic of requesting damages of less than $75,000 per class member (the jurisdictional limit for a federal court to hear a claim involving plaintiffs and defendants of different states) to stymie a defendant from removing the lawsuit to federal court. Over the last year, employers repeatedly invoked the statute to remove class actions filed in state court to federal court. In turn, federal courts addressed several novel issues arising under CAFA.

CAFA also established a class action "bill of rights" for litigants, which includes various protections for class members such as judicial review and approval of "injunctive relief only" settlements, protection against losses to the class because of payments to class counsel, more standardized settlement notification information, and specific requirements regarding the notification of federal and state officials of proposed class action settlements. In the context of workplace class actions, this feature of CAFA has resulted in few court rulings to date.

The statute has had profound effects, however, on considerations underlying case strategy and the structuring of class actions. In this context, CAFA's impact on workplace class actions is both varied and evolving. Class actions and collective actions under Title VII, the ADEA, the FLSA, and ERISA typically are brought in federal court. CAFA may have limited impact on strategic decisions in those cases relative to choice of venue in a federal court or state court. Class actions in state law-based wage & hour litigation are another matter. The plaintiffs' bar and defense bar alike continue to confront novel CAFA issues in these types of cases, for the fight over venue is often a key driver of exposure and risk. On the one hand, employers sued in state law wage & hour class actions are increasingly confronted by plaintiffs' lawyers seeking to avoid removal to federal court by various stratagems, including prayers for relief of less than $5 million, the filing of multiple "baby" class claims on behalf of fewer than 100 plaintiffs, and limiting the scope of the class to residents of one state. On the other hand, defense counsel seeking (often successfully) to dismiss state law claims pursued by plaintiffs with FLSA claims in "hybrid" wage & hour class actions in federal court also argue that judges should not exercise supplemental jurisdiction over the state law claims; in turn, federal courts are increasingly confronted with questions of whether original jurisdiction exists under CAFA over such hybrid state law claims, and employers also may face a two front litigation war – one in federal court and the other in state court – depending on resolution of those CAFA issues.