

# Annual Workplace Class Action Litigation Report

2011 Edition

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Dear Clients:

The last several years have seen an exponential increase in class action and collective action litigation involving workplace issues. The present economic climate is likely to fuel even more lawsuits. The stakes in this type of 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 corporations 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 2011 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 2010, 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

## Author's Note

Our Annual Report analyzes the leading class action and collective action decisions of 2010 involving claims against employers brought in federal courts under Title VII of the Civil Rights Act 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 849 decisions analyzed in the Report.

The cases decided in 2010 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, Brett C. Bartlett, Edward W. Bergmann, Jeffrey Berman, Rebecca Bjork, Daniel Blouin, Benjamin D. Briggs, Rebecca Bromet, William M. Brown, Michael J. Burns, Rob J. Carty, Jr., Mark A. Casciari, Edward Cerasia, John L. Collins, Brian Cousin, Ariel Cudkowicz, Patsy Cullison, Catherine M. Dacre, Joseph R. Damato, Christopher J. DeGroff, Gilmore F. Diekmann, Jr., Alex Drummond, Brigitte Duffy, William F. Dugan, Noah A. Finkel, Timothy F. Haley, David D. Kadue, Lynn Kappelman, Raymond R. Kepner, Mary Kay Klimesh, Ronald J. Kramer, Richard B. Lapp, Kari Erickson Levine, Laura Maehtlen, Richard P. McArdle, Kristen McGurn, Jon Meer, John F. Meyers, Ian H. Morrison, Camille A. Olson, Andrew Paley, Steven Pearlman, Kate Perrelli, Thomas J. Piskorski, George E. Preonas, David Ross, Jeffrey K. Ross, David J. Rowland, Alfred L. Sanderson, Fredrick T. Smith, Kenneth D. Sulzer, Diana Tabacopoulous, Joseph S. Turner, Peter A. Walker, Tim M. Watson, Robert S. Whitman, Thomas Wybenga, and Kenwood C. Youmans.

Our goal is for this Report to guide clients through the 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

January 2011

# Guide To Citation Formats

The Report uses the Bluebook citation format. As corporate counsel utilize the Report for research, we have attempted to cite the West bound volumes wherever possible (e.g., *Dukes, et al. v. Wal-Mart Stores, Inc.*, 609 F.3d 222 (9th Cir. 2010)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (e.g., *Bamgbose, et al. v. Delta-T Group, Inc.*, 2010 U.S. Dist. LEXIS 10681 (E.D. Pa. Feb. 8, 2010)), and if a LEXIS cite is not available, then to a WESTLAW cite from its electronic database (e.g., *In Re Washington Mutual, Inc. Securities, Derivative And ERISA Litigation*, 2010 WL 4272567 (W.D. Wash. Oct. 12, 2010)). If a ruling is not contained in an electronic database, the full docketing information is provided (e.g., *Cavallaro v. UMass Memorial Health Care, Inc.*, Case No. 09-CV-40181 (D. Mass. Dec. 20, 2010)).

## Search Functionality

This Report is fully searchable. Case names, Rule 23 terms, and class action topics can be searched by selecting Edit and then Find (or Ctrl+F), and then by typing in the word or phrase to be searched, and then select either Next or hit Enter.

# A Note On Class Action And Collective Action Terms And Laws

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 the plaintiffs intended 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 class actions 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 (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 one 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. Windsor*, 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 always 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 a Rule 23(b)(3) class action 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 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 coextensive 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 a first stage conditioned certification process and a second stage potential decertification process. It is more commonly used and is the prevailing test in federal courts. In practice, it tends to be 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, and often before discovery even commences. Courts have held that a plaintiff’s burden at this stage is minimal. A ruling at this stage of the litigation often is based upon allegations in the complaint 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 the plaintiffs 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 decertification. Courts engage in a more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the decertification 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 binds 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 range 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 2010. 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.

## A. Introduction And 2010 Trends

Developments over the past year manifest multiple trends that impact employers. Eight developments are particularly significant to Corporate America.

First, 2010 was the year of big headlines in employment discrimination class actions. Those headlines involved the biggest employment class action trial verdict ever – the \$250 million verdict in *Velez, et al. v. Novartis Pharmaceuticals Corp.* in May of 2010 – and its subsequent settlement two months later for \$175 million. This fueled a four-fold increase in the monetary value of the top ten employment discrimination class action settlements. As success by the plaintiffs' bar often prompts copy-cat litigation filings, these headlines are likely to encourage more class actions in the future as well as enhanced settlement demands by the plaintiffs' bar to resolve their cases.

Second, 2010 also spawned landmark Rule 23 decisions. None was bigger than the ruling by the Ninth Circuit in *Dukes, et al. v. Wal-Mart Stores, Inc.* on April 26, 2010, and the subsequent grant of *certiorari* in the case by the U.S. Supreme Court on December 6, 2010. In a 6 to 5 *en banc* opinion, the Ninth Circuit upheld in part certification of the largest employment discrimination class action ever – a pay and promotions class of approximately 1.5 million female workers. The Supreme Court's grant of *certiorari* put the Ninth Circuit's decision in flux and other decisions on hold, while the class action bar awaits the next chapter in the litigation. The Supreme Court's expected ruling in *Dukes* in 2011 is apt to be a bellwether decision. The key Rule 23 employment discrimination rulings of 2010 are analyzed in Chapter III of this Report.

Third, the continued economic challenges and low hiring rates during 2010 fueled more class action and collective action litigation. Most significantly, the plaintiffs' bar increased the pace of collective action filings under the Fair Labor Standards Act ("FLSA") seeking recovery for unpaid work time and overtime wages. These conditions spawned more employment-related case filings, both by laid-off workers and government enforcement attorneys. In turn, this resulted in higher settlement numbers (especially in government-initiated lawsuits and wage & hour litigation). Even more class action litigation is expected in 2011, as businesses continue to re-tool their operations.

Fourth, by sheer numbers, wage & hour litigation continued to out-pace all other types of workplace class actions. In turn, this trend also was manifest in more wage & hour class action and collective action decisions by federal and state court judges than any other area of workplace litigation. It also reflected the fact that in terms of case filings, collective actions pursued in federal court under the FLSA outnumbered all other types of private class actions in employment-related cases. As a result, FLSA collective actions produced more rulings in 2010 than class actions for employment discrimination or under ERISA. Significant growth in wage & hour litigation also was centered at the state court level, and especially in California, Florida, Illinois, New Jersey, New York, Massachusetts, Minnesota, Pennsylvania, and Washington (the key FLSA decisions of 2010 are analyzed in Chapter V and the leading state wage & hour rulings over the past year are examined in Chapter VII). This trend is likely to continue in 2011.

Fifth, the mid-term election results in 2010 – with Democratic losses and Republican gains in the U.S. Congress – also contributed to heightened workplace litigation exposures for employers. As Democratic legislative initiatives for labor and employment reform stalled, the Obama Administration continued to ramp

up its enforcement efforts through the U.S. Equal Employment Opportunity Commission (“EEOC”) and the U.S. Department of Labor (“DOL”). The Obama Administration’s emphasis on regulation and administrative enforcement also spawned more government-initiated litigation over workplace issues. Those efforts are expected to intensify as the Obama Administration’s policy goals, which may be thwarted in the U.S. Congress, are advanced through agency regulation and government enforcement litigation. Many state labor departments are following this lead. Increased funding for the DOL and the EEOC also resulted in the recruitment and training of more DOL and EEOC attorneys and investigators; it is expected that employers will encounter more investigations – and more governmental enforcement lawsuits – in 2011 as the augmented staffs of the DOL and EEOC carry out their law enforcement functions. Even more aggressive government enforcement litigation is likely in the coming year.

Sixth, the Class Action Fairness Act of 2005 (“CAFA”) continued to have significant effects on workplace litigation, and most significantly on wage & hour class actions filed in state court. The past twelve months saw evolving case law on jurisdictional issues under the CAFA (the key rulings of 2010 interpreting the CAFA are analyzed in Chapter VIII of this Report). As the plaintiffs’ bar continues to devise techniques to adapt to the CAFA, rulings on the scope, meaning, and application of the law are already numerous for a statute of such recent vintage. In this respect, CAFA-related law continued to mature quickly in the Ninth Circuit, as the high volume of California-based wage & hour class action filings resulted in a deluge of CAFA removals in California federal courts in 2010.

Seventh, the class action plaintiffs’ bar has been able to cultivate new strategies in response to fast paced developments in Rule 23 and § 216(b) case law. This fosters quick evolution in legal theories, which in turn impacts defense litigation strategies. As a result, cutting-edge developments evolve and quickly spread throughout the substantive areas encompassed by workplace class action law (the key developments in this area are discussed in Chapter IX of this Report).

Eighth and finally, the financial stakes in workplace class action litigation increased in 2010. 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 (the leading class action and collective action settlements for 2010 are discussed in Chapter II), particularly in the context of employment discrimination and wage & hour litigation. This trend is also unlikely to abate in 2011.

## ***B. Key Developments In Workplace Class Action Litigation In 2010***

While shareholder and securities class action filings experienced only a slight uptick in 2010, employment-related class action filings increased dramatically. Anecdotally, surveys of corporate counsel confirm that workplace litigation – and especially class actions, multi-plaintiff lawsuits, and government enforcement litigation – continues to drive corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies.

In terms of key decisions, there was no class action ruling in 2010 quite like *Dukes, et al. v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), a Title VII gender discrimination case challenging pay and promotions involving 1.5 million class members. On April 26, 2010, an *en banc* panel of the Ninth Circuit affirmed the certification order in *Dukes* by a 6 to 5 vote. A detailed analysis of the Ninth Circuit ruling in *Dukes* is contained in Appendix I at page 617 of the Report. Wal-Mart subsequently filed a petition for

*certiorari* with the U.S. Supreme Court, which was granted on December 6, 2010.<sup>1</sup> A future ruling by the Supreme Court in *Dukes* is likely to be one of the top class action developments in 2011 and beyond.

Employment discrimination, ERISA, and FLSA litigation filings increased over the past year. FLSA and employment discrimination cases spiked sharply, and outpaced ERISA filings. Based on statistics from PACER filings with the Administrative Office of the U.S. Courts, employment discrimination lawsuits increased to 14,559 in 2010 from 13,720 in 2009; ERISA lawsuits increased to 9,038 in 2010 from 8,944 in 2009; and FLSA lawsuits increased to 6,761 in 2010 from 6,120 in 2009.<sup>2</sup> Since the majority of FLSA filings were on behalf of groups of employees, wage & hour class actions and collective actions out-paced filings of class actions for employment discrimination and ERISA violations. In turn, 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. Given the trickle-down phenomenon of class action settlements (and the increased awareness of wage & hour issues by workers), it is expected that the pursuit of nationwide FLSA collective actions by the plaintiffs' bar will continue in 2011.

A new case law trend in 2010 focused on workplace arbitration agreements and their enforceability and impact in the class action context. While no one suggests that the sun is setting on workplace class actions, the Supreme Court's ruling in *Stolt-Nielsen S.A., et al. v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010), arms employers with additional ammunition to confront class action litigation through drafting of comprehensive workplace arbitration programs. *Stolt-Nielsen* quickly spawned several rulings in employment discrimination and wage & hour class actions, thereby demonstrating the importance of this development for employers utilizing arbitration agreements. This development is likely to accelerate, as the Supreme Court considers state law limits on class action waivers in *Concepcion, et al. v. AT&T Mobility*, a case scheduled for decision in the Spring of 2011.

On the wage & hour front, a confluence of factors contributed to an ever-increasing number of claims. In one respect, 2010 might be termed the "Year of the Misclassified Worker" class action lawsuit based on end-of-the-year figures that show a sharp increase in crackdowns this year by state and federal authorities, and filings by class action lawyers in pursuing private lawsuits against companies that allegedly misclassify employees. Employers utilizing independent contractors were the focus of intense litigation scrutiny on these fronts. Approximately 20 states and scores of municipalities passed laws in the past two years that make it easier to force employers to reclassify independent contractors as employees and seek unpaid taxes, or authorizing claims for "wage theft." Likewise, the DOL's enforcement litigation resulted in employers paying \$6.5 million in back wages to 5,261 employees in fiscal 2010, up sharply from \$2.6 million obtained for 2,190 employees in 2009. The DOL and Internal Revenue Service ("IRS") also increased their budgets and staffs to identify and audit employers and their classifications of workers, as well as implementing its new "Plan/Prevent/Protect" enforcement strategy.

Due to the enormous financial stakes, trials of class actions continue to be rare, and verdicts in these trials rarer still. However, 2010 witnessed the largest employment discrimination class action trial verdict ever – the \$250 million verdict in *Velez, et al. v. Novartis Pharmaceuticals Corp.*, Case No. 04-CV-9194 (S.D.N.Y.) following a seven-week trial in the Spring of 2010. After the verdict, the parties promptly settled the class

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<sup>1</sup> *Dukes, et al. v. Wal-Mart Stores, Inc.*, 2010 U.S. LEXIS 9588 (U.S. Dec. 6, 2010) (No. 10-277).

<sup>2</sup> Administrative Office of the U.S. Courts, PACER Case Locator, <https://pcl.uscourts.gov/search> (last visited Jan. 3, 2011).



action for \$175 million on July 14, 2010. The settlement is one of the largest employment discrimination class action settlements ever.

If trials of class actions were rare, settlements of class actions in 2010 reflected a continuing trend from past years, in which significant monetary payments were made in mega-class actions with nationwide classes. Settlements in FLSA collective actions and ERISA class actions once again outpaced employment discrimination class action settlements in terms of overall settlement values. In turn, settlement amounts in wage & hour class actions and government enforcement lawsuits experienced significant increases over 2009 figures. In closing the year, plaintiffs secured a \$57 million verdict in a wage & hour class action in *Rekhter, et al. v. Washington Department of Social And Health Services*, Case No. 07-2-895-5 (Thuston County, WA), on December 20, 2010.

Finally, case law developments under the CAFA accelerated in 2010. The statute has had profound effects on litigation strategy and the structuring of underlying class actions. In this context, the 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. The 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 wage & hour cases, as 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 action 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 argue that judges should not exercise supplemental jurisdiction over the state law claims. Federal courts, in turn, are increasingly confronted with questions of whether original jurisdiction exists under the 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. These litigation issues continue to shape class action practice and defense strategy, and are likely to do so for the foreseeable future.

### ***C. Implications Of These Developments For 2011***

A certitude of the modern American workplace is that class action and collective action litigation has become very attractive to the plaintiffs' bar. Passage of the CAFA had little impact on the pace and volume of overall workplace class action filings in 2010. Instead, the impact of the CAFA has been limited primarily to determine venue, which often has a dramatic impact on the outcome of workplace class actions.

The U.S. Supreme Court's acceptance of three cases for review in 2010 – *Dukes, et al. v. Wal-Mart Stores, Inc.*, *Concepcion, et al. v. AT&T Mobility*, and *In Re Baycol* – may signal a coming transformation of Rule 23 law in 2011. Depending on how the Supreme Court rules in these cases next year, the world of class action litigation could change dramatically. *Dukes* presents the Supreme Court with the opportunity to elucidate how much, for purposes of Rule 23(a), class members must have in common for a class action to be certified and the extent to which under Rule 23(b)(2) claims for money damages impact certification. *In Re Baycol* presents the Supreme Court with the question of whether certification determinations are preclusive, while *Concepcion* concerns whether arbitration agreements barring class actions cannot be struck down based on state law contract doctrine. Depending on how the Supreme Court approaches these class action issues, 2011 may well be a transformative year in Rule 23 law; one possible outcome for employers is a new litigation playing field where the commonality requirement is eased or becomes more strict (as to the degree class members will have to show that their common questions of law and fact also have common answers). Plaintiffs may face a Rule 23 world in which, if they fail to certify their class they

may be precluded from trying again, perhaps even if they were not class representatives, and in which consumers – and by extension, employees – will be almost universally barred from bringing class actions in arbitration (assuming corporations would choose not to have an explicit arbitration provision barring class-wide treatment).

Meanwhile, on the governmental enforcement front, the EEOC intensified its litigation filings in 2010. The Commission continues to follow through on the strategic enforcement and litigation plan it announced in April of 2006; that plan centers on the government bringing more systemic discrimination cases affecting large numbers of workers. The EEOC's prosecution of pattern or practice lawsuits is now an agency-wide priority. As a result, the EEOC is focusing its investigations and resources on systemic discrimination issues. Many of the high-level investigations started in 2006 mushroomed into the institution of EEOC pattern or practice lawsuits in 2009 and 2010. Under the Obama Administration, increases in funding have expanded the number of investigators and attorneys, and it is expected that the EEOC will partner with the U.S. Department of Justice in pursuing more employment discrimination systemic litigation against both public and private employers in 2011. The Commission's 2010 Annual Report announced that it expects a dramatic shift in the composition of its litigation docket from smaller individual cases to pattern or practice lawsuits on behalf of larger groups of workers.<sup>3</sup> Thus, employers are likely to face even more such claims in 2011.

ERISA class action litigation is also expected to accelerate in 2011. The relatively negative economic conditions over the past 24 months, as well as the sub-prime mortgage meltdown, surely will continue to affect the course of ERISA class action litigation in 2011. As in other areas, increased government action also will impact plan sponsors and fiduciaries. The DOL has stepped up its regulatory and enforcement efforts and continues to push for a broad definition of who is a fiduciary under its regulations and to oppose employers' efforts at early dismissal of ERISA class actions. As employers modify their employee benefits packages in light of the economy, they will likely face litigation challenges from disappointed employees. Finally, plaintiffs and employers await the Supreme Court's decision in *Cigna v. Amara*, regarding the extent to which participant communications can modify plan terms and whether participants seeking to recover benefits based upon erroneous or incomplete disclosures must prove that they suffered actual prejudice; the Supreme Court's future decision could vastly expand or greatly circumscribe litigation opportunities for the plaintiffs' bar. The precipitous market drops that occurred in 2008 and 2009 also are likely to provide the grist for a multitude of new ERISA class actions.

Finally, on the wage & hour front, the ever increasing number of FLSA collective actions and state law wage & hour class actions is expected to increase again in 2011. The plaintiffs' bar continues to pursue push-the-envelope theories, and target new industries and new types of claims in litigating their claims. Another contributing factor is the Supreme Court's decision this year in *Shady Grove Orthopedic Associates, et al. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), as it frees plaintiffs' class action lawyers to pursue enhanced damages claims under New York law – which has a 6-year statute of limitations period, one of the longest in the U.S. – notwithstanding previous state law restrictions on pursuing such class actions.

The lesson to draw from 2010 is that the private plaintiffs' bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2011 in bringing class actions, collective action litigation, and government enforcement lawsuits against employers. As class actions are a pervasive aspect of litigation in Corporate America, defending and defeating this type of litigation is a top priority for corporate counsel.

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<sup>3</sup> See EEOC Fiscal Year Performance & Accountability Report (November 15, 2010), at page 5.



Identifying, addressing, and remediating class action vulnerabilities, therefore, deserves a place at the top of corporate counsel's priorities list for 2011.

