SEYFARTH SHAW LLP
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Annual Workplace Class Action Litigation Report

2007 Edition

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Dear Clients:

The last few years have seen an explosion in class action and collective action litigation over workplace issues. The stakes in such litigation can be extremely significant, as the financial and operational impact of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and prejudice its reputation in the marketplace. It is truly an 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 2007 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 2006, 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 2006 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 407 decisions analyzed in the Report.

The cases decided in 2006 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, Brett C. Bartlett, Edward Bergmann, William M. Brown, Mark A. Casciari, John L. Collins, Ariel Cudkowicz, Catherine Dacre, Gilmore F. Diekmann, Jr., Brenda H. Feis, Noah Finkel, Michael Gallion, David D. Kadue, Lynn Kappelman, Thomas R. Kaufman, Ray Kepner, Mary Kay Klimesh, Carolyn Knox, Ronald J. Kramer, Sam McAdam, Richard P. McArdle, John Meyers, Ian H. Morrison, John Murray, Camille A. Olson, Andrew Paley, Kate Perrelli, Thomas J. Piskorski, George Preonas, David Ross, Jeffrey Ross, David Rowland, Diane M. Soubly, Edwin Sullivan, Kenneth D. Sulzer, Joseph S. Turner, and Kenwood 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
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A Note On Class Action And Collective Action Terms And Law

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

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 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. Unlike in Rule 23(b)(2) class actions, each class member in 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. *See Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999). 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 multiple plaintiff lawsuits under the ADEA and the FLSA. Generally, such lawsuits are known as collective actions (as opposed to class actions).

Under § 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 29 U.S.C. § 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 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 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 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 much more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the second, 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 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 significant class action and collective action lawsuits against employers in 2006. As this Report reflects, federal and state courts faced a myriad of new theories and defenses in ruling on class action and collective action litigation issues.

Three key issues are manifested by developments over the past year. First, the U.S. Congress enacted significant reforms to federal class action procedures in February of 2005 with passage of the Class Action Fairness Act of 2005 ("CAFA"). The CAFA impacts all class actions, although that impact is different for particular types of workplace litigation. The past twelve months saw significant case law developments on novel issues under the CAFA. The plaintiffs' bar continues to devise techniques to address this reform measure, and rulings on the scope, meaning, and application of the law are already numerous for a statute of such recent vintage. The key rulings of 2006 interpreting the CAFA are analyzed in Chapter VIII of this Report.

Second, the volume of wage & hour litigation continues to increase exponentially. FLSA collective actions pursued in federal court were reflected by more rulings on that subject in 2006 than for employment discrimination class actions. The most significant growth in wage & hour litigation, however, is at the state court level and especially in California, Florida, Illinois, New Jersey, New York, and Texas. This trend is likely to continue in 2007. The significant FLSA decisions of 2006 are analyzed in Chapter V and the leading state wage & hour rulings over the past year are examined in Chapter VII.

Third, the financial stakes in workplace class action litigation increased yet again in 2006. Plaintiffs' lawyers continued to push the envelope this past year in crafting damages theories to expand the size of classes and the scope of their recoveries. This trend is also unlikely to abate in 2007. The leading class action and collective action settlements for 2006 are discussed in Chapter II.

A. Legislative Activity At The Federal Level

Congressional enactment of the Class Action Fairness Act of 2005 was a significant development for employers facing class action litigation. President Bush signed the CAFA into law on February 18, 2005. The CAFA was intended to address the abuses of state court judges certifying class action lawsuits involving plaintiffs from numerous states in jurisdictions with a reputation for a lack of fairness toward out-of-state defendants. As a result, the CAFA allows defendants to remove what were formerly "non-diverse" state law-based class actions if one member of the class and one defendant are citizens of different states, the class involves more than 100 people, and the aggregate amount in controversy exceeds $5 million.

The statute'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 the 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, the CAFA forecloses the pleading tactic of requesting damages of less than $75,000 per class member (*i.e.*, 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 and successfully invoked the statute to effectuate the removal of class actions filed in state court to federal court. In turn, federal courts issued a myriad of rulings on novel issues arising under the CAFA.

The CAFA also addresses the issue of abusive "coupon" settlements whereby plaintiffs' attorneys in the past have received awards of millions in fees while members of the putative class received coupons having little to no value. Under the CAFA, plaintiffs' attorneys may not receive a contingency fee based on the potential aggregate value of coupons available to class members; instead, their fees must be calculated based on the value of coupons actually redeemed by class members. To date, this aspect of the CAFA has seen little case law developing in the employment law context.

The CAFA also established a class action "bill or 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 the CAFA has not resulted in any court rulings to date.

The statute, however, has had profound effects on considerations underlying case strategy and the structuring of 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 and litigated 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 are confronting novel CAFA issues in these types of cases, for the fight over venue is often a key driver of exposure and risk. 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 less than 100 plaintiffs, and limiting the scope of the class to residents of one state.

B. Trends In Workplace Class Action Litigation In 2006

While shareholder and securities class action filings decreased dramatically in 2006, employment-related class action filings increased significantly. Anecdotally, surveys of corporate counsel confirmed that workplace litigation – and especially class action and multiple-plaintiff lawsuits – is the chief exposure driving corporate legal budget expenditures.

In terms of decisions, there were no class action rulings in 2006 quite like the certification order in *Dukes, et al. v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), which certified a Title VII gender discrimination claim challenging pay and promotions involving 1.5 million class members. The U.S. Court of Appeals for the Ninth Circuit heard argument on the appeal of the *Dukes* certification order on August 8, 2005. Many expected a ruling in 2006, but none came. The Ninth Circuit's future ruling in *Dukes* – and further appellate proceedings thereafter – likely will be one of the top class action developments in 2007 and beyond.

At the same time, the certification order in *Dukes, et al. v. Wal-Mart Stores, Inc.* impacted many class action developments in 2006. The plaintiffs' bar increasingly used the theories in the *Dukes* case 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 facilities on a nationwide basis. Employers fought these theories with good success, as 2006 witnessed may pro-employer victories in class certification battles.

FLSA collective action litigation increased again in 2006 and far outpaced employment discrimination class action filings. While plaintiffs continued to achieve certification of wage & hour claims, employers also secured several significant victories in defeating conditional certification and obtaining decertification of § 216 (b) collective actions. Of particular significance were 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 are paid commissions and fees earned toward their employer 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. Some companies elected to resolve these lawsuits in 2006 for significant sums, including $98 million in the *Citigroup* case, $89 million in the *UBS* cases, $42.5 million in the *Morgan Stanley* case, and $37 million in the *Merrill Lynch* case. Big impact FLSA collective actions are expected to continue this trend in 2007.

Given the enormous financial stakes, trials of class actions are rare. The key event and driver of risk and exposure in class actions is the court's decision on plaintiffs' motion for class certification. However, several ERISA class actions, wage & hour collective actions, and EEOC pattern or practice actions proceeded to trial in 2006. These verdicts and judgments included:

- A liability judgment of $123.5 million in *Rios, et al. v. Cmacho, et al.*, Case No. SP208-93 (Superior Court of Guam), on October 5, 2006, in a class action involving 4,000 current and former employees suing for cost-of-living allowances and compensation benefits;

- A liability verdict of $78.5 million in a jury trial in *Braun, et al. v. Wal-Mart Stores, Inc.*, Case No. 3217 (Court of Common Pleas of Philadelphia County, Penn.), on October 12, 2006, in a wage & hour class action involving 187,000 current and former employees alleging that Wal-Mart forced hourly employees to work through rest periods and after their shifts ended;

- A liability judgment of $46.2 million in *West, et al. v. AK Steel Corp. Retirement Accumulation Pension Plan*, Case No. 02-CV-1 (S.D. Ohio), on February 24, 2006, in an ERISA class action over miscalculated lump-sum cash balance payments; and,

- A liability verdict of $1.76 million in a jury trial in *EEOC v. John Pickle Co.*, Case No. 02-CV-85 (N.D. Okla.), on August 22, 2006, in an EEOC pattern or practice lawsuit alleging national origin discrimination in a "human trafficking" scheme involving workers lured to Oklahoma from India.

If trials of class actions were rare, settlements of class actions in 2006 reflected a continuing trend from past years where significant monetary payments were made in mega-class actions. Settlements in FLSA collective actions and ERISA class action outpaced employment discrimination class action settlements in terms of overall settlement values. Of particular note were a series of ERISA settlements stemming from the meltdown of Enron.

C. Implications Of These Developments For 2007

It is a fact of the modern American workplace that class action and collective action litigation is very attractive to the plaintiffs' bar. Passage of the CAFA seems to have little to no effect on the pace and volume of overall workplace class action filings in 2006. Instead, the battleground for class actions impacted by the CAFA centers on venue issues.

At the same time, the U.S. Equal Employment Opportunity Commission became increasingly activist on the litigation front in 2006. The Commission announced a new strategic enforcement

and litigation plan in April of 2006; that plan centers on systemic discrimination cases with broad impact and affecting large numbers of workers, such that 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, and institution of EEOC pattern or practice lawsuits increased dramatically in 2006. Employers are likely to face even more such claims in 2007.

ERISA class action litigation is also expected to accelerate in 2007. The end of 2006 saw a dramatic increase in class actions brought against 401(k) plan sponsors for breach of fiduciary duties. Plaintiffs are targeting Fortune 500 companies and their 401(k) sponsor committees as defendants. These class actions will likely expand in 2007 to include investment management companies and fund managers.

The lesson to be drawn from 2006 is that the private plaintiffs' bar and government enforcement attorneys are apt to be equally if not more aggressive in 2007 in their pursuit of class action and collective action litigation against employers. Identifying, addressing, and remediating class action vulnerabilities, therefore, ought to be at or near the top of corporate counsel's priorities list for 2007.