SEYFARTH SHAW LLP
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Annual Workplace Class Action Litigation Report

2012 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. This came to a head in 2011 with several major class action rulings from the U.S. Supreme Court. Likewise, 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 2012 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 2011, 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 2011 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 50 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 976 decisions analyzed in the Report.

The cases decided in 2011 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, Daniel Blouin, Rebecca Bromet, William M. Brown, Michael J. Burns, Robert J. Carty, Jr., Mark A. Casciari, Edward Cerasia, John L. Collins, Ariel Cudkowicz, Catherine M. Dacre, Joseph R. Damato, Christopher J. DeGroff, Pamela Devata, Gilmore F. Diekmann, Jr., Alex Drummond, William F. Dugan, Noah A. Finkel, Timothy F. Haley, David D. Kadue, Lynn Kappelman, Raymond R. Kepner, Daniel B. Klein, Mary Kay Klimesh, Ronald J. Kramer, Richard B. Lapp, Kari Erickson Levine, Richard P. McArdle, John F. Meyers, Ian H. Morrison, Camille A. Olson, Andrew Paley, Steven Pearlman, Katherine E. Perrelli, Thomas J. Piskorski, George E. Preonas, David Ross, Jeffrey K. Ross, David J. Rowland, Alfred L. Sanderson, Jeremy Sherman, Frederick T. Smith, Kenneth D. Sulzer, Diana Tabacopoulos, Joseph S. Turner, Peter A. Walker, Timothy M. Watson, Robert S. Whitman, 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, Class Action Litigation Practice Group of
Seyfarth Shaw LLP

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Guide To Citation Formats

As corporate counsel utilize the Report for research, we have attempted to cite the West bound volumes wherever possible (*e.g.*, *Jock, et al. v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (*e.g.*, *EEOC v. Global Horizons*, 2011 U.S. Dist. LEXIS 127734 (D. Haw. Nov. 2, 2011)), and if a LEXIS cite is not available, then to a Westlaw cite from its electronic database (*e.g.*, *Alexander, et al. v. American Express Co.*, 2011 WL 6046928 (C.D. Cal. Nov. 10, 2011)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *Wallace, et al. v. Countrywide Home Loans*, No. 08-CV-1463 (N.D. Cal. Dec. 14, 2011)).

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 either selecting Next or hitting 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.

The standards for analyzing the commonality requirement of Rule 23(a)(2) were tightened in 2011 with the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011). As a result, a "common" issue is one that is "capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* at 2551.

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. 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 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 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%.

TABLE OF CONTENTS

I. Overview Of The Year In Workplace Class Action Litigation

As events of the past year in the workplace class action world have demonstrated, the array of bet-the-company litigation issues that businesses face continued to evolve on a landscape that is undergoing significant change. In turn, governmental enforcement litigation and regulatory oversight of workplace issues heated up to new levels, thereby challenging businesses to integrate their litigation and risk mitigation strategies to navigate these exposures.

By almost any measure, 2011 was a transformative year for workplace class actions. The U.S. Supreme Court issued three class action rulings – in *Wal-Mart Stores, Inc. v. Dukes*, *et al., AT&T Mobility v. Concepcion*, *et al.,* and *Smith, et al. v. Bayer Corp.* – that impact all varieties of complex litigation in a profound manner. The Supreme Court's decisions are also apt to have far-reaching implications for litigants for years to come.

More than any other development in 2011, *Dukes* had an immediate and substantial ripple effect on virtually all types of class actions pending in both federal and state courts throughout the county. The Supreme Court's decision elucidated whether Rule 23(b)(2) could be used to recover individualized monetary relief for a class (and held it may not), established a heightened standard for the Rule 23(a)(2) commonality requirement (and determined that common questions for a class must have common answers), and rejected previous misreadings of Supreme Court precedent on Rule 23 burdens of proof (and found that to the extent factual determinations that go to the merits also overlap with the Rule 23 requirements, those factual issues must be analyzed to determine the propriety of class certification). As a result, *Dukes* fostered a cascading wave of decisions in the second half of 2011, as litigants and courts grappled with the ruling's implications in a wide variety of class action litigation contexts. As of the close of the year, *Dukes* had been cited a total of 260 times in subsequent lower court rulings, a remarkable figure for a decision rendered in June of 2011.

Against this backdrop, the plaintiffs' class action employment bar filed and prosecuted significant class action and collective action lawsuits against employers in 2011. In turn, employers litigated an increasing number of novel defenses to these class action theories, fueled in part by the new standards enunciated in *Dukes* and *Concepcion*. 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. The impact and meaning of "*Dukes* issues" and "*Concepcion* issues" were at the forefront of these case law developments.

An overview of workplace class action developments in 2011 reveals six key trends.

First, the Supreme Court's opinions in *Dukes* and *Concepcion* had a profound influence in shaping the course of class action litigation rulings throughout 2011. *Dukes* caused both federal and state courts to conduct a wholesale review of the propriety of previous class certification orders in pending cases, prompted defendants to file new rounds of motions based on *Dukes* to attack all sorts of class theories (and not just those modeled after the nationwide class claims rejected in *Dukes),* and reverberated in case law rulings on a myriad of Rule 23-related issues. *Concepcion* likewise fueled significant litigation over the impact of workplace arbitration agreements and the impediments such agreements may impose on employment discrimination class actions and wage & hour collective actions. The result was a year of decisions on class action issues the likes of which have never been seen before. This wave of new case law is still in its infancy. As many class action issues are in a state of flux post-*Dukes* and post-*Concepcion*, these evolving precedents are expected to continue developing in the coming year.

Second, government enforcement litigation reached "white hot" levels in 2011. This was especially evident in terms of the enforcement litigation program of the U.S. Equal Employment Opportunity Commission ("EEOC"). As an inevitable by-product of the economy's woes, more discrimination charges were filed with

the EEOC in 2011 than in any previous year since the founding of the Commission in 1964 – a new record high of 99,947 discrimination charges against private sector employers (by comparison, the EEOC last year reported receiving a then record high of 99,922 discrimination charges). The Obama Administration's emphasis on administrative enforcement also spawned more government-initiated litigation over workplace issues. The EEOC's systemic program – in which the Commission emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of "alleged victims" – grew to its largest level ever. This development is of significant importance to employers, for it evidences an agency with a laser-focus on high-impact, big stakes litigation.

Third, the continued dislocations in the economy during 2011 fueled more class action and collective action litigation. In particular, the plaintiffs' class action bar continued the pace of filings of FLSA collective actions and ERISA class actions seeking recovery for unpaid wages and 401(k) losses. Furthermore, these conditions spawned more employment-related case filings, both by laid-off workers and government enforcement attorneys. As of the close of the year, filings held steady in each of these distinct categories and increased on an aggregate basis in employment discrimination, wage & hour, and ERISA cases. In turn, this resulted in more judicial rulings, as well as higher settlement numbers (especially in government-initiated enforcement lawsuits and ERISA class action litigation). Even more workplace litigation is expected in 2012, as businesses re-tool their operations and the dust continues to settle from the economic fallout of the last several years.

Fourth, wage & hour litigation continued to out-pace all other types of workplace class actions. This trend was manifested by the fact that in terms of case filings, collective actions pursued in federal court under the Fair Labor Standards Act ("FLSA") outnumbered all other types of private class actions in employment-related cases. In addition, Rule 23 and § 216(b) decisions by federal and state court judges on wage & hour issues were more voluminous than in any other area of workplace litigation – more than triple that for employment discrimination or ERISA class actions combined. Significant growth in wage & hour litigation also was centered at the state court level, and especially in California, Illinois, New Jersey, New York, Massachusetts, Minnesota, Pennsylvania, and Washington. The crest of the wave of wage & hour litigation is not yet in sight, and this trend is likely to continue in 2012.

Fifth, the plaintiffs' class action bar is a tight-knit community, and developments in Rule 23 and § 216(b) case law in 2011 saw rapid strategic changes based on evolving decisions and developments. This fostered quick evolution in case theories, which in turn impacted defense litigation strategies. With the Supreme Court's rulings in *Dukes* and *Concepcion*, the plaintiffs' class action bar has begun a process of "re-booting" class-wide theories of liability and certification. As a result, new certification approaches and cutting-edge strategies are spreading rapidly throughout the substantive areas encompassed by workplace class action law. More than any other trend, the on-going changes to strategy considerations in crafting class claims and litigating Rule 23 certification motions in the wake of *Dukes* drove case law developments in the second half of 2011. As a result, workplace class action case law is in flux, and more change is inevitable in 2012.

Sixth and finally, the financial stakes in workplace class action litigation increased in 2011, but in a manner far different than past years. The plaintiffs' class action bar 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 ERISA class actions, as well as in government enforcement prosecutions at levels above the aggregate settlement totals in 2010. At the same time, settlements of employment discrimination class actions were less frequent and decidedly smaller than in past years. This reflected the impact of *Dukes*, and the notion that difficulties in certifying nationwide, massive class actions place restrictions on the ability of the plaintiffs' bar to convert their case filings into settlements; it also manifests the ability of defendants to dismantle large class cases, or to devalue them for settlement purposes. As the "shake-out" period of litigating in the post-*Dukes* world continues to play out in 2012, the

plaintiffs' bar undoubtedly will continue in their search for a successful blueprint for certifying large employment discrimination class actions that enhance their ability to convert the class filings into substantial settlements.

A. Significant Trends In Workplace Class Action Litigation In 2011

While shareholder and securities class action filings experienced a slight uptick in 2011, employment-related class action filings increased substantially, especially in terms of wage & hour cases. Anecdotally, surveys of corporate counsel confirm that workplace litigation – and especially class action and multi-plaintiff lawsuits – remain as one of the chief exposures driving corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies.

By the numbers, FLSA and ERISA litigation filings stayed constant over the past year, while employment discrimination cases increased. By the close of the year, ERISA lawsuits totaled 8,414 (down slightly as compared to 9,038 in 2010), FLSA lawsuits totaled 6,779 (up slightly as compared to 6,761 in 2010), and employment discrimination filings totaled 14,771 lawsuits (an increase from 14,559 in 2010). In terms of employment discrimination cases, employers can expect a significant jump in the coming year, as the charge number totals at the EEOC in 2010 and 2011 were the highest in the 57 year history of the Commission; due to the time-lag in the period from the filing of a charge to the filing of a subsequent lawsuit, the charges in the EEOC's inventory will become ripe for initiation of lawsuits in 2012.

FLSA collective action litigation increased again in 2011 and far outpaced employment discrimination class action filings. Wage & hour class actions filed in state court also represented an increasingly important part of this trend. In turn, while plaintiffs continued to achieve initial certification of wage & hour collective actions, employers also secured significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions.[1] It is expected that the pursuit of nationwide FLSA collective actions by the plaintiffs' bar will continue in 2012.

A key FLSA litigation issue currently percolating in the courts is how *Dukes* – to the extent it held that "trial by formula" via representative or statistical proof as to damages is inappropriate on a class-wide basis – impacts conditional certification under 29 U.S.C. § 216(b) and/or Rule 23 class certification in wage & hour litigation. An emerging trend suggests that employers can more readily block certification – or secure decertification – in misclassification cases by targeting and challenging plaintiffs' representative evidence.

At the same time, the *Dukes* ruling also may fuel an increase in the number of employment discrimination class action filings in 2012. The Supreme Court's decision has had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.[2] While the playbook on Rule 23 strategies is undergoing an overhaul, the remand of the *Dukes* case is a prime example of the morphing of plaintiffs' certification and class structuring theories. Plaintiffs' counsel narrowed their amended complaint upon remand from the Supreme Court to assert gender discrimination claims on behalf of current and former female Wal-Mart employees in California only. The amended complaint continues to challenge Wal-Mart's allegedly discriminatory pay and promotion practices against women. Plaintiffs seek to certify an injunctive

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[1] An analysis of rulings in FLSA collective actions in 2011 is set forth in Chapter V. An analysis of state court class action rulings in 2011, including wage & hour class actions, is set forth in Chapter VII.

[2] An analysis of rulings in employment discrimination class actions in 2011 is set forth in Chapter III, and an analysis of rulings in ADEA collective actions in 2011 is set forth in Chapter IV.

relief class under Rule 23(b)(2) and a Rule 23(b)(3) monetary relief class for back pay, front pay, and punitive damages. The new complaint scales back the proposed class size from a nationwide class to one that encompasses California-based workers only; the new proposed class has an estimated 45,000 members, about 3% of the total class size proposed and certified – and then decertified – previously. At the same time, the consortium of plaintiffs' lawyers representing plaintiffs filed a tag-along gender discrimination class action against Wal-Mart in Texas entitled *Odle, et al. v. Wal-Mart Stores, Inc.*, Case No. 11-CV-2954 (N.D. Tex.) in October of 2011. The Texas suit alleges Wal-Mart gave female workers fewer promotions and paid those in salaried and hourly positions less than men in comparable positions, even though female employees on average had more seniority and higher performance ratings. Plaintiffs are seeking to certify a class of female employees that could exceed 45,000. The consortium of plaintiffs' lawyers promises to bring even more "smaller-sized" class actions in the wake of *Dukes.* In sum, as the plaintiffs' bar "re-boots" to take account of the Supreme Court's ruling in *Dukes,* future employment discrimination class action filings are likely to increase due to a strategy whereby state or regional-type classes are asserted rather than nationwide, mega-cases.

More than any other area of workplace litigation, ERISA class actions took center stage in 2011 as class action settlements in employee benefits cases led all other types of class actions.[3] Furthermore, as the financial crisis battered employees' retirement savings, pension plan sponsors sought to recoup investment losses by initiating ERISA class actions against investment managers and trustees for engaging in imprudent behavior. Plaintiffs' lawyers bringing ERISA class action claims pursued several broad categories of cases, including (i) "stock drop" suits in which the ERISA plan participants complained of the availability of employer stock as an investment option (after the company stock suffers a dramatic decline, resulting in losses to plan participants who were invested in the company stock); (ii) cases where pension plans cut back or reduced benefits; and (iii) "plan administration" suits in which participants challenged excessive advisory fees and other mechanics of how the plan is run. As these ERISA cases grow in size and complexity, they also have raised numerous issues over whether many of the cases meet the requirements for class certification.[4]

Meanwhile, on the governmental enforcement front, both the EEOC and the U.S. Department of Labor expanded and intensified their administrative enforcement activities and litigation filings in 2011.

The EEOC continued to follow through on the enforcement and litigation strategy plan it announced in April of 2006; that plan centers on the government bringing more systemic discrimination cases affecting large numbers of workers. As 2011 demonstrated, the EEOC's prosecution of pattern or practice lawsuits is now an agency-wide priority. Many of the high-level investigations started in 2006 mushroomed into the institution of EEOC pattern or practice lawsuits in 2010 and 2011. Under the Obama Administration, increases in funding expanded the number of investigators. The Commission's 2011 Annual Report[5] also announced that it expects to continue the dramatic shift in the composition of its litigation docket from small individual cases to pattern or practice lawsuits on behalf of larger groups of workers. The EEOC's FY 2011 Performance and Accountability Report detailed the EEOC's activities from October 1, 2010 to September 30, 2011. The EEOC's Report indicated that:

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[3] An analysis of the leading class action settlements in 2011 – for ERISA, wage & hour, employment discrimination, and governmental enforcement actions – is set forth in Chapter II.

[4] An analysis of rulings in ERISA class actions in 2011 is set forth in Chapter VI.

[5] The EEOC's 2011 Annual Report is published at http://www.eeoc.gov/eeoc/plan/index.cfm.

- The Commission completed work on 235 systemic investigations in FY 2011, which resulted in 96 "probable cause" determinations, and 35 settlements or conciliation agreements that yielded a total recovery of $8.6 million for systemic claims.

- As of the close of the year, the EEOC had 580 on-going systemic investigations involving more than 2,000 charges, a significant jump from last year, which saw 468 active systemic investigations.

- The EEOC filed 261 lawsuits in 2011, of which 23 involved claims of systemic discrimination on behalf of more than 20 workers and 61 cases involved multiple alleged discrimination victims of up to 20 individuals. The EEOC had 443 cases on its active lawsuit docket by year end, of which 116 involved multiple aggrieved parties and 63 involved challenges to alleged systemic discrimination.

- The EEOC is also posed to enhance its regulatory and litigation enforcement programs, as it increased its headcount from 2,176 full-time equivalent employees in 2008 to 2,506 full-time equivalents in 2011. Many of these new hires were investigators and systemic case specialists. Federal funding has also increased from $329.3 million for the Commission's budget in 2008 to $366.5 million in 2011.

While the inevitable by-product of these governmental enforcement efforts is that employers are likely to face even more such claims in 2012, the EEOC's systemic litigation program is not without its detractors. Several federal judges entered significant sanctions against the EEOC in 2011 – some in excess of seven figures – for its pursuit of pattern or practice cases that were deemed to be without a good faith basis in fact or law.[6] The EEOC has showed no signs of adjusting its litigation strategy in light of those sanction rulings, and employers can expect that the coming year will entail aggressive "push-the-envelope" litigation filings and prosecutions by the EEOC, as well as the filing of larger systemic cases.

The U.S. Department of Labor also undertook aggressive enforcement activities in 2011, and employers can expect more of the same with the DOL's agenda in 2012:

- The DOL Wage & Hour Division will further its efforts to conduct more targeted investigations in low-wage/high-risk industries (described by the DOL as industries in which there are high violation rates and low complaint rates) around the country, including the janitorial, construction, and hotel/motel industries. The Wage & Hour Division also will continue its emphasis on investigations conducted in what it terms "fissured" industries, which according to the DOL are those sectors that rely on a wide variety of organizational methods, such as sub-contracting, third-party management, franchising, and independent contracting. Among the industries likely to be targeted by the Wage & Hour Division are construction, janitorial, home health care, child care, transportation and warehousing, meat and poultry processing, and other professional and personnel service industries.

- The DOL investigations conducted in these (and other) industries in 2011 are expected to be accompanied by more aggressive enforcement strategies, including corporate-wide investigations, use of the FLSA's "hot goods" provisions, and the assessment of liquidated

[6] An analysis of rulings in EEOC cases in 2011 is set forth in Chapter III, Section B.

damages, penalties, and other sanctions. In addition, the DOL will continue its *Bridge to Justice* and *We Can Help* (in conjunction with community and worker organizations) programs to increase employee awareness of FLSA rights and refer certain categories of cases to private attorneys for institution of lawsuits.

- The DOL will seek to build upon its active *amicus* program from 2011, submitting briefs to advance its policy preferences in private litigation around the country. The continued viability of some aspects of this program, however, may be called into question when the Supreme Court rules in 2012 in *Christopher, et al. v. SmithKlineBeecham*, 635 F.3d 383 (9th Cir. 2011), in which the Supreme Court may address the issue of the level of deference to be given to such DOL *amicus* briefs.

B. Impact Of Changing Rule 23 Standards

The U.S. Supreme Court's seminal ruling this past spring in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011), is as significant a class action ruling for employers as any decision in the history of workplace litigation. The lessons of *Dukes* are wide and varied for a myriad of issues involving workplace class action litigation. In *Dukes*, the district court certified a class in 2004, which sought both injunctive relief and back pay, under Rule 23(b)(2). In overturning that order, the Supreme Court unanimously held that individualized monetary relief claims such as back pay cannot be certified under Rule 23(b)(2). In the 5-4 portion of the opinion, the Supreme Court held that plaintiffs failed to satisfy the Rule 23(a) commonality requirement, which requires that plaintiffs present significant proof that an employer operated under a general policy of discrimination. The Supreme Court's majority reasoned that plaintiffs' statistical evidence was insufficient to establish that plaintiffs' theory could be proved on a class-wide basis. Plaintiffs had provided regional and national data showing pay disparities, but the majority determined that the regional disparity could be attributable to only a small set of stores, and could not by itself establish the uniform, store-by-store disparity upon which plaintiffs' theory of commonality depended.[7]

The new strategic approaches of the plaintiffs' class action bar to "*Dukes* issues" are beginning to coalesce. Suffice it to say, 2012 is likely to witness significant litigation over these case structuring issues and the new approaches to "*Dukes* issues" by plaintiffs' counsel and by the defense bar. Corporate counsel can expect a "stretching-of-the-envelope" as litigants advance novel theories and defenses and courts sort out how class certification theories are analyzed under these evolving standards.[8]

The Supreme Court's decision this term in *AT&T Mobility LLC v. Concepcion, et al.*, 131 S. Ct. 1740 (2011), subordinates state law to the Federal Arbitration Act ("FAA") and opens the door for the broad use of arbitration and class action waiver clauses in consumer and employment contracts. In *Concepcion*, the Supreme Court held that the FAA preempted California state law precedent that rendered most class action waivers in consumer contracts unconscionable and thus unenforceable. The decision has been hailed by business interests, which prefers the speed and efficiency of bilateral arbitration for resolving claims arising from consumer and employment contracts. Consumer and civil rights advocates suggest the decision closes the door on many small-dollar consumer claims and allows corporations to perpetrate frauds unchecked. Today, class-wide arbitration would appear to be available only if the parties expressly

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[7] A detailed analysis of the Supreme Court's ruling in *Dukes* is set forth at Appendix I of this Report at page 721 to 728.

[8] An analysis of rulings in non-workplace class actions in 2011 is set forth in Chapter IX.

contract for it. Although mandatory arbitration and class action waiver provisions are already common in retail contracts, the next major step is likely to be their broader introduction into employment contracts (where only collective bargaining agreements, at least in unionized companies, may impede their use).

Concepcion received almost as much attention as *Dukes* by federal and state courts passing upon workplace arbitration issues in a class action context. Though the Supreme Court's ruling pertained to consumer contracts, 2011 saw widespread case law rulings on its application to workplace arbitration agreements. As of the close of the year, *Concepcion* had been cited in 215 rulings. "Second generation" *Concepcion* issues are already appearing in the case law, as the plaintiffs' class action bar asserts new angles of attack against arbitration in general and workplace arbitration agreements in particular. The key battleground issues for the future are whether class action bans in arbitration agreements should not be enforced in the limited sub-set of cases where plaintiffs' lawyers have hard evidence that it would be too costly to pursue an individual action, and therefore a class action is the only mechanism that would allow plaintiffs to effectively vindicate their statutory workplace rights.

As these issues play out in 2012, additional chapters in the class action playbook will be written.

C. Implications Of These Developments For 2012

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2011 was a year of great change in the landscape of Rule 23. So what will 2012 bring?

A certitude of the modern American workplace is that class action and collective action litigation is a magnet that attracts skilled members of the plaintiffs' bar. The passage of the CAFA has had little impact on the pace and volume of overall workplace class action filings since 2005. Instead, the impact of the CAFA has been limited primarily to determine the proper venue, which often has a dramatic impact on the outcome of workplace class actions.[9] Thus, in 2012, the *Dukes* and *Concepcion* decisions are unlikely to dampen the focus of government enforcement litigators and the plaintiffs' class action bar. Instead, case structuring theories will continue to undergo a wholesale "re-booting" process, and case law developments are expected to evolve and reflect these new creative litigation strategies.

ERISA class action litigation is expected to accelerate in 2012. The relatively negative economic conditions over the past 36 months, as well as the on-going winding down of the credit crisis and sub-prime mortgage meltdown, surely will affect the course of ERISA class action litigation in 2012, as attorneys for retirement plan participants are likely to sue over whether plan fiduciaries made prudent investments in light of the credit, sub-prime mortgage lending, and real estate crises. The precipitous market drops that occurred in 2008 to 2011 also are likely to provide the grist for the plaintiffs' bar to prosecute ERISA class actions.

On the ERISA front, corporate counsel can expect to see the following developments:

- ERISA class actions will continue to receive increased scrutiny at the class certification stage post-*Dukes*, potentially making it more difficult for plaintiffs to secure certification of ERISA claims. Unlike in the employment discrimination arena, the focus is likely to be on whether it is possible to certify ERISA class actions under Rule 23(b). Plaintiffs' counsel

[9] An analysis of key CAFA rulings in 2011 is set forth in Chapter VIII.

also are apt to begin to shift their case structuring from Rule 23(b)(1) and (b)(2), which have traditionally been used in ERISA cases, to Rule 23(b)(3).

- Plaintiffs' class claims challenging 401(k) plan investment lineups likely will continue to face significant challenges at the motion to dismiss stage. Courts are becoming increasingly skeptical of imprudent investment claims where the challenged investment is "hard-wired" into the plan or the investment is one of several investments that are not challenged. Against this back-drop, plaintiffs' lawyers who have struck out in certain jurisdictions are expected to re-plead their claims, perhaps with new representative plaintiffs, and bring them in other jurisdictions. ERISA's broad venue provision makes it difficult to avoid this kind of forum shopping, but corporate counsel can expect to see more and more plan sponsors write choice-of-venue provisions into their plans.

- The Supreme Court's decision on health care reform – the constitutionality of the Patient Protection and Affordable Care Act – should be closely watched to determine its impact on claims related to employer-sponsored health care plans. It also may reverberate into other ERISA-related litigation issues.

In sum, market conditions suggest that the current wave of ERISA class actions will continue unabated.

On the wage & hour front, the deluge of FLSA filings – making wage & hour claims the most predominant type of workplace class action pursed against corporate America – is expected to continue. Corporate counsel can expect to see a consistent level of significant litigation activity. Key areas to watch include:

- The Supreme Court's upcoming decision in *Christopher, et al. v. SmithKline* will determine whether pharmaceutical sales representatives qualify for the outside sales exemption by applying a functional approach to "sales," consistent with the U.S. Department of Labor's ("DOL") expressed view of that term since the 1940's, rather than the strict definitional view of "sales" under the plaintiffs' formulation and the DOL's current position. The decision may well impact other litigation over wage & hour exemptions, and hence impact FLSA collective action filings and settlements.

- Whether the DOL's positions as expressed in *amicus* briefs (the agency's "ambush by *amicus*" initiative) will be accorded controlling deference by the Supreme Court, no deference at all, or a different quantum of deference. If the Supreme Court finds that no deference is warranted, then the Department's efforts to change existing law on issues such as the amount of discretion and independent judgment ("some" as stated in the regulations, or "sufficient" as stated in the DOL's *amicus* briefs) required under the administrative exemption, will be unsuccessful. A finding in favor of the DOL's position on deference may significantly alter the applicability of the administrative exemption and open the way for the Department to use *amicus* briefing to seek to alter the law on many issues with which the current Administration disagrees.

- In terms of novel litigation theories, employers can expect an increase in off-the-clock litigation brought by non-exempt employees, fueled by new theories attacking employer rounding practices, and increased off-duty use of PDA's and other mobile electronic devices vis-à-vis the application of the continuous workday rule.

- The DOL's efforts are likely to continue in its goal to reverse the unanimous view of the federal circuits that have considered the issue to limit successful plaintiffs in misclassification cases to a 0.5 damages multiplier for hours worked in excess of a 40-hour workweek under *Overnight Motor Transport v. Missel* and/or Interpretive Regulation § 778.114 (the "fluctuating workweek").

- Increased litigation also is expected over issues in independent contractor misclassification and joint employer liability cases, as well as off-the-clock work (including donning and doffing cases), unpaid overtime, missed or late meal and rest breaks, time-shaving, and improper tip pooling.

- Continued developments in the case law are virtually certain relative to § 216(b) certification defenses, as *Dukes* continue to impact FLSA certification questions and rulings, and as some courts narrow their conception of the "similarly-situated" requirement in collective actions based on the commonality requirement as reformulated by *Dukes.*

- A ruling by the California Supreme Court is expected in the first half of 2012 in *Brinker International, Inc. v. Superior Court*, regarding whether employers must merely make meal breaks available or ensure that employees take them for purposes of the California Labor Code. As trends in wage & hour class actions based on state laws often emanate from California, the ruling in *Brinker International* poses significant stakes for non-California employers too.

Last but not least, employment discrimination class action litigation – both in terms of private plaintiff cases and government enforcement litigation brought by the EEOC – is expected to remain "white hot" in 2012. On the employment discrimination front, corporate counsel can expect to see the following developments:

- The plaintiffs' bar will continue to "re-boot" the architecture of employment discrimination class actions to increase their chances to secure class certification post-*Dukes*. Their focus is likely to be on smaller class cases (*e.g.*, confined to a single corporate facility or operations in one state) as opposed to national, mega-class cases. In terms of certification theories, the plaintiffs' bar is apt to pursue hybrid or parallel class certification theories where injunctive relief is sought under Rule 23(b)(2) and monetary relief is sought under Rule 23(b)(3), as well as a range of partial "issues certification" theories under Rule 23(c)(4).

- Employers and their defense counsel will use new post-*Dukes* case law authorities to challenge class allegations at the earliest opportunity. An emerging trend of rulings in 2011 will continue to develop, as courts confront these pro-active defense strategies.[10]

- The EEOC's systemic litigation program is expected to expand in 2012, with more filings, larger cases, and bigger monetary demands as the agency continues its aggressive

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[10] These evolving defenses are analyzed in Chapter IX (at sub-section (ii) of the Report). The leading ruling of 2011 in this area is *Pilgrim, et al. v. Universal Health Care, LLC*, 660 F.3d 943 (6th Cir. 2011), and represents the first circuit decision post-*Dukes* to address the propriety of a motion to strike class allegations at the pleadings stage.

enforcement activities. Corporate counsel also can expect to see more systemic administrative investigations relative to hiring issues (use of criminal histories in background checks) and based on pay and promotions disparate impact theories due to alleged gender or race discrimination.

- Despite a series of set-backs for the EEOC in 2011 with federal judges entering significant sanctions and fee awards against the Commission (which the government has uniformly appealed), it is expected that these rulings will embolden rather than damper the EEOC's aggressive enforcement of workplace bias laws.

In sum, the lesson to draw from 2011 is that the private plaintiffs' bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2012 in bringing class action and collective action litigation against employers.

These novel challenges demand a shift of thinking in the way companies formulate their strategies. As class actions and collective actions are a pervasive aspect of litigation in Corporate America, defending and defeating this type of litigation is a top priority for corporate counsel. Identifying, addressing, and remediating class action vulnerabilities, therefore, deserves a place at the top of corporate counsel's priorities list for 2012.

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