



## **Seyfarth Shaw's *Annual Workplace Class Action Litigation Report*: The State-of-the-Art Word on Employment-Related Class Actions**

**By Bob Bregman, CPCU, MLIS, RPLU**

Following is a brief overview of the eighth edition of Seyfarth Shaw's *Annual Workplace Class Action Litigation Report*, just as we provided in last year's Spring issue of *EPLiC* for the previous edition. The *Report* stands alone as the definitive source of information on employment class action litigation.

Each year, it is compiled and edited by Gerald L. Maatman Jr., a partner with Seyfarth Shaw LLP. Mr. Maatman's practice focuses on defending employers involved in employment-related class actions and in Equal Employment Opportunity Commission pattern or practice cases. He is cochair of the firm's class action defense group and authors the firm's class action blog ([www.workplaceclassaction.com](http://www.workplaceclassaction.com)). Mr. Maatman pioneered the process of conducting employment practices audits to assist employers in structuring effective and practical personnel policies and protocols. His work in this area has been profiled in the *Wall Street Journal*, the *Economist*, and *Time* magazine.

### **A Thumbnail Sketch of What's Inside**

The voluminous, 790-page *Annual Workplace Class Action Litigation Report* incisively analyzes 976 class action case decisions. And, because it is available on CD-ROM, the *Report*

is fully searchable, making its comprehensive, authoritative content readily accessible. The CD-ROM format allows the reader to quickly and easily tab through to the desired section(s) of interest. In addition, all of the federal cases examined in the *Report* are indexed by federal circuit, yet another invaluable feature that further enhances its utility.

The following is a synopsis of what's inside.

- ◆ **Overview of the Year in Workplace Class Action Litigation.** This section summarizes the key legal and procedural trends that emerged in 2011, addresses key developments in workplace class action litigation in 2011, and assesses the implications these developments will have on litigation in 2012.
- ◆ **Significant Class Action Settlements in 2011.** This section lists the top 10 settlements in (a) private plaintiff employment discrimination lawsuits, (b) private plaintiff wage and hour class actions, (c) private plaintiff ERISA actions, (d) government-initiated enforcement actions and pattern or practice suits, and (e) the top 10 injunctive relief rulings issued by various courts that were a part of certain class action settlements. Items (a), (b), (c), and (d) are reproduced later in this article.

- ◆ **Significant Federal Employment Discrimination Class Action and Equal Employment Opportunity Commission (EEOC) Pattern and/or Practice Rulings.** This section of the *Report* analyzes discrimination class action cases brought under (a) Title VII of the Civil Rights Act of 1964 and (b) “pattern or practice” enforcement actions brought by the EEOC.
- ◆ **Significant Collective Action Rulings under (a) the Age Discrimination in Employment Act (ADEA), (b) the Fair Labor Standards Act (FLSA), (c) the Employee Retirement Income Security Act of 1974 (ERISA), and (d) the Class Action Fairness Act.** Cases brought under these federal statutes constitute a substantial portion of all employment-related class action litigation. Therefore, court interpretations of these statutes are important for future cases.
- ◆ **Significant State Law Class Action Rulings.** These rulings are significant because during the past several years, plaintiffs’ attorneys have been increasingly resorting to state courts as a forum for pursuing employment-related class action litigation.
- ◆ **Rulings on the Class Action Fairness Act (CAFA).** This law facilitates removal of class actions from state court to federal court. In addition, CAFA regulates the selection of class counsel, tightens control of attorneys’ fees awarded to class counsel, toughens pleading standards, reduces the ability of class counsel to dictate the choice of forum, facilitates interlocutory appeals of class certification rulings, and regulates settlements of class actions. Given these profound effects on underlying case strategy and the structuring of class actions, the *Annual Workplace Class Action Litigation Report* analyzes CAFA-related cases.
- ◆ **Other Significant Federal Rulings Affecting the Defense of Workplace Class Action Litigation.** Throughout 2011, federal courts issued key rulings in class action lawsuits on Rule 23 issues,

which significantly impact the defense of workplace actions. As the plaintiffs’ class action bar has pressed new theories and the nature of claim allegations continues to morph, these rulings are important in formulating effective defense strategies for workplace class actions.

- ◆ **An article analyzing the outcome and implications of the historic *Dukes v. Wal-Mart* Case: “*Wal-Mart Stores v. Dukes*: U.S. Supreme Court’s Clarification of Rule 23 Standards Means a Win for Employers Facing Class Actions,”** by Gerald L. Maatman Jr. and Laura J. Maechtlen. In this noteworthy article, two of the nation’s leading employment class action litigation experts discuss the U.S. Supreme Court’s June 20, 2011, ruling that forever changed the landscape of class actions and makes certification as a class more difficult to achieve. The piece explains how, as a consequence of the case, plaintiffs are more likely to allege narrower class definitions, while federal judges will require additional evidence of commonality and inquire more deeply into the merits at the class certification stage. The article also analyzes the broader implications of *Dukes* for employers that seek to avoid class action litigation, and for litigators of workplace class actions.

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**THE SEYFARTH SHAW  
ANNUAL WORKPLACE CLASS ACTION  
LITIGATION REPORT  
2012 Edition**

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The following sections offer a glimpse of the *Report’s* contents.

## Six Key Trends in Workplace Class Actions during 2011

The report notes six important developments in class actions during 2011. They are:

- ◆ **The U.S. Supreme Court's opinions in *Dukes* and *Concepcion* had a profound impact in shaping class action rulings in 2011.** *Dukes* caused both federal and state courts to conduct a wholesale review of the propriety of previous class certification orders in pending cases, while *Concepcion* fueled significant litigation over the effect of workplace arbitration agreements and impediments such agreements may impose on employment discrimination class actions.
- ◆ **U.S. government enforcement litigation reached “white-hot” levels in 2011, especially by the Equal Employment Opportunity Commission (EEOC).** Not only were a record number of charges filed with the EEOC, but the Obama administration's emphasis on administrative enforcement also spawned more government-initiated litigation over workplace issues.
- ◆ **Continued economic woes during 2011 spurred more class action and collective litigation.** As of the close of the year, claim filings held steady in each of the important categories of claims and even more workplace litigation is anticipated in 2012 as businesses retool their operations and the dust continues to settle from the economic fallout of the past several years.
- ◆ **Wage and hour litigation continues to outpace all other types of workplace 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.

- ◆ **The plaintiffs' class action bar is a tight-knit community and developments in Rule 23 and Section 216(b) caselaw in 2011 saw rapid strategic changes based on evolving decisions and developments.** Accordingly, workplace class action law is in flux and more change is inevitable in 2012.
- ◆ **The financial stakes in workplace class action litigation increased in 2011 but in a manner far different than in past years.** The plaintiffs' class action bar continued to craft new damages theories to expand the size of classes and increase the scope of recoveries. While such strategies produced a series of massive settlements in nationwide ERISA class actions, settlements of employment discrimination class actions were less frequent and decidedly smaller than in previous years. As the “shakeout” period of litigating in the post-*Dukes* era continues to play out during 2012, the plaintiffs' bar will undoubtedly seek new, successful blueprints for certifying large employment class actions that will enhance their ability to convert such filings into large settlements.

A much more thorough discussion of these trends appears within the *Report*.

### Top 10 Settlements in Private Plaintiff Employment Discrimination Class Action Lawsuits

The monetary value of the top 10 private plaintiff lawsuits entered into or paid in 2011 totaled \$123.2 million, which represented a decrease from the prior year. By comparison, the top 10 settlements in 2010 totaled \$346.4 million.

#	Amount	Defendant	Type of Discrimination
1.	\$32 million	Wells Fargo Advisors, LLC	Gender
2.	\$22 million	Dolgenercorp, Inc.	Gender
3.	\$15 million	Taylor Bean & Whitaker Mortgage Corp.	WARN Act Violation
4.	\$12 million	3M Co.	Age
5.	\$11.6 million	Willis Group Holdings, Ltd.	Gender
6.	\$10.0 million	Best Buy Co., Inc.	Race & Gender
7.	\$7 million	Nassau County	Gender
8.	\$6 million	Toyota Motor Corp.	Disability
9.	\$5 million	DeStefano	Race
10.	\$2.6 million	WellPoint	Age

### Top 10 Settlements in Private Plaintiff Wage and Hour Class Action Lawsuits

The monetary value of the top 10 private plaintiff wage and hour class action settlements entered into or paid in 2011 was \$221.1 million, down from the top 10 settlements in 2010, which totaled \$336.5 million.

#	Amount	Defendant
1.	\$42 million	JP Morgan Chase & Co.
2.	\$35 million	Oracle
3.	\$34 million	CVS Caremark Corp.
4.	\$32 million	Tyson Foods, Inc.
5.	\$17.3 million	Partners Health Care System, Inc.
6.	\$15 million	Dick's Sporting Goods, Inc.
7.	\$14 million	Bento Bulk Transport
8.	\$11.3 million	Cin-Lan, Inc.
9.	\$10.5 million	DHL Express (USA), Inc.
10.	\$10 million	Spearmint Rhino Companies Worldwide, Inc.

### Top 10 Settlements of Government-Initiated Enforcement Actions and Pattern or Practice Lawsuits

The Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) aggressively litigated government enforcement actions in 2011. Based on preliminary figures for the U.S. government's 2011 fiscal year, the EEOC filed 261 new lawsuits, resolved 277 pending lawsuits, and secured \$364 million in settlements for allegedly injured victims of job bias, an increase of over \$45 million from the prior year.

The EEOC also had the highest number of discrimination charges filed in 2011—a total of 99,947—than ever before in its history. As of September 20, 2011 (the end of the U.S. government's fiscal year), 47 Commissioner's charges were being investigated, compared with 15 Commissioner's charges in April 2006, the month before the EEOC established its systematic discrimination program. In addition, the EEOC's docket of systematic pattern or practice cases more than doubled over fiscal year 2011, with 61 active pattern or practice lawsuits. The EEOC also reported that it has an active docket of 589 active systematic administrative investigations at the end of 2011.

For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2011 totaled \$65.078 million. This was an increase over 2010, as the top settlements in that year totaled \$61.31 million.

#	Amount	Defendant
1.	\$20 million	Verizon Delaware LLC
2.	\$11 million	Mattingly
3.	\$8 million	USProtect Corp.
4.	\$8 million	International Profit Associates, Inc.
5.	\$5.1 million	Lenny's
6.	\$3.4 million	Supervalu, Inc.
7.	\$3 million	3M Co.
8.	\$2.328 million	Blockbuster, Inc.
9.	\$3 million	FedEx Ground Package Systems, Inc.
10.	\$2 million	Sonic Drive-In of Los Lunas Ltd.

### Top 10 Settlements in Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top 10 private settlements entered into or paid in 2011 totaled \$898.95 million. This amount is significantly higher—more than double—than in 2010, when the total monetary

value of the top 10 private settlements reached \$424.4 million.

The largest ERISA class action settlements involved disputes over the breach of fiduciary duty, reducing retiree benefits and/or investing pension or 401(k) assets into company stock.

#	Amount	Defendant
1.	\$525 million	Mack Trucks, Inc.
2.	\$178.6 million	AK Steel Corp.
3.	\$50 million	Merck & Co. Inc.
4.	\$32 million	Tribune Co.
5.	\$30 million	Duke Energy Corp.
6.	\$21.5 million	Nortel Networks Corp.
7.	\$18.5 million	Bechtel Corp.
8.	\$17.5 million	Wells Fargo & Co.
9.	\$13.5 million	Wal-Mart Stores, Inc.
10.	\$12.35 million	Wachovia Corp.

### And this Is Just the Tip of the Iceberg

This article has provided only a brief sample of the depth and breadth of the information this authoritative document contains. No practitioner who deals with employment claims, whether as an underwriter, broker, risk manager, or attorney, should be without it. Even better, the Seyfarth Shaw *Annual Workplace Class Action Litigation Report*, 2012 edition, is free! For information on how to obtain a complete copy of the *Report*, see the accompanying text box or send an e-mail to [gmaatman@seyfarth.com](mailto:gmaatman@seyfarth.com). *EPLiC*