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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

This is the fourth year in which we provide a brief summary of (what is now in its 10th edition) Seyfarth Shaw's *Annual Workplace Class Action Litigation Report*. (The previous three overviews can be found here—[2013](#), [2012](#), and [2011](#).)

The *Report* is the singular, definitive source of information, research, and in-depth analysis on employment-related class action litigation. Practitioners and corporate counsel should not be without it on their desk, since the *Report* is the sole compendium of its kind in the United States. Moreover, this year marks the first time that the *Report* is available as an eBook. (Previously, it was available only as a hard-bound volume or as a CD-ROM.)

Gerald L. Maatman Jr., a partner with Seyfarth Shaw LLP, compiles and edits the *Report*. 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](#). 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 extensive, 805-page *Annual Workplace Class Action Litigation Report* insightfully examines and analyzes a total of 1,123 class action case decisions. And, because it is also 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.

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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 2013, addresses key developments in workplace class action litigation in 2013, and assesses the implications these developments will have on litigation in 2014.
- ◆ **Significant Class Action Settlements in 2013.** 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 Employee Retirement Income Security Act (ERISA) of 1974 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 the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and under the Employee Retirement Income Security Act (ERISA) of 1974.** 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 Federal Rulings Affecting the Defense of Workplace Class Action Litigation.** Throughout 2013, 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.

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**THE SEYFARTH SHAW
ANNUAL WORKPLACE CLASS ACTION
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2014 Edition**

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

Seven Key Trends in Workplace Class Actions during 2013

The *Report* notes seven important developments in class actions during 2013. They are:

- 1. The U.S. Supreme Court's opinions in *Wal-Mart* and *Comcast Corp.* had a profound impact in shaping class action rulings in 2013.** These cases caused defendants to mount challenges to class certification based on all sorts of theories (and not just those modeled after the nationwide class action claims rejected in *Wal-Mart* and the antitrust damages issues discussed in *Comcast Corp.*). This resulted in new types of caselaw rulings on a myriad of Rule 23-related issues. The result was a year of decisions on class action issues the likes of which have never been seen before. This wave of new caselaw is still in its infancy. As many class action issues are in a state of flux post-*Wal-Mart* and post-*Comcast Corp.*, these evolving precedents are expected to develop in the coming year.
- 2. U.S. government enforcement litigation in 2013 increased over levels in 2012.** This was especially evident in terms of the systemic investigation program of the U.S. Equal Employment Opportunity Commission. As the inevitable by-product of the economy's unemployment rates, more discrimination charges were filed with the EEOC in 2013 than in all but 3 previous years since the founding of the Commission in 1964—a total of 93,727 discrimination charges against private sector employers. By comparison, in 2012, the EEOC reported receiving a then-record high of 99,412 discrimination charges. The Obama administration's emphasis on administrative enforcement also spawned more government-initiated investigations concerning workplace issues.

The EEOC's systemic investigation program—in which the Commission emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of “alleged victims”—expanded yet again compared with prior years. EEOC systemic suits comprised 16 percent of all merits filings in 2013 and, by the end of the year, represented 23.4 percent of the Commission's active litigation docket. This development is of critical importance to employers, for it evidences an agency with a laser-focus on high-impact, big-stakes litigation.

- 3. *Wal-Mart* and *Comcast Corp.* influenced settlement strategies in workplace class actions in a profound way.** Employers settled fewer employment discrimination class actions than at any time over the past decade and at a fraction of the levels of 2006 to 2012. The same was true with wage and hour and ERISA class actions as well as governmental enforcement litigation; settlement numbers and aggregate totals were down in each category. This reflected the impact of *Wal-Mart* and *Comcast Corp.* and the notion that difficulties in certifying nationwide, massive class actions impaired the ability of the plaintiffs' bar to convert their case filings into blockbuster settlements. It also manifested the ability of defendants to dismantle large cases, or to devalue them for settlement purposes. Simply stated, *Wal-Mart* and *Comcast Corp.* aided employers to defeat, fracture, and/or devalue employment discrimination class actions and resulted in fewer settlements at lower amounts.
- 4. Continued economic dislocations during 2013 fueled more class action and collective action litigation involving wage and hour laws.** In particular, the plaintiffs' class action bar eclipsed the pace of filings of Fair Labor Standards Act (FLSA) collective actions

and wage and hour class actions, compared to previous years. 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 or were slightly down in the distinct categories of employment discrimination and ERISA class actions and increased on an aggregate basis in wage and hour cases, as well as government enforcement litigation. In turn, this resulted in more judicial rulings on wage and hour issues and EEOC lawsuits than any other area of workplace class action litigation. Even more wage and hour and EEOC litigation is expected in 2014. Indeed, the crest of the wave of wage and hour litigation is still not in sight, and this trend is likely to continue in 2014.

- 5. Caselaw developments under the Class Action Fairness Act (CAFA) of 2005 continue to mature and the U.S. Supreme Court decided its first case under CAFA in 2013 in *Standard Fire Insurance Co. v. Knowles*.** The Court rejected the increasingly frequent tactic of the plaintiffs' bar to stipulate to damages of less than \$5 million, the CAFA's amount-in-controversy requirement, in an effort to prevent removal of class actions from state court to federal court. Caselaw under CAFA turned the corner in this regard for employers in 2013, solidifying another defense strategy to secure removal of class actions to federal court.
- 6. The Supreme Court's ruling in 2013 on class arbitration issued in *American Express Co. v. Italian Colors Restaurant (AMEX)* informed the ever-growing body of caselaw.** The ruling reinforces employers' right to utilize carefully crafted workplace arbitration agreements to manage their class action litigation risks. While ill-conceived arbitration

programs can create significant litigation problems, the *AMEX* decision rejected attempts by the plaintiffs' bar to challenge arbitration as a violation of public policies of federal statutory rights. This ought to help defendants avoid wage and hour class action litigation more easily for those employers that choose to institute workplace arbitration agreements.

- 7. The plaintiffs' class action bar is a tight-knit community and developments in Rule 23 and Section 216(b) caselaw in 2013 saw rapid strategic changes based on evolving decisions and developments.** This fostered quick evolution in case theories, which in turn impacted defense litigation strategies. In reaction to the Supreme Court's rulings in *Wal-Mart* and *Comcast Corp.*, the plaintiffs' class action bar continued the process of "rebooting" classwide theories of certification, as well as new methods for establishing liability and damages on a classwide basis. As a result, new certification approaches and cutting-edge strategies are rapidly evolving throughout the substantive areas encompassed by workplace class action law. More than any other trend, the ongoing changes to strategy considerations in crafting class claims and litigating Rule 23 certification motions in the wake of *Wal-Mart* and *Comcast Corp.* drove caselaw developments in 2013. As a result, workplace class action caselaw is in flux, and more change is inevitable in 2014.

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 2013 totaled \$234.1 million, which represented a significant increase from the prior year. By

comparison, the top 10 settlements in 2012 totaled \$48.65 million.

#	Amount	Defendant
1.	\$160 million	Merrill Lynch
2.	\$39 million	Bank of America
3.	\$8 million	Costco Wholesale Corp.
4.	\$7.5 million	The Wet Seal Inc.
5.	\$6 million	City of Los Angeles
6.	\$4.5 million	U.S. Postal Service
7.	\$3.7 million	City of Chicago
8.	\$3.1 million	State of Connecticut, Department of Correction
9.	\$1.3 million	City of New York
10.	\$1 million	City of Richmond

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 2013 was \$248.45 million, a significant decrease from the top 10 settlements in 2012, which totaled \$292 million.

#	Amount	Defendant
1.	\$73 million	Bank of America
2.	\$29.75 million	Tata Consultancy Services, Ltd.
3.	\$29 million	Ecolab
4.	\$21 million	Merrill Lynch
5.	\$20.9 million	Rite Aid Corp.
6.	\$19 million	AT&T Corp.
7.	\$17.5 million	24 Hour Fitness USA, Inc.
8.	\$14.3 million	Roto-Rooter Services Co.
9.	\$12 million	Merrill Lynch
10.	\$12 million	Old Republic Title Co.

Top 10 Settlements in Private Plaintiff ERISA Class Actions

For Employee Retirement Income Security Act (ERISA) class actions, the monetary value of the top 10 private settlements entered into or paid in 2013 totaled \$155.6 million. This amount is significantly lower than in 2012, when the total monetary value of the top 10 private settlements was \$237 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.	\$45.9 million	Colgate Palmolive Co.
2.	\$35 million	CIGNA Corp.
3.	\$30 million	International Paper Co.
4.	\$22.5 million	Regions Financial Corp.
5.	\$5.1 million	Reser
6.	\$4.5 million	Advanta Corp.
7.	\$3.6 million	Coventry Health Care, Inc.
8.	\$3.5 million	United Community Banks, Inc.
9.	\$3 million	Flagstar Bancorp.
10.	\$2.5 million	AK Steel Corp.

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

Based on preliminary figures for the U.S. government's 2013 fiscal year, the EEOC filed 131 new lawsuits, including 21 nonsystemic class suits (i.e., those involving fewer than 20 employee-plaintiffs) and 21 systemic pattern or practice suits (i.e., those involving 20 or more employee-plaintiffs). In 2013, the EEOC resolved 209 pending lawsuits and secured a record-breaking \$372.1 million in settlements for allegedly injured victims of job bias, an

increase of \$6.7 million over the prior year and the largest-ever level in the Commission's history. The EEOC also received a total of 93,727 private sector charges of discrimination, which is approximately 6,000 fewer than the previous year (but still one of the highest totals in any year since 1964). In addition, the EEOC's docket of systemic pattern or practice cases grew to more than 23.4 percent of the Commission's caseload. Furthermore, the U.S. Department of Wage & Hour division reported that it recovered \$249,954,412 in back wages for 269,250 workers in fiscal year 2013, a new record for the government.

For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2013 totaled \$171.6 million. This was a significant decrease from 2012, as the top settlements in that year totaled \$262.78 million.

#	Amount	Defendant
1.	\$80 million	Sherwin-Williams
2.	\$35 million	Commonwealth of Puerto Rico
3.	\$34 million	Austin Capital Management
4.	\$8.1 million	San Diego United Port District
5.	\$4.8 million	National Grid USA
6.	\$3 million	Daniyal Enterprises, LLC
7.	\$2.5 million	Carrols Corp.
8.	\$2 million	Hutco Inc.
9.	\$1.2 million	Global Horizons, Inc.
10.	\$1 million	Bowlin Group LLC

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*, 2014 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. EPLiC

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