Webcast: Five Key Lessons to Learn from Today's Landscape of Complex Employment Litigation
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Sponsored by Morgan Lewis
Presenters: Grace Speights, Morgan Lewis, Washington, D.C. and Michael Burkhardt, Morgan Lewis, Philadelphia
Moderator: David A. Hitchens, Vice President-Human Resources Counsel, LandAmerica Financial Group Inc.

ASSOCIATION OF CORPORATE COUNSEL

Moderator: David A. Hitchens
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Operator: Just a reminder, today's call is being recorded.

Female: Please go ahead, David.

David Hitchens: Good afternoon everyone or good morning, depending on where you are today. My name is David Hitchens and I'm a Sub-Committee Chairman on the ACC's Employment and Labor Law Committee. I am Vice President and Human Resources Counsel for Land America Financial Group in Richmond, Virginia, and I am delighted to be the moderator for today's Webcast.

I first want to address a couple of logistical items, then I'll have the pleasure of introducing today's speakers. The title for today's Web cast is, Five Key Lessons to Learn from Today's Landscape of Complex Employment Litigation. You are able to ask questions on line during the Web cast.

If you have your screen open, you should have at the bottom left-hand corner a box that says, questions. Please type in your questions there and click send. You can enlarge that box if you need to. I'll see your questions as they are submitted and I'll try to get them to the speakers during the presentation today.

However, I know there is quite a bit to cover today and we have over 200 registered participants, so please understand that depending on the number of questions submitted, we may not have time to get to all of them. However, the presenters have agreed to provide answers to your questions which will be posted later on the committee Web site.

Another matter that's very important to the speakers and to the ACC and the Employment and Labor Law Committee is the evaluation form which you are asked to complete. In the middle of the left-hand side of your screen, you should see a link to Web cast evaluation.

We would very much appreciate you taking a few moments to complete that evaluation form at the end of today's presentation. They are reviewed and used to continually improve these Web casts so they can remain a superior resource available from the ACC. Please note this Web cast is being recorded and will be made available on the ACC Web site.

If you have technical difficulties during the session, please e-mail ACCWebcast@commpartners.com. Note that there are two M's in commpartners.

With that being said, please allow me to introduce our two presenters today and we'll go from there. I'm delighted to have both of them speak on today's topic and I'm sure you'll agree as we proceed.

Grace Speights is a partner in Morgan Lewis' labor and employment practice in Washington, D.C. and co-chairs the complex employment litigation practice. Grace's practice focuses on counseling and defending clients in connection with employment discrimination claims, primarily those involving class claims.

Grace has handled several employment discrimination class action cases and she has also defended several cases involving claims of discrimination of public accommodations.

Prior to joining the labor and employment law practice at Morgan Lewis, Grace was an associate and partner and in the firm's litigation practice where she focused on employment discrimination litigation, employee benefits litigation, and insurance coverage litigation. She has litigation and trial experience in federal courts nationwide and in the local courts in the District of Columbia.

Grace is a graduate of the University of Pennsylvania and the George Washington University and National Law Center.

Michael Burkhardt is also a partner in Morgan Lewis' labor and employment practice out of the Philadelphia office.

Michael's federal and state court trial and appellate litigation practice includes representation of employers and employment discrimination class actions and multi-plaintiff litigation as well as occupational safety and health matters, disability, sex, age, and race single plaintiff discrimination claims, wrongful discharge claims, non-compete matters, and various other labor related matters.

In addition, Michael handles administrative proceedings for the Occupational, Safety and Health Review Commission, the Equal Employment Opportunity Commission, the Pennsylvania Human Relations Commission, the Bureau of Worker's Compensation, state and local fair employment practice agencies, the National Labor Relations Board, and State Unemployment Compensation Tribunals.

He also handles grievance arbitrations. Michael is a graduate of St. Joseph's University and the University of Michigan Law School.

Welcome to you both and Grace, now I will turn it over to you.

Grace Speights: Thank you, David. Good afternoon or good morning depending on where you are. Today's presentation is broken down into two broad categories.

First, we're going to give you a quick snapshot of recent major employment discrimination class action decisions because those decisions will set the stage for the second part of the presentation, which is outlining briefly six lessons as opposed to five, learned from those cases regarding the dispense of these kinds of cases.

And as you will see on the presentation, those six lessons are the need to focus on the substance of claims of class representatives, the need obviously to focus on the broader class claims, the importance of statistical analysis in these cases, the importance of having counter experts as a defendant in these cases, the need to challenge plaintiff statistical and sociological experts, and then the importance of attacking plaintiffs' claims for damages under Rule 23B2.

As you will see, although our presentation today focuses largely on the legal issues related to these lessons, we will also make sure that we weave in some practical tips and lessons learned so that you are able to implement those hopefully at your companies.

Michael, do you want to talk about the recent cases?

Michael Burkhardt: Thanks Grace and I appreciate the opportunity to talk to everyone. What I'm going to try to do is just give a quick overview. We've cited the cases in the slide which should be up on the screen for your viewing and access to read in more detail, and then hopefully move quickly to the lessons that I think are drawn from these four in particular, these four cases.

The first lesson, not articulated on any slide, is it really matters where you're located with a particular class action because both the Jenkins and the Johnson & Johnson case, the first two listed, denied certification, one in the 11th Circuit, one in the 3rd Circuit, and the Costco and the Wal-Mart decision are both granting certification and are both in the 9th Circuit.

And the Dukes case, of course, just recently being affirmed by the 9th Circuit in a detailed opinion that everyone was anticipating, waiting for the 9th Circuit to reach its conclusion, and I do not think it's the end of the road for that case in terms of appellate issues going forward, and we'll talk about some of the impact that that case and its influence potentially on other jurisdictions.

With respect to each of these cases, they are all very – they're styled very similarly in terms of the nature of the allegations and I think it's important to start with that piece of information so everyone is kind of rounded in the types of cases we're talking about.

Primarily focused on pay and promotion, allegations and the centerpiece of the allegations in each of the cases is that potentially, the companies had excessively subjected decision-making processes that because of that excessive subjectivity, stereotyping adverse to whether it's race or gender, had a substantial and adverse effect on the opportunities for promotion and on compensation.

So in Wal-Mart, if you read the decision in detail, you will see the tremendous amount of focus on the allegations of excessive subjectivity, the expert testimony and support of the subjectivity and decision-making and the purported connection between that and the compensation disparities that existed and the statistical analysis presented by the plaintiff's expert.

And as we go through each of the slides and we're talking about the practical lessons that we've learned, we will reference back to each of these cases in terms of how strategic decisions in those cases or decisions by the court influenced how you might, going forward, employ tactics and strategies to defeat class certification if you are faced with one of these types of class actions.

So Grace, again, I think the best thing to do is to transition to the first slide and I can address the context of our first lesson about focusing on the substantive claims of the class representatives, focused on standing and typicality.

David Hitchens: Michael, we also have a question already about how these class action lessons translate into lessons for potential single employee/employment disputes, so as you both are going through today keeping sort of that in mind, how these things might impact not only class certification, but also single plaintiff claims.

Michael Burkhardt: It's a great question and it provides a nice transition to this – to the first slide, which is one of the principal points that we want the listeners of today's presentation to take from this is that strategically, at least based on these cases in our experience in handling these types of class actions, one of the principal things to focus attention on is attacking the plaintiffs, their individual substantive claim, the named plaintiffs in the case.

Whether it's one or it's 10, it's 15, whatever number you have in the case, what we have seen play out in several of these cases are the individual facts and the circumstances relating to both the substance of their claim, the viability of their claim, legal defenses, unique issues that impact them, has a dramatic effect on whether or not they are going to be able to represent a class.

And some of the lessons in that regard are obviously applicable to if they were simply a single plaintiff case because even if you defeat class certification, it's not a determination on the merits that the individual claim will live on and you will be approaching it from a perspective of summary judgment or however else we might normally deal with a single plaintiff case.

So I do think there are lots of lessons to be drawn from that, however, most of the points are specific to the strategies and tactics around defeating certification.

If you think about the impact of these cases on a corporation, they have a tremendous drain on resources and the possibility of actually litigating post-certification, a claim like Wal-Mart with 1.5 million women in it, or a claim like the (Belfal) case, which had a potential for 25,000 punitive class members to be in the case. It's a tremendous drain on resources and very costly pieces of litigation.

Grace Speights: Michael, going back to your point about our first lesson, which is focusing on the substantive claims of a class representative, I think a lot of people sitting out there may think, well, I mean, that's pretty basic. Why is that, you know, so novel?

But I think in handling these cases, what you will see is that because a case is a class case, when it first comes in, there is a tendency for people to focus more on the class issues because that's the bigger apple here that you're trying to get at, rather than dealing with the individual claims of the class representative.

But as Michael mentioned, it's crucial, however, to focus on those individuals who are seeking to represent the class pretty early on because if the class rep can't represent the class for, you know, reasons that, you know, we have outlined here, standing and typicality for example, class certification can be in fact denied. And that's exactly what happened in the Jenkins case.

Michael, I don't know if you want to talk about that just a little.

Michael Burkhardt: Yes. I think just to go back to the point that Grace just mentioned, I think it's a significant fact to focus on and that is, there's a tendency in these types of cases to instantaneously believe that you should bifurcate discovery and have class discovery and put to the back burner so-called merits discovery.

And in reality, I think that it works to the disadvantage of the employer to do that. Class discovery is usually the most time-consuming and costly of the process. You go through that anyway and by bifurcating, in some instances, you provide the plaintiffs with arguments to preclude you from fully exploring their individual claims.

So for example, you might have a debate about whether you should get mitigation evidence since it goes to the individual damages, not to per se class determination. The reality is every aspect of the individual named plaintiff's case goes to the question of typicality. Are they typical of the broad class that they seek to represent?

And part of that analysis is understanding fundamentally their claim, what unique aspects do they have to their claim and what unique legal defenses and issues do they face as hurdles to pursing the claim?

In the (Belfal) litigation, one of the principal issues upon which the court relied to defeat certification was that the individual named plaintiff who had a disparate impact claim, a very certifiable claim, had failed to timely file a class charge. And the court ultimately made a determination that that person did not have standing to pursue the disparate impact claim.

Otherwise, in a very certifiable issue, likely would have been certified and focusing on and taking significant discovery on that particular issue and then filing a summary judgment motion simultaneous with the briefing on class certification put us in a position to inform the court that this plaintiff did not have standing to pursue the claim, which is a threshold question that the court must resolve.

And when you think about typicality and what that means, typically that's an analysis of the named plaintiffs compared to the broader class. And depending on the jurisdiction, like in the Wal-Mart case, there was very little focus given to that issue.

The 9th Circuit took the view that it was a very simple low threshold to establish typicality, but in jurisdictions like the 3rd Circuit, the 11th Circuit and many others, like the 7th Circuit, the courts will engage in a much more detailed analysis and the more individual issues, legal and factual, that you can present about the named plaintiff's claims, will provide you with opportunities to distinguish them from the broader class.

If you think about that broader class, an example of that in the Belfal litigation is the class involved two types of employees, non-management versus management.

And in the – even within the broad category of non-management employees, there were large groups of employees that had very unique issues impacting them and we were able to use the individual facts of the named plaintiffs to draw both contrast among, and there were five named plaintiffs in that case, but also showing how they in fact were not typical of a large majority of the population of other non-management employees that they purported to represent.

On the slides, you see we tried to identify certain things that you want to take discovery on, you want to develop in the course of litigating these cases, unique promotion issues, discipline issues, different skills or position sets.

Many of these things are generic, but they are simply a checklist to apply when taking discovery of the individual cases and to identify as many of those unique issues as possible to distinguish them and put them in a silo or put them in a silo with a very defined small group of similarly situated people in comparison to what undoubtedly in most of these cases is a large population across the entire company.

Grace Speights: As another example, I mean, if a plaintiff is seeking to represent a class on let's say merit compensation increases, but you find from discovery and working with your expert that that plaintiff has received the highest merit increases, you know, in their unit or they have the highest compensation in their unit as compared to similarly situated non-protected folks.

Then that plaintiff's claims cannot be typical of someone else sitting out there in the class who also has a compensation claim because they in fact did not get a great merit compensation increase or they are on the lower end of that. And we saw that as well.

Michael Burkhardt: All right. I think although the courts typically reference typicality and commonality together, you have to think of commonality – if typicality is comparing the named plaintiff to the broad group, commonality is focused on the broad group to assess whether this population of people in the punitive class, however it's defined, do they have similar claims across that group?

And again, what we see is in a Wal-Mart context, the court articulated and applied a very low threshold standard which was simply, is there any single question that is common to this group?

And concluded that the question that was common was whether Wal-Mart had a broad corporate policy that had excessive subjectivity and that that had a disparate effect on the individual women in the punitive class because they earned less compensation across the company, according to the plaintiff's expert.

And there is a significant issue in the 9th Circuit compared to others about whether the court will ever engage in expert dueling, meaning will the court at class certification make any determination about the merits of the expert testimony as it affects class certification.

And we'll talk a little bit about in a later slide, but it's important to note that the 9th Circuit takes the view that you cannot engage in expert dueling and so it accepted the plaintiff's statistical expert analysis showing that there were compensation disparities across the company, across regions of the company.

And that was used as the lynch pen to say in conjunction with sociological expert testimony about excessive subjectivity and decision-making to say there's a common question for the group.

Now, contrast that with either the Belfal case or the Johnson & Johnson case, where the court did not accept that proposition, concluded that the plaintiffs had not established any causal link between excessive subjectivity and compensation disparities in part because the court also looked at the statistical analysis that was being used.

And one of the things that we try to do as a practical lesson when analyzing data in these cases, from the perspective of commonality, is to, just as I was referencing earlier, break down that population and try to analyze it in as many different ways as you can to determine whether the groups have different claims.

For example, in one of the cases, the expert took the population and said, let me look at salary increases for people who have been hired in the last five years and let me look at starting salaries for the population.

And the defendant's expert found there was no disparity whatsoever among people that were hired in the last five years, separately looking at folks that had been at the company for more than 10 years and seeing that before any class period, there was an existing disparity, but there was no difference in merit compensation year over year over year during the class period.

And think about what each of these cases is based upon. It is based upon the argument that there is a pattern and practice of discrimination at the company. That's the sort of centerpiece common question that's being articulated in each of these cases.

And that standard is that the company has as a standard operating procedure, race discrimination or gender discrimination, depending on the case.

Grace Speights: Michael, let's talk a little bit about the statistical analysis. You've talked about the use of statistics in one of the cases and although I think some people tend to think the statistical work is pretty daunting, it is key in these cases, so let's talk a little bit about that.

Michael Burkhardt: For each of these cases, the statistics plays a huge role because the court is looking for some basis upon which to say that this pattern of practice allegation or the excessive subjectivity causes harm allegation has some support in the data.

And so when I go back to that standard for a moment and think about what burden the plaintiffs ultimately have to show that it's the standard operating procedure of the company, you want to try to use your statistical analysis to poke as many holes in that hypothesis as possible.

You accomplish that at the same time as you accomplish demonstrating lack of commonality by looking at your population in different ways. And what I mean by that is go back to my example, you're analyzing people based on when they came to the company to see if there are compensation disparities.

Look at different compensation practices, starting salary, and assignment of starting salary versus merit increases. Looking at promotions look at whether you've got latter or technical type promotions within your company as some do, where there's not a specific opening versus competitive promotions.

In each case, what you're trying to do is identify groups of employees that might have unique and different issues which are not all common to the other. You are at the same time trying to poke holes in the fundamental theory being advanced by the plaintiffs, that is, that subjective decision-making causes disparities.

And what I mean by that is if you look at each of those practices, the plaintiff's expert will say the same subjectivity applies across the company. They're trying to say that subjectivity is everywhere and there's lack of oversight.

The more practices you can actually model, you can actually test where they have the same type of discretion and discretion gets a bad wrap in these cases, but it's really nothing more than judgment, and we all have to accept the fact that every day, managers have to exercise judgment to apply whatever policy you have.

Unless you're going to tell a manager this is what you're going to pay a person and there's no deviation from that, you're always going to have the exercise of judgment in decision-making. So discretion per se is not a bad thing.

It is an essential thing to the running of the business. What you want to try to show is by testing as many practices that have the same or more discretion or judgment built into them, there's no disparities.

So if there's discretion in the setting of starting salaries and you look at a group of employees hired in the last five years and there is no difference in starting salaries, it is an essential piece of evidence to say the theory isn't working. Discretion is not causing harm.

So we start with the supposition of trying to demonstrate differences among groups of employees, that same set of evidence helps to refute the notion that subjectivity is causing any kind of disparity and ultimately is used to defeat certification.

And the Johnson & Johnson opinion is a great example of it, because in that case, the court really rejected the plaintiff's hypothesis because it concluded that their expert had done nothing to link what was supposed to be excessive subjectivity to the alleged compensation disparities or promotion disparities that were found.

And they also concluded that there was no common practice that was applied to all of the various people across the many companies that were part of that broad class action. And that's a theme that you see in more and more of these cases where there has been enough of a record established demonstrating the differences among the groups.

Grace Speights: One thing, I mean, we talked about statistical analysis, I think if there's one practical tip that we can offer when you talk about this issue is that we don't recommend that people wait until they're hit with a class action to show or to find out what your statistics are going to tell you.

I mean, these are the types of things that we recommend that you be doing, you know, throughout your normal business in terms of looking at, you know, your compensation, looking at your promotion practices, and things of that nature.

And you want to make sure that you're taking a look at them in the same way that the plaintiff will take a look at this if you were to be hit with an employment class action.

Michael, do you want to talk a little bit about the preventive of analysis and what we would be doing?

Michael Burkhardt: Yes, and it's in the context of this statistical analysis slide in terms of the things to focus on. The reality is that in all companies, there is some kind of analysis that's going on.

People are always looking at data from a variety of perspectives, whether it's a one-off manager saying I want to look at some analysis from my organization or department, it's an HR organization trying to do a broader analysis of the group, whether it's gender, race, whatever, or affirmative action planning where you're doing compensation analysis specific to whatever affirmative action plans you have if you have them.

In each of those instances, the thing that's important to know is, look, there's some kind of methodology or purpose behind that analysis. It is not necessarily going to equate with the purpose of analysis in a class action and Grace's point is an essential one to being prepared for a class action.

It's not going to prevent you from having a class action if you analyze your data, but being prepared to address the situation by looking at your data, particularly if you've got a threatened class action or the potential for one because you have charges pending, et cetera, and understanding how that data looks, both from a defensive perspective, but equally as important, from a plaintiff's perspective.

And what do I mean by that? The two experts in the Wal-Mart case, (positive) completely different ways of looking at the data. Plaintiff's experts analyzed Wal-Mart by region and

overall for the whole company and presented a picture to the court that showed highly statistically significant differences in compensation adverse to women.

And basically saying to the court, there's no way this could exist but for gender discrimination. The court accepted that opinion and said, that's enough to establish that in conjunction with the subjective decision-making, there's a common corporate wide policy that is impacting women in an adverse way.

Now, that viewpoint, which contrasted with the defendant's expert, then came in and said, I'm analyzing the data by store because each store manager has the ability to decide what individual's compensation is going to be and/or has the ability and does apply that corporate policy to the individuals within a store.

There is a lot of logic to the argument. There is a tremendous amount of merit in modeling your analysis by decision makers, which were store managers, but it ultimately was discredited by the court as not being sufficient to defeat certification. In part, based on the notion that the 9th Circuit said, we're not going to analyze and compare experts at class certification.

But another important factor that influenced the court's decision, I think at least, and you have to look at the district court decision to really get to this, and that is that defendant's experts oftentimes are criticized for what is called disaggregating the data, and the argument is that an expert is taking an analysis and breaking it into as small parts as possible simply to defeat certification.

And the lesson to learn there is having a rational basis to analyze the data and testing the effect of it when you aggregate up to a larger level. So if I look at my populations I referenced earlier between those hired in the most recent five years versus the longer-term employees, and I'm testing different policies, setting a salary versus merit increase, ladder promotion or non-competitive promotion versus competitive promotion, they are definable policies and practices that you are modeling that are consistent with the way decisions are made and you have an opportunity to present a result that you can show to the court.

It's legitimate, but creates unique issues for each of those populations. There's an ((inaudible)) debate in all of these cases about whether you look at the data company wide or whether you look at it by department or business unit, and there's no guarantee in any jurisdiction that you'll convince a court of the right way to look at the data or to discredit a plaintiff's expert for looking at it on a broad basis.

What you want to be able to do is be prepared for that argument, know what your data looks through the prism of the plaintiff's lawyer because that will best prepare you for how to attack that and how to show why that is incorrect.

But it also identifies the risk, it identifies the potential that the plaintiffs will be able to successfully get a class certified because statistics play such a significant role in these cases. And if the plaintiffs can present a reasonable statistical analysis, even if it's company wide, even outside of the 9th Circuit, there is a potential for that type of analysis to be accepted.

One of the other significant cases we referenced in the materials is the Miles case or otherwise referred to as the IPO decision out of the 2nd Circuit, in which the 2nd Circuit kind of changed its path about how to analyze class certification and really concluded that it was the court's obligation to evaluate whether the plaintiffs had satisfied all the requirements of Rule 23 for certification.

And part of that included examining the expert testimony and making judgments about which testimony was legitimate and whether it satisfied the requirements.

So there are many jurisdictions and now the 2nd Circuit is included that allow you to engage in expert dueling, allow you to really attack the other side's expert analysis and challenge not just whether it is flawed, not whether you could win a ((inaudible)) motion to reach a conclusion that is inadmissible, but more importantly, to attack the analysis as not satisfying the requirements and not addressing whether there is commonality.

Any statistical expert could lump all the data together and find a statistical disparity, but if your expert can demonstrate how there are groups, organizations, business units within that data where there are no statistical disparities, and it's not just a function of breaking it into small parts, but there's a legitimate basis for how you organize the data, you will go a long way to defeating certification in the vast majority of jurisdictions.

And while I'd like to say that that's still a potential argument you could advance in the 9th Circuit, short of the Supreme Court taking the case, it's not – it's not a particularly strong argument and it's not one that you should hang your hat on.

So understanding that risk and where you have statistical disparities from the viewpoint of the plaintiffs is essential if you're in California, to knowing, what's your risk of having a class certified?

Grace Speights: In these cases, I think it's clear from this presentation that, you know, effectively knowing the cases of your named representatives or your plaintiffs who are seeking to represent the class and experts are probably two of the most important things in defending these cases.

And as Michael mentioned, I mean, the statistical experts are obviously people who are brought into these cases but we also see the sociological experts now in all of these cases. And one of our key lessons is making sure that you, you know, aggressively challenge both the statistical and sociological experts.

Michael, just spend a few minutes on how you go about challenging the statistical experts. Then I'll talk briefly about the sociological experts.

Michael Burkhardt: Well, as I – as I was detailing a little bit earlier about how you want to approach the statistical challenge, it is not solely related to identifying or finding some major flaw.

Anyone who has handled one of these cases or been involved in one of these cases will quickly realize, and if you read the four cases we identified in the employment context, you will realize that the same experts appear in all of these cases.

There's a small handful of plaintiff's experts and there's a small handful of defense experts, and in each instance, it is a rare situation that the expert engages in some kind of analysis that is so poor and so flawed that it would be kicked out. They're just too experienced and they've done this for too long for that to be the case.

It doesn't mean they don't make mistakes, but it's important not to rely too much on errors and mistakes and sloppiness as providing you a real strong basis to undermine an expert's analysis.

In the (Sedexil) litigation that occurred several years ago, and there were opinions written about certification in that context and really about the experts, the plaintiff's expert was severely criticized by the court for a lot of errors, for not understanding certain programming and types of analyses.

But at the end of the day, what the court knew to be the case because the plaintiff's expert came back and said it, and the defense had no opposition to it, is, well, I went and I corrected the mistakes and it doesn't change the result. There are still highly significant disparities.

And so if there's a difference between mistakes and errors and sloppiness and fundamental flaws, and contrast all of that with what I am trying to articulate as an approach to challenging the other expert, and that is showing a different legitimate view of the data to the court that demonstrates why there is no commonality among the group, or why the named plaintiffs are not typical by doing an analysis of their individual claim and providing statistical analysis.

One of the centerpieces of evidence in the BellSouth litigation that the court relied upon in its decision was an analysis of one of the named plaintiffs and showing how that particular named plaintiff who was promoted into a particular job had gotten the highest salary of anyone promoted in the year she was promoted and had gotten the second highest merit increase in the subsequent year.

There was simply no factual basis to assert that this person had suffered any kind of racial discrimination and certainly nothing to link it to a policy or a practice of the company that was common to the group.

And I think far too often, that type of simple analysis and in (digging) of the named plaintiff's claim and using that as part of your statistical approach is overlooked. It has a substantial effect in these cases in defeating certification.

Grace Speights: As Michael mentioned earlier, in this case, the plaintiffs routinely rely on expert opinion about stereotyping in an effort to satisfy Rule 23's commonality requirements.

And essentially what they argue is that where there is excessive subjectivity in employment practices and decisions are left largely to what is called the unchecked discretion of managers, subconscious stereotypes will seep into a manager's decision-making and inevitably result in workforce disparity.

The social scientists, they never quantify how much is too much subjectivity. This argument has the most chance of success when an employer has no or has very little written guidelines related to its important employment practice and simply delegates these decisions to managers who make decisions based on their own good judgment.

So I mean, a good prevention tool therefore is to make sure that your companies develop and implement guidelines that can be used or ought to be used by managers in making key employment decisions in, you know, hiring people, interviewing people, compensation decisions, how they go about evaluating people, promoting people, how they impose discipline.

And companies should also be monitoring those key decisions to make sure that the guidelines are in fact working and are effective. Having said that, if you are pulled into one of these cases despite your best efforts, it is important to challenge a social science expert's opinion.

We see that in some of these cases, the social sciences opinions will go unchecked, and what I mean by unchecked is that either defendants do not offer an expert to counter a social scientist being proffered by the plaintiff or do not put a lot of effort into challenging the opinion of the expert.

And we think that it's key to challenge the opinions of these experts and there are a number of ways of doing them. We don't have a lot of time to get into all of them, but one of the biggest things is that the sociological experts never are able to establish a causal link between the alleged subjectivity and the disparities or what they would call discrimination.

For example, you know, they will say, OK, you have excessive subjectivity in your, you know, compensation system, however, if you do the statistical analysis that Michael is talking about of your compensation system, you see no disparity.

So where's the causal link between the excessive subjectivity that's supposed to be in the policies and practices and the disparities?

Michael Burkhardt: I think also, following up on that point though, is even where there is a statistical disparity, as there was in what was presented in the Wal-Mart case and in others, the challenge is to demonstrate to the court that the plaintiffs haven't linked the two concepts together, the subjectivity is the cause for that disparity.

There might be a difference based on a particular view of the statistics, but the plaintiffs bear the burden of identifying and challenging a practice, some type of practice that is discriminatory and is causing the negative result. And that's really the heart of the Johnson & Johnson decision.

The court concluded that the plaintiff had not identified a practice that was causing the disparity. The mere assertion of subjectivity and simply broad, raw statistical disparities was not enough. Contrast that with Wal-Mart where the court established a much lower threshold for causation and accepted the fact that the plaintiff's expert says these disparities are due to racial discrimination.

The sociological expert says the reason why there's racial discrimination is because there's excessive subjectivity in the decision-making. The key theme for us in defending these cases is attack the sociological expert hard, present a contrary expert opinion and part of that involves both attacking the science that underlies these theories and the fact that they are – they have not and are not tested in an employment context.

They are based on very rudimentary studies of basic stereotyping, not employment situations where individuals have tons of information, have tons of interaction, which is supposed to break down the existence of stereotypes and avoid that and address the context of whether subjectivity is causing the disparity, not simply by challenging the sociological expert, but by presenting an alternative view of the data and testing a wide variety of practices where you can show that it is not subjectivity alone that is causing.

And you could even do it in context beyond compensation. You could pick your hiring practices. You could pick other types of things, assignment of training records or courses, movement into upper management or mentoring programs.

There are a lot of different practices or policies you could think of where you could look at the policy on paper and determine that it has the same type of discretion that is found in another policy that the plaintiff's expert is saying is bad, yet there is no disparity.

And the purpose of that is to provide as many avenues to say to the court, it's not subjectivity. It may be something else, but there is not subjectivity and it's not uniform because when you look at the same level of discretion in a lot of other areas, you don't find those types of disparities.

And the other thing that's a very practical and important lesson to learn is focusing significantly on the use of language and prepping witnesses who are being company representatives. One of the key facts I think in the original Wal-Mart was the court's reliance on deposition testimony of managers articulating how much discretion they had in making decisions.

And there's this constant tension where you're trying to show individual decision-making and decentralize decision-making in an effort to defeat certification compared to a situation where maybe there's less "individualized decision-making".

There's more oversight by the company, but there's less discretion. And the important lesson I think in prepping witnesses is to think about how you articulate what is undoubtedly true in all of these circumstances. There's always going to be the exercise of judgment, but that judgment is never made in a vacuum. It is not made without any guidance.

Almost every company has corporate policies on compensation or promotions or other things that provide guidance. They all have anti-discrimination policies. All of those things provide guidance and structure around decisions that are being made where managers have to exercise judgment.

There's nothing unlawful about having discretion. You couldn't run your business without it, but it's significant how that gets portrayed through testimony of witnesses and putting it in its proper context with the broad range of policies, structure, oversight, approvals at

different levels of management that undoubtedly exist, and it doesn't have to be some specialized oversight even if you're not doing some special (EBO) impact analysis.

It could be as simple as another manager needs to sign off on it. It all undercuts the notion that there's just complete subjectivity in decision-making which is causing discrimination.

Grace Speights: Yes, Michael, and that's a good point. I mean, as long as you can show that there is oversight within the company and that the company is doing some monitoring of these employment decisions, there's nothing wrong with discretion.

Michael Burkhardt: And I think that, you know, along the lines of one of the themes that we're trying to articulate as lessons to come from these cases is being in a defensive mode is not going to serve your interest well, meaning you have to accept at some level, even though technically speaking plaintiffs bear the burden, there is a practical burden that each defendant bears in these types of cases.

To come out and almost demonstrate to the court through sufficient evidence that certification is inappropriate and particularly in the context of the sociological expert in the statistical analysis, our tactical view is that you want to go out and try to affirmatively show that this alleged theory doesn't have support in the data, not just undermine the theory, not just undermine the statistical analysis as being flawed.

And sometimes you don't have it. Sometimes your data stinks and you have to accept certain realities that that may be the only argument you have.

But if you can develop, and this goes to issues of retaining a consulting expert and getting out in front of your data early, to understand it and on a privileged basis, explore ways to understand your populations, the data and the effect of policies on those populations, to in essence build your case that there's no commonality among all employees within the company that would support certification of a class action.

Grace Speights: OK. Let's talk about the last lesson learned and than I guess David can open it up for questions. And that is attacking – making sure that you attack plaintiff's claims for damages under Rule 23B2.

Michael Burkhardt: One of the – and there are two parts to certification in all these cases, the plaintiff needs to satisfy Rule 23A, which is (numerosity), typicality, commonality and adequacy of representation. And we've spent a lot of time on typicality and commonality because that's where most of these cases get decided.

The other sort of extraneous issues of adequacy of representation and (numerosity) are rarely issues that support the feeding certification in these – in these types of cases. The second part of the analysis is the plaintiffs must satisfy one of the requirements of Rule 23B and the plaintiff's bar significantly tried to get certification under Section 23B2 and the reason is because the burden is lower.

It is much easier to get certification under B2. Under 23B3, the plaintiffs need to establish that the common claims predominate over individual claims and that a class action is the

superior method to try the issues being presented to the court. That burden doesn't exist in 23B2.

All the plaintiffs need to show is that the company has acted in a manner common to the group for which injunctive relief would be appropriate. And the issue that has come up is a legal issue about which there is a lot of disagreement among the circuits and could very easily be one of the issues that get before the Supreme Court, in the Wal-Mart case or in other cases, is whether or not you can assert claims for compensatory and punitive damages under 23B2.

The argument being that if you inject those types of damages, then the primary relief will not be injunctive. All the case will be all focused on what will the damages be for the individuals which will dominate the discussion. And some courts and jurisdictions have found you cannot have a class under 23B2 if you are seeking compensatory and punitive damages.

An issue that Wal-Mart rejected and said that is not true and certified under B2, but in other jurisdictions where this is not a resolved question like still the 2nd Circuit and the 9th Circuit, what the courts have said is, we're going to assess the issue of whether injunctive relief is the primary form of relief such that certification under 23B2 is appropriate on a case-by-case basis.

And what the court is going to do is look at the nature of the claims being asserted, what is the intent of the plaintiffs, what are they articulating as their form of relief and what their primary focus is.

And so in addressing that type of question, you want to take aggressive discovery of the plaintiffs to explore those issues and explore the nature of the complaints that they are making, what damages do they want, would they be satisfied if they got no monetary damages.

And build a record from which you can argue that the named plaintiffs, whatever the circumstances, if they're former employees or if they articulate a lot of testimony about how they have been harmed and they need to be compensated, that you have arguments to the court to say, despite what it says in the pleading, the complaint, the reality is the record shows that the plaintiff's real interest is in getting compensation with money damages.

And if that is the case, then the plaintiff must satisfy the burden under 23B3 where you have a much greater opportunity to say, individual issues will predominant in this type of case because each person has to come in and show how they suffered, how they are entitled to compensatory damages and/or how they would be entitled to punitive damages.

And again, the 9th Circuit in Wal-Mart rejected that argument because they adopted a lot of cases that talks about how you can largely address those issues through formulaic, class-wide remedies, and most other jurisdictions do not accept that. And so it creates an argument at least to defeat certification by not satisfying one of those two requirements.

So it's important to, you know, that goes back to this issue of bifurcating discovery or not. You want to be able to take complete discovery of the plaintiffs because everything you gain from that discovery will help you at some level in trying to defeat certification.

David Hitchens: Michael, we've had a number of questions come in, in the last few minutes and we are coming to the end of our hour, so we may not get to all of them here on line, but we'll certainly try to answer them afterwards. But I wanted to pick out one of them to start with and see if you and Grace could comment on this issue.

And the question is, do you have any tips for designing a company's preventative analysis, statistical analysis? For example, ways to insure privilege, items to include or not include, and whether to do a statistical analysis versus a broader diversity audit.

So if you guys could comment on that, and that will probably take us close to the end of the hour, but if we have additional time, we will move on to another question.

Michael Burkhardt: I think the tips as at least a two-phased approach, the first part of the approach is to conduct a statistical analysis with the use of a consulting expert under privilege. And the important point to maintain the privilege is that you are engaging outside counsel with the help of an expert for the purpose of seeking legal advice around your risk or exposure for class litigation.

Statistical analysis that's done and provided to counsel is for the purpose of getting legal advice and therefore, is covered under the umbrella of the attorney/client privilege. If you do it in the context of a broader diversity audit, there's a harder argument to support that notion.

You get tied up in the business initiatives that might exist related to diversity and you could certainly do a diversity audit that Grace can talk about on a parallel track, but in terms of doing analysis, I would keep that as a separate privileged analysis in two phases.

One, where you look at it from the plaintiff perspective, you take that broad approach, you take that aggregated view, and secondarily, on a more defensive approach where you were including a lot of different variables in your analysis that might impact compensation differences, time in job, time in grade, really defining and insuring that you have functional job groups or job families so you are properly bucketing and comparing similarly situated people.

Looking at the data maybe by business unit or region or something else that has some legitimate basis to allow you to see what the effect is of differences based on a business unit.

Or if there's something that's driving it or doing an outlier analysis, so I'd be happy to provide more detail to that answer in terms of ideas and thoughts, but that's a basic tip in terms of how I think you approach a preventative analysis and do those two parts of your analysis.

Grace Speights: Well, I would just want to add two points to that. Even doing that, I always advise companies that if you aren't going into this process with the intent of making some type of –

I don't want to say correction, but moving forward, making some type of adjustments, I think you want to give good thought to whether or not you do this.

Because even though you take all of the steps to try to make these analyses privileged, you have to keep in mind that at some point, they may not be privileged and they may come before the court. And if you're not committed to actually taking some steps to correct problems, you may have an issue.

I think the Bowing case is a good example of this. They assumed or hoped that an analysis was going to be privileged and it wasn't. It eventually had to be turned over, so that's the first point.

The second point is you do want to be able to show, and it may not be – it's probably not the analysis that Michael is talking about, but that you do, do some type of statistical analysis because monitoring and doing statistical analysis is a good thing. It will help you in defending these cases.

Michael Burkhardt: Well, and the point about that is that if you think about those first two phases, what you do is you learn about the data, you learn about an appropriate way to analyze your data.

A and from that, you could develop a non-privileged statistical approach to creating oversight procedures for merit increases year over year in compensation, or for analyzing promotions over a certain period of time where you would take a look at the existence or non-existence of adverse impact and whether or not decisions need to be adjusted because of that or whether you need to get more information to support the decisions or processes that you're using.

So the first piece of it gives you the type of insight on a privileged basis and allows you to develop a potentially non-privileged process where you want to use affirmatively to show the company's oversight and review of these decisions.

David Hitchens: OK. Well, I think we are at the end of our hour. We do have a couple of other questions and Grace and Michael will do their best to answer those off line and they will be included as part of the transcript on the committee Web page. But that is going to conclude today's Web cast on behalf of the Employment Labor Law Committee, the ACC.

Let me thank our two speakers, Grace Speights and Michael Burkhardt from Morgan Lewis. For everyone attending today, please take a few minutes to complete the Web cast evaluation that I spoke about at the beginning and remember that the answers to your submitted questions will be posted on the committee Web page.

Thanks very much for participating.

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