204:Class Actions: 30 Developments in 90 Minutes

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Mr. Brennan began his legal career as a staff law clerk at the United States Court of Appeals for the Seventh Circuit followed by several years in New York at Kaye Scholer where he worked on securities and other commercial litigation. Mr. Brennan then returned to his native Chicago where he served as an assistant corporation counsel for the City of Chicago and gained extensive trial experience.

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Prior to joining USG, Ms. Martin was a partner at the Chicago litigation firm of Butler, Rubin, Saltarelli & Boyd. At Butler Rubin, Ms. Martin focused her practice on commercial litigation, including trials of products liability lawsuits, franchise and distributor disputes, and antitrust matters.

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Garry G. Mathiason is a senior shareholder of Littler Mendelson, resident in the San Francisco and San Jose offices. Mr. Mathiason has supervised the firm's attorneys on over 1,000 employment law litigation matters. He routinely designs defense strategies and evaluates class action and complex employment law litigation. Mr. Mathiason was recognized in the *National Law Journal's* summary of the 100 most influential attorneys in the U.S.

Mr. Mathiason originated several of the firm's preventive employment law programs, and he structures in-house employment law training programs. He has drafted model legislation on employment law, and has appeared frequently on national radio and television regarding the role of technology in the workplace. Mr. Mathiason has developed the firm's alternative dispute resolution program, and has participated with Professor Arthur Miller of Harvard in the development of a video-training program on ADR.

Mr. Mathiason is the chair of Littler's high technology group. He has developed unique legal services and products for some of the nation's largest technology employers and scores of "dot com" start-ups. He has authored a comprehensive guide on employment law for the *Digital Workplace.* Mr. Mathiason is the founder and chairman of the board of Employment Law Learning Technologies, Inc. (ELT). This company is at the center of the e-learning revolution. ELT takes employment law content and distributes it to managers and employees in the form of story-based training.

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AMERICAN CORPORATE COUNSEL ASSOCIATION

204 CLASS ACTIONS: 30 DEVELOPMENTS IN 90 MINUTES

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EMPLOYMENT CLASS ACTIONS: A TOOL IN TRANSITION

I. RECENT TRENDS & DEVELOPMENTS

A. INTRODUCTION

§ 241

Significant trends in class action litigation for 2003 include the rise in wage and hour litigation, increased activity by the EEOC, and closer court scrutiny of settlements. In 2000, the number of class actions filed in federal court under the Fair Labor Standards Act surpassed the number of Title VII class actions, and there is little doubt the trend has continued.[1] It is a fair conclusion that wage and hour class actions predominate in state courts as well. Those cases typically challenge the exemptions employers claim for a particular category of workers or the systematic failure to pay overtime to employees who concededly are subject to the overtime laws, perhaps by working them "off-the-clock."

As explained in subsequent sections, the high cost of litigating class actions, and the potential financial exposure, place great importance on the employer's ability to defeat class certification, a threshold issue

[1]BNA Daily Lab. Rep. (BNA) (Mar. 22, 2002).

in the case. However, courts continue to display great inconsistency in deciding this issue, both in terms of the evidence they consider and the conclusions they reach, making it difficult to predict the outcome in any particular case.

The alternative approaches taken by federal courts in wage and hour cases are summarized in *Mooney v. Aramco Services Co.*[2] One is referred to as "two-stage class certification." Courts following this procedure first consider whether to certify a class conditionally, and provide notice to potential class members that they may "opt-in," using "a fairly lenient standard." Second, if notice is given and discovery largely is complete, the court undertakes a more searching inquiry and decides whether to "decertify" the class.

The second approach adheres more closely to the requirements of Federal Rule of Civil Procedure 23 and subjects the request for classwide notice to the same rigorous requirements. Courts that follow this approach will usually insist that plaintiffs make a strong showing that they are similarly situated to members of the putative class.[3]

Recent cases continue this checkerboard pattern, with class certification decisions seemingly dependent as much on a court's judicial philosophy as the facts. *White v. Osmos* is a case from the Middle District of Alabama, in which the court refused to provide nationwide notice to a putative class of utility maintenance crewmen, who allegedly were worked "off the clock."[4] The court required a showing of "commonality" beyond the mere similarity of job duties and pay provisions.[5] Finding no such evidence in the record, it refused to certify the class.

Within six months of that decision, a court in the Northern District of Alabama granted the plaintiffs' motion for nationwide notice to 11,000 store managers in *Morgan v. Family Dollar Stores*.[6] Although the court conceded that there were differences in job duties and pay between the opt-ins and the named plaintiffs, whose managed stores differed in size, location, and sales volume, it certified the class, emphasizing the statute requires only that employees be similarly, not identically, situated.

Similar tensions exist within many state courts. For example, *Sav-On Drug Stores, Inc. v. Superior Court*, is a case challenging the exempt status of 1,400 store managers under California law.[7] The appellate court reversed the trial court's certification of the class, finding that plaintiffs failed to prove that common issues predominated over individualized questions of fact. Although the plaintiffs emphasized that store managers were subject to the same job descriptions, performance reviews, training programs, and compensation system, the critical inquiry at trial would be how each manager actually spent his or her workday. Because the court found no evidence that managers spent their time in standard or uniform ways, the court concluded the case was not triable on a classwide basis.[8] On July 17, 2002, the California Supreme Court granted review of the *Sav-On* decision. Thus, until the court rules, and perhaps afterwards, the standards for certifying California wage and hour class actions will be uncertain at best.

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[2] 54 F.3d 1207 (5th Cir. 1995).

[3] *Id.* at 1214.

[4] 204 F. Supp. 2d 1309 (M.D. Ala. 2002).

[5] *Id.* at 1314.

[6] Civ A. No. 01-C-0303-W (N.D. Ala., Nov. 7, 2002).

[7] 97 Cal. App. 4th 1070 (2002), *rev. granted*, 2002 Cal. LEXIS 4528 (2002).

[8] *Id.* at 1080-81.

B. EEOC CONTINUES ACTIVE PARTICIPATION IN CLASS ACTIONS

§ 242

During 2002, the EEOC actively continued to pursue class or representative actions, filing 109 such cases. Although this is below the 130 class actions the EEOC filed in 2001, they are a higher percentage of all EEOC cases, and account for nearly one-third of all EEOC litigation.[9]

The EEOC's Web site regularly publicizes its class actions. On January 2, 2003, it announced that it had filed suit on behalf of a class of East Indian workers that the EEOC alleges were recruited abroad, and then harassed and discriminated against by their Oklahoma employer.[10]

On December 23, 2002, the EEOC announced it had settled a classwide sexual harassment suit for $1.79 million against a beverage company based in Norwalk, Connecticut. That same month, the EEOC announced it had settled a class action age discrimination case, in connection with a reduction-in-force, against an aerospace company for $2.1 million.[11]

The EEOC also was active as an intervenor in class actions. In a group of sex discrimination class actions filed against Rent-A-Center, the EEOC intervened and opposed settlement in one case, contending that the settlement was grossly inadequate, and successfully intervened in another gender discrimination class action.[12]

Following *Amchem Products, Inc. v. Winston*, courts continue to insist on genuine compliance with the requirements of Rule 23, even in the case of settlement-only classes. Indeed, the *Rent-A-Center* cases cited above are a useful reminder that statements regarding class certification in settlement documents are not mere recitations, but may have the force of law. Rent-A-Center apparently found it advantageous to settle two pending class actions that were not yet certified, and therefore stipulated that the class formed for settlement purposes satisfied the elements of Rule 23. Subsequently, the company was faced with another class action, in *Wilfong*, in which it disputed that the plaintiffs met the requisites of Rule 23. As the court in *Wilfong* observed, "when the Defendant stipulated to commonality 'for settlement purposes' in the Western District, it stipulated to actual commonality, not some legal fiction for a limited purpose." Thus, the court found that Rent-A-Center was judicially estopped in *Wilfong* to contest this fact.[13]

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[9]Daily Lab. Rep. (BNA), Jan. 9, 2003.

[10]*Id.*

[11]*See* http://www.eeoc.gov.

[12]*Wilfong v. Rent-A-Center*, 87 Fair Emp. Prac. Cas. (BNA) 1094, 1096, 1104, n.8 (S.D. Ill 2001).

[13]*Id.* at 1103, n.7.

C. ATTORNEYS' FEES PROVISIONS IN CLASS ACTION SETTLEMENTS GET CLOSER SCRUTINY

§ 243

Courts also have taken a close look at the attorneys' fees included as part of a class settlement. Of particular concern are settlements that have the earmarks of collusion-where plaintiffs' attorneys agree to compromise the class claims at a bargain price in exchange for a hefty amount in fees.

Class settlements generally may provide for attorneys' fees in either of two ways. One approach is based on the "lodestar," which is derived by determining the actual hours worked on a case and valuing these at reasonable hourly rates.[14] This amount then may be adjusted up or down, depending upon other factors not subsumed within the lodestar calculation, such as the plaintiff's degree of success or lack thereof.

Alternatively, attorneys' fees may be awarded out of a "common fund" obtained by the class in settlement. Under this theory, the attorneys derive their fees from the beneficiaries of the lawsuit, the plaintiffs' class itself. Accordingly, the plaintiffs' attorneys may seek a percentage of the total recovery in the case.

However, as the Ninth Circuit held recently in *Staton v. The Boeing Company*, the fraction of the common fund allocated to attorneys may not to be negotiated between the parties, but rather must be determined by the court.[15] As the court explained: "When the ordinary procedure is not followed and instead the parties explicitly condition the merits settlement on a fee award justified on a common fund basis, the obvious risk arises that plaintiffs' lawyers will be induced to forego a fair settlement for their clients in order to gain a higher award of attorneys' fees." Therefore, settlements that do not base attorneys' fees on a lodestar calculation can expect to receive greater judicial scrutiny and may be disapproved.

In contrast to the close scrutiny courts give to settlements that purport to bind an entire class is the greater freedom parties enjoy in settling lawsuits prior to class certification, when it affects only the named plaintiff.[16] An example is provided by a recent Third Circuit opinion in *Colbert v. Dymarol, Inc.*[17] In that case, the defendant made an offer of judgment to the named plaintiffs under Federal Rule of Civil Procedure 68, *before a motion was filed for class certification.* The offer was for the maximum amount of statutory damages, including costs and attorneys' fees. The district court struck the offer of judgment, holding that it would bypass court approval of settlement. The Third Circuit reversed that decision.

The appellate court disapproved the district court's suggestion that Rule 68 does not apply in a class context, and further observed that there is no "class" before it is certified. Because an offer of complete relief extinguishes any "case or controversy," the Third Circuit held that this settlement offer deprived the district court of jurisdiction, mandating that the case be dismissed.

Although it may seem an effective tactic to settle with named plaintiffs one at a time, the *Colbert* court suggested that this would be an expensive strategy when faced with a large potential class - its costs easily

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[14]*Morales v. City of San Rafael*, 96 F.3d 359, 363 (5th Cir. 1996).

[15]No. 99-36086 (9th Cir. Nov. 26, 2002).

[16]Of course, in that case, the settlement will bind only the named plaintiff, but in some cases there may not be substitutes available to assume the lead of a "headless" class.

[17]No. 01-4397 (3d Cir. Aug. 28, 2002).

could exceed the cost of going to trial. Nevertheless, that would appear to be a decision best made on a case-by-case basis, considering settlement costs and the ease with which new plaintiffs can be found to head the class.

II. OVERVIEW OF CLASS ACTION LITIGATION

A. INTRODUCTION

§ 244

Class actions are a procedural device, intended to facilitate the fair and efficient adjudication of a dispute, that allows named plaintiffs to sue on behalf of themselves and other similarly situated but unnamed persons. Historically, class actions were permitted only in courts of equity, but they became widely available in the United States in 1938 with the promulgation of Rule 23 of the Federal Rules of Civil Procedure. Rule 23 is a procedural mechanism that governs litigation of most class actions in federal court. Suits brought by the Equal Employment Opportunity Commission (EEOC) are exempt from the requirements of Rule 23. Other federal class actions, such as those under the Fair Labor Standards Act, are governed by the statutory procedure set forth in the particular statute under which the lawsuit is brought. Many states have looked to Rule 23, and the case law developed under it, when adopting their own class action rules.

Class actions have been used effectively in numerous substantive legal areas, including antitrust, consumer fraud, products liability, government benefit entitlements, and mass torts. In employment law, class actions traditionally have been used to challenge employment discrimination - particularly in the areas of race and sex discrimination. However, with the potential for multi million-dollar judgments or settlements, and awards of attorneys' fees in addition, plaintiffs' attorneys are increasingly utilizing class actions to challenge a myriad of employment issues well beyond the traditional class claims of employment discrimination. Cases attacking employers' overtime and leave policies, as well as hostile work environment and Employee Retirement and Income Security Act (ERISA) actions, are being brought as class actions. Labor unions have become extremely adept at using class actions both as an organizing tactic and as a method of publicizing employee concerns.

A classic case from San Francisco shows how costly a class action lawsuit can be. In 1979, three women commenced a class action lawsuit against State Farm, alleging that the insurance company had refused to hire, and failed to promote, women as sales agents.[18] Six years later, after a nine-month bench trial on liability, a United States district court in San Francisco ruled that State Farm had systematically discriminated against qualified females in the recruitment, selection, and hiring process. Far from resolving the litigation, the court's decision sparked another six years of bitter arguments and negotiations between the parties about the best method of compensating the class. In 1991, twelve years after the suit was filed, State Farm agreed to pay $245 million to settle the case. The settlement represented the largest dollar figure ever in an employment discrimination suit and included not only $170 million in payments to the claimants, but an estimated $75 million in attorneys' fees and costs for plaintiffs' counsel.

[18] *Kraszewski v. State Farm Gen. Ins. Co.*, No. C-79-1261-TH, 1981 U.S. Dist. LEXIS 15825 (N.D. Cal. Sept. 9, 1981).

While private plaintiffs bring most cases, the EEOC also files class actions charging employers with unlawful employment discrimination.[19] First Asset Management (formerly Lew Lieberbaum & Co.), a New York-based investment banking and brokerage house, agreed to pay $1.75 million to a group of female and African-American former employees to settle a suit filed by the EEOC. At the time, the settlement was the largest ever obtained by the EEOC in New York. The EEOC's suit alleged that management at two of the company's locations created a sexually and racially hostile environment.[20]

The efforts of plaintiffs' attorneys, unions, and the EEOC to expand the boundaries of traditional employment class actions into new areas of employment law have garnered considerable publicity, as a new generation of class action litigation threatens the operation, and even the economic survival, of unwary employers. Employers should anticipate the increasing use of this potent weapon and the associated cost of defense, a cost that exists even when class actions are unsuccessful.

B. GENERAL NATURE OF CLASS ACTIONS

§ 245

A *class action* is a lawsuit brought by an individual or several individuals on behalf of a larger group (the class), where the size of the group is so large that joining all of its members in the lawsuit as individual plaintiffs would be procedurally impracticable. In addition to prosecuting their own claims, the named plaintiffs represent the interests of the absent class members. The court must determine whether to maintain the lawsuit as a class action, and if so, identify the group to be certified as the class.[21]

Rule 23 governs class actions brought under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Title VII), the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA). The rule sets forth four prerequisites for class certification and establishes three categories of lawsuits that are maintainable as class actions. Unnamed individuals who meet the class definition specified by the court automatically are members of the certified class. In certain cases certified under Rule 23, the court may send notice to the potential class members and give them an opportunity to "opt out" of the certified class. This opt-out procedure requires individuals who prefer to pursue their own actions individually to affirmatively notify the court that they wish to opt out of the class. Class action lawsuits brought by the EEOC, or in which the EEOC intervenes, are not subject to the requirements of Rule 23.[22]

Other employment statutes provide their own procedural mechanisms for class certification and class membership, including actions brought under the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Fair Labor Standards Act (FLSA). These statutes have an "opt in," rather

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[19]*See, e.g.*, Doris Hajewski, *Suit Accuses Target of Race Bias; EEOC Alleges Retailer's Practices Discriminated Against Black Job Applicants*, Milwaukee Journal Sentinel, Feb. 9, 2002, at 1A (EEOC filing putative class action discrimination lawsuit, claiming that retailer, Target Corporation, discriminated against African-Americans by not hiring them for entry-level management positions).

[20]*EEOC v. Lew Lieberbaum & Co.*, D.C.S. New York, No. 97-5166 (Apr. 8, 1998).

[21]Fed R. Civ. P. 23.

[22]*See, e.g., General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318 (1980); *In re Bemis Co.*, No. 01-8038, 2002 U.S. App. LEXIS 1007 (7th Cir. Jan. 11, 2002).

than an "opt out," procedure. Each individual who wishes to join the certified class must opt in by taking positive action to notify and convince the court that he or she is "similarly situated" to the named plaintiffs and should be included in the class.

Once a case is certified as a class action, the court assumes a heightened role in managing and monitoring the prosecution of the lawsuit to ensure that the absent class members' interests are protected. The primary reason for this heightened scrutiny is that a judgment in a class action, whether favorable or not, will be binding on all class members. Thus, once a class is certified, any proposed settlements, compromises, or dismissals must be approved by the court, and as a general rule, the court must give notice of its decisions to all the members of the class.[23]

Requirements for Class Certification under Rule 23(a)

§ 245.1

Under Rule 23(a), an action may be brought by representative parties on behalf of a class only if four requirements are met: numerosity, commonality, typicality, and adequacy of representation.

Numerosity

Numerosity requires that the proposed class size be so "numerous that joinder of all members is impracticable."[24] Determining whether joinder is impracticable depends not only on the number of putative class members, but also on such factors as the nature of the action, the size of the individual claims, class members' financial resources, ability of the members to institute individual suits, and the geographical location of the class members.[25] Thus, there is no specified minimum number of class members that will satisfy this prerequisite. The numerosity requirement generally has been met in cases where there are more than fifty putative class members. On the other hand, a putative class consisting of over 125 members has failed the numerosity requirement.[26] However, certification has been granted in cases where fewer than thirty putative class members exist.[27]

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[23]FED. R. CIV. P. 23(e).

[24]Fed. R. Civ. P. 23(a)(1).

[25]*See, e.g., Paxton v. Union Nat'l Bank*, 688 F. 2d 552, 559-60 (8th Cir. 1982) (listing factors to consider); *Robidoux v. Celani*, 987 F. 2d 931, 936 (2d Cir. 1993) (same); *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (considering geographic area); *Dirks v. Clayton Brokerage Co. of St. Louis Inc.*, 105 F.R.D. 125, 131 (D.C. Minn. 1985) (considering size of each individual's claim for damages).

[26]*See, e.g., Monahan v. City of Wilmington*, No. 00-505-JJF, 2001 U.S. Dist. LEXIS 10554 (D. Del. July 23, 2001) (finding that numerosity element was not satisfied where all 126 members of the class were identifiable, all lived in the same city, all but 8 had filed charges with the EEOC).

[27]*See, e.g., Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982) (citing cases certifying classes of sixteen and seventeen members); *Tietz v. Bowen*, 695 F. Supp. 441 (N.D. Cal. 1987), *aff'd*, 892 F.2d 1046 (9th Cir. 1990) (ADEA class action certified for class of twenty-seven retirees); *Kohl v. Ass'n of Trial Lawyers of Am.*, 183 F.R.D. 475, 483-84 (D. Md. 1998) (certifying a class of approximately 25 individuals).

Although the pleadings in the case must establish more than a mere allegation of numerosity, a class representative may satisfy the numerosity requirement even if he or she cannot plead with any certainty the number of putative class members.[28] Named plaintiffs may seek to represent not only existing, identifiable employees, but also unnamed past and/ or future employees who may benefit from the relief sought by the named plaintiffs. Class actions can also be brought on behalf of unsuccessful applicants for employment, as well as those who claim that they were deterred from applying.

Commonality

Commonality requires that there be "questions of law or fact common to the class."[29] These common issues must be such that "the resolution of them will advance the litigation."[30] This prerequisite, however, does not require the plaintiff to establish commonality with respect to every question of law or fact raised in the litigation.[31] The commonality requirement is satisfied where a pattern of discrimination is alleged, or a standardized employment practice or policy is challenged.[32]

Discrimination claims based on retaliation or disparate treatment tend to be factually distinct and thus may be inappropriate for class treatment.[33] Claims under the ADA generally are inappropriate for class action treatment because a court must make a separate and highly individualized assessment, generally based on medical information, as to whether a putative class member satisfies the ADA's definition of disability.[34] Class actions under the ADA may be certified, however, when employees challenge a policy and the issues involved do not turn on whether putative class members are "disabled" under the statute.[35]

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[28]*Bremiller v. Cleveland Psychiatric Inst.*, 898 F. Supp. 572 (N.D. Ohio 1995). *But see McCree v. Sam's Club*, 159 F.R.D. 572 (M.D. Ala. 1995) (class not certified when representative could not identify more than fifteen class members).

[29]Fed. R. Civ. P. 23(a)(2).

[30]*Sprague v. GM Corp.*, 133 F.3d 388, 397 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998).

[31]*See, e.g., Harris v. General Dev. Corp.*, 127 F.R.D. 655 (N.D. Ill. 1989).

[32]*See, e.g.*, *Martinez v. Bechtel Corp.*, No. C-72-1513-SW, 1975 U.S. Dist. LEXIS 15226 (N.D. Cal. Nov. 18, 1975); *Butler v. Home Depot, Inc.*, No. C-94-4335-SI, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. Jan. 24, 1996) (holding that female employees satisfied the commonality requirement where they challenged Home Depot's alleged uniform personnel policies as discriminatory and relied upon statistical evidence of discrimination common to the class as a whole).

[33]*Allen v. City of Chicago*, 828 F. Supp. 543 (N.D. Ill. 1993). *But see Binion v. Metropolitan Pier & Exposition Auth.*, 163 F.R.D. 517 (N.D. Ill. 1995) (granting class certification in an action challenging discriminatory discipline policy, even though the facts of each employee's discipline varied widely).

[34]*Davoll v. Webb*, 160 F.R.D. 142 (D. Colo. 1995), *aff'd* 194 F.3d 1116 (10th Cir. 1999); *see also Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994) (denying certification to class of disabled employees under the Rehabilitation Act).

[35]*See Hendricks-Robinson v. Excel Corp.*, 164 F.R.D. 667 (C.D. Ill. 1996) (reversing earlier court order denying certification when claims were no longer dependent upon determination of disability).

Typicality

Typicality requires that the "claims or defenses of the representative parties" be "typical of the claims or defenses of the class."[36] This prerequisite is similar to the commonality requirement, but focuses more on the named representatives than on the putative class members. The typicality requirement is satisfied if class representatives "possess the same interest and suffer the same injury" as the class members.[37] A class representative's claims need not be factually identical to those of the putative class.[38] The claims must, however, "arise out of the same remedial and legal theory."[39] A court refused to certify a class after two lawsuits had already been filed against the employer by potential class members. The court found that the previously filed suits rendered the putative class representatives' claims atypical.[40]

Adequacy of Representation

Adequacy of representation requires a determination that "the representative parties will fairly and adequately protect the interests of the class."[41] This prerequisite is intended to protect the interests of the putative class, who will be bound by the final judgment. The adequacy of representation is evaluated by looking at two factors: (1) the absence of antagonistic interests between the class representatives and members of the putative class and (2) the assurance of vigorous prosecution through competent counsel.[42] Thus, a court may refuse to certify a class if the named representatives may have competed with each other, or members of the rest of the class, for a position or promotion.[43] One court found that the decision of the named plaintiffs to waive claims for compensatory damages so that the action could be certified under Rule 23(b)(2) rendered the named plaintiffs inadequate representatives because a final judgment in the suit could bar class members from pursuing claims for compensatory damages.[44]

In reaching a determination regarding vigorous prosecution on behalf of the class, courts consider counsel's competency, experience in class litigation, and experience in the substantive area of law at issue.[45]

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[36]Fed. R. Civ. P. 23(a)(3).

[37]*East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

[38]*Wagner v. NutraSweet Co.*, 95 F.3d 527 (7th Cir. 1996) (typicality determined by reference to employer's actions, not by particularized defenses employer might have against certain class members).

[39]*Wofford v. Safeway Stores, Inc.*, 18 Fair Empl. Prac. Cas. (BNA) 1645, 1666, 78 F.R.D. 460 (N.D. Cal. 1978). *See, e.g., General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

[40]*Lumpkin v. E.I. du Pont De Nemours & Co.*, 161 F.R.D. 480 (M.D. Ga. 1995).

[41]Fed. R. Civ. P. 23(a)(4).

[42]*See, e.g., Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978).

[43]*Allen v. City of Chicago*, 828 F. Supp. 543 (N.D. Ill. 1993). *But see Wilkerson v. Martin Marietta Corp.*, 875 F. Supp. 1456 (D. Colo. 1995) (class certified although oldest people in class competed with youngest people in class for jobs during layoff).

[44]*See Zachery v. Texaco Exploration and Prod., Inc.*, 185 F.R.D. 230, 244 (W.D. Tex. 1999).

[45]*See, e.g., General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (competency of counsel may be judicially noticed); *Lamphere v. Brown Univ.*, 71 F.R.D. 641 (D.R.I. 1976).

Despite the fairly relaxed standard for establishing the competency of class counsel, few plaintiffs' law firms take on class action litigation because of the costs and time required to successfully prosecute a class action lawsuit. Firms that regularly handle class action litigation are highly selective in their choice of cases, handle only a limited number of cases at one time, and tend to fund new cases with proceeds from prior settlements. Because of this reality, class action lawsuits are often well funded and prosecuted by experienced class action firms.

Categories of Class Action Lawsuits under Rule 23(b)

§ 245.2

In addition to satisfying the four requirements of Rule 23(a), an action must qualify under one of three categories listed in Rule 23(b) to be certified as a class action.

Rule 23(b)(1) provides for class certification where multiple suits would create a risk of:

(a) inconsistent adjudications which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudication that could be dispositive of the interests of the class members or could substantially impair the class members' ability to protect their interests.[46]

Lawsuits challenging standardized employment policies or benefit practices are prime candidates for certification under Rule 23(b)(1)(A).[47] Actions involving a limited fund or breach of fiduciary duties are the most common type of employment class action brought under Rule 23 (b)(1)(B).[48]

Rule 23(b)(2) provides for class certification where 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."[49] The typical Rule 23(b)(2) class action is a civil rights action seeking broad declaratory or injunctive relief for a large class of individuals.[50] Thus, Title VII class actions alleging unlawful employment policies or practices most often

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[46]Fed. R. Civ. P. 23(b)(1)(A)-(B).

[47]*See, e.g., Piazza v. EBSCO Indus., Inc.,* 273 F.3d 1341 (11th Cir. 2001) (class certification granted under Rule 23(b)(1)(A) in ERISA breach of fiduciary duty action to avoid possibility of inconsistent adjudications); *National Treasury Employees Union v. Reagan,* 509 F. Supp. 1337 (D.D.C. 1981) (class certification granted under Rule 23(b)(1)(A) where possibility of inconsistent adjudications would make federal employment policy ineffective).

[48]*See, e.g., Banyai v. Mazur,* No. 00-Civ-9806, 2002 U.S. Dist. LEXIS 207 (S.D.N.Y. Jan. 8, 2002) (certifying class action brought for breach of fiduciary duty by a fund participant and a fund beneficiary because any relief would inure to the fund); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.,* 140 F.R.D. 474 (D.C. Ga. 1991) (certifying class of beneficiaries of an employee welfare benefits plan covered by ERISA under Rule 23(b)(1)(B) because prosecution of individual ERISA suits would substantially impair or impede absent beneficiary's abilities to protect their interests).

[49]FED. R. CIV. P. 23(b)(2).

[50]*See, e.g.,* RULES ADVISORY COMM. NOTES TO 1966 AMEND. TO FED. R. CIV. P. 23, 39 F.R.D. 69, 119 (1966).

are certified under Rule 23(b)(2).[51] In these cases, courts have the authority to impose hiring or promotion quotas to remedy past discrimination.[52]

Rule 23(b)(3) requires that *common issues of law and fact* predominate over individualized issues and that a class action be the superior method of resolving claims.[53] This rule "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[54] To defeat certification under Rule 23(b)(3), employers may argue that the need for individualized determination of liability makes class certification inappropriate.[55] Examples of employment class actions certified under Rule 23(b)(3) include lawsuits challenging changes to retiree benefits,[56] and actions seeking recovery for violations of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. section 1801 *et seq.*[57]

When a court certifies a class action under Rule 23(b)(3), the court is required to provide notice to the class members that: (1) they may opt out of the class; (2) the judgment will be binding on them if they do not opt out; and (3) if they choose not to opt out, they may enter an appearance through counsel.[58] Such notice is not required in actions certified under Rule 23(b)(1) or (b)(2), as class members do not have an opportunity to opt out. However, in all Rule 23 class actions the court must give notice to the absent class members of proposed dismissals or settlements.[59]

Traditionally, employment discrimination class actions were certified under Rule 23(b)(2) because they were limited to claims for equitable relief, such as back pay and reinstatement. With the passage of the Civil Rights Act of 1991, plaintiffs became entitled to recover compensatory and punitive damages in intentional discrimination cases and also could have a trial by jury. Courts then began to question the applicability of Rule 23(b)(2) in intentional discrimination actions seeking non-equitable relief, on the basis that monetary damages might predominate over injunctive relief.

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[51]*See, e.g., Waldrip v. Motorola, Inc.*, 85 F.R.D. 349 (N.D. Ga. 1980) (class action challenging maternity leave policy); *Bullick v. City of Philadelphia*, 110 F.R.D. 518 (E.D. Pa. 1986) (class action challenging race discrimination in hiring).

[52]*See, e.g., Davis v. City of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990) (requiring the hiring of women and minorities in percentages equal to their representation in the labor market); *United States v. Paradise*, 480 U.S. 149 (1987) (requiring that 50% of all employees promoted be black).

[53]Fed. R. Civ. P. 23(b)(3).

[54]RULES ADVISORY COMM. NOTES TO 1966 AMEND. TO FED. R. CIV. P. 23(b)(3).

[55]*See, e.g., Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997) (court suggesting, without deciding, that motel employees' nationwide class claims for retaliation and hostile work environment based on Motel 6's alleged policy of requiring them to deny rooms to nonwhites might involve predominantly individualized issues).

[56]*See, e.g., Thonen v. McNeil-Akron, Inc.*, 661 F. Supp. 1271 (N.D. Ohio 1986).

[57]*See, e.g., Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281 (W.D. Mich. 2001); *Ramirez v. DeCoster*, 203 F.R.D. 30 (D. Me. 2001).

[58]Fed. R. Civ. P. 23(c)(2).

[59]Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

In the seminal case addressing these issues, *Allison v. Citgo Petroleum Corp.*,[60] the Fifth Circuit refused to certify a class of African-American employees who challenged their employer's hiring, promotion, compensation and training policies as being racially discriminatory under disparate treatment and disparate impact theories. The plaintiffs sought every available form of injunctive, declaratory, and monetary relief. The court recognized that aspects of the case would have qualified for class certification if they had been filed prior to the passage of the Civil Rights Act of 1991. However, in light of the plaintiffs' request for compensatory and punitive damages, the court refused to certify the class under Rule 23(b)(2). The court reasoned that because the request for monetary relief was not incidental to, but rather predominated over, the requested injunctive and declaratory relief, the case could not be certified under rule 23(b)(2). The court also refused to certify a "hybrid" class action, which would have certified the claims for compensatory and punitive damages under Rule 23(b)(3), and the remaining claims under Rule 23(b)(2). Rejecting this "hybrid" structure, the court opined that the individualized proof required to recover compensatory and punitive damages, combined with trying the case to a jury, make class certification inappropriate under Rule 23(b)(3).

Following *Allison,* most courts find that certification under Rule 23(b)(2) is appropriate only when monetary relief is incidental to equitable relief.[61]

However, at least one circuit court and a few district courts have rejected *Allison's* bright-line "incidental damages" approach in assessing Rule 23(b)(2) in favor of an ad hoc balancing approach.[62] Under the ad hoc balancing approach, certification is assessed in light of the relative importance of the remedies sought, given all of the facts of the case.[63] To certify a class under Rule 23(b)(2), where the class seeks compensatory or punitive damages, a district court must at a minimum satisfy itself of the following: (1) reasonable plaintiffs would bring the suit for injunctive relief even in the absence of possible monetary recovery; and (2) the injunctive relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.[64]

Plaintiffs have also responded to *Allison* by seeking compensatory and punitive damages for the named plaintiffs but not for the class members, or by dropping the claim for monetary damages altogether. Although this tactic resulted in class certification in *McLain v. Lufkin Indus., Inc.*,[65] the plaintiffs in *Zachery v. Texaco Exploration and Production, Inc.*,[66] did not succeed with this tactic. Indeed, the court in *Zachery* stated that it was very concerned with the named plaintiffs' decision to drop the claim for

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[60]151 F.3d 402 (5th Cir. 1998).

[61]*See, e.g., Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000); *Lemon v. International Union Operating Eng'rs, Loc. No. 139*, 216 F.3d 577 (7th Cir. 2000); *Butler v. Sterling, Inc.*, No. 98-3223, 2000 U.S. App. LEXIS 6419 (6th Cir. Mar. 31, 2000); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999); *Miller v. Hygrade Food Prod. Corp.*, 198 F.R.D. 638 (E.D. Pa. 2001); *Burrell v. Crown Central Petroleum, Inc.*, 197 F.R.D. 284 (E.D. Tex. 2000); *Adams v. Henderson*, 197 F.R.D. 162 (D. Md. 2000); *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645 (M.D. Ala. 1999).

[62]*See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001); *see also Taylor v. District of Columbia Water & Sewer Authority*, No. 01-00561, 2002 U.S. Dist. LEXIS 51 (D.D.C. Jan. 2, 2002) (citing *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997)).

[63]*Robinson*, 267 F.3d at 164.

[64]*Robinson*, 267 F.3d at 164; *see also Beck v. The Boeing Co.*, 203 F.R.D. 459, 465-66 (W.D. Wash. 2001).

[65]187 F.R.D. 267 (E.D. Tex. 1999).

[66]185 F.R.D. 230 (W.D. Tex. 1999).

damages in order to maintain a class action because of the potential binding effect of any judgment on the absent class members.

Although most courts continue to follow *Allison's* Rule 23(b)(2) analysis, some courts have been more receptive to certification. In *Jefferson v. Ingersoll Int'l Inc.*, the Seventh Circuit adopted *Allison's* rationale with respect to the problem of certifying classes that seek compensatory and punitive damages under Rule 23(b)(2).[67] The court suggested alternatives to class certification in cases where compensatory and punitive damages are sought: (1) hybrid certification, certifying the injunctive aspects under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3); or (2) certification under Rule 23(b)(2), but treating the class as if it were certified under Rule 23(b)(3) by giving the class members notice and opportunity to opt out.

Since the *Jefferson* decision, some courts have followed its suggested procedure of certifying the equitable claims under Rule 23(b)(2) and the monetary claims under Rule 23(b)(3).[68]

Other courts have followed the other procedure set forth in *Jefferson* by certifying the case under Rule 23(b)(2), but treating the action as though it were certified under Rule 23(b)(3) by extending the class members the procedural safeguards of personal notice and an opportunity to opt out.[69]

Recovery of Attorneys' Fees in Class Actions

§ 245.3

One reason for the continued interest in class action lawsuits by the plaintiffs' bar is that such suits bring with them the possibility of significant attorneys' fee awards even if each class member recovers very little. Indeed, fee awards often represent a considerable percentage of a total settlement. In the *State Farm* case, State Farm agreed to pay approximately $75 million to plaintiffs in attorneys' fees, a sum that totaled 41% of the amount received by the individual class claimants. In contrast to plaintiffs, prevailing employers are entitled to attorneys' fees under Title VII only when a class action is "meritless, frivolous, or vexatious."[70]

Prevailing plaintiffs may recover attorneys' fees under Title VII and other discrimination statutes. In fact, in most employment discrimination actions, plaintiffs are entitled to attorneys' fees if they prevail on any significant issue in the litigation. Attorneys may recover for time spent on successful claims, unsuccessful claims that are legally or factually related to the successful claims, and for time spent on the

[67] 195 F.3d 894, 897-98 (7th Cir. 1999).

[68] *See, e.g., McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267 (E.D. Tex. 1999); *Lemon v. Int'l Union Operating Eng'rs, Loc. No. 139*, 216 F.3d 577 (7th Cir. 2000) (district court could proceed with Title VII case by using divided certification); *Waldrip v. Motorola, Inc.*, 85 F.R.D. 349 (N.D. Ga. 1980) (challenge to mandatory maternity leave policy certified under Rule 23(b)(2), while claims for back pay certified under Rule 23(b)(3)); *Greenspan v. Automobile Club of Mich*, 495 F. Supp. 1021 (E.D. Mich. 1976) (claims for declaratory and injunctive relief certified under Rule 23(b)(2), claims for reinstatement and back pay certified under Rule 23(b)(3)); *cf. Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) (holding that district court abused its discretion by not certifying the liability stage of a pattern-or-practice disparate treatment claim under rule 23(b)(2)).

[69] *See e.g., Robinson v. Sears, Roebuck and Co.*, 111 F. Supp. 2d 1101 (E.D. Ark. 2000); *see also Lemon v. International Union Operating Eng'rs, Loc. No. 139*, 216 F.3d 577 (7th Cir. 2000).

[70] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

fee petition. Class members even may be awarded attorneys' fees if they fail to recover monetary damages in the underlying action, so long as they secured some judicial relief such as an injunction.[71]

Until May 2001, an attractive feature of class actions to plaintiffs' attorneys was the fact that courts had the discretion to award attorneys' fees if the class action resulted in a change of policy or a voluntary change in the defendant's conduct, under the so-called "catalyst theory." However, the United States Supreme Court rejected the rationale that attorneys' fees may be awarded under "catalyst theory," reasoning that "[a] voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to classify such plaintiffs as prevailing parties.[72] Thus, plaintiffs must receive some form of judicial relief prior to receiving attorneys' fees.

In determining the fees to be awarded, courts generally multiply all hours reasonably spent by a reasonable hourly rate to reach a figure known as the *lodestar*.[73] Calculations of reasonable time expended may include attorney time and time spent by law clerks, paralegals, and data processors. A *reasonable hourly rate* is based on the relevant legal market and not on the actual cost of the services.[74]

A court has the discretion to adjust the lodestar amount upward or downward to reach a reasonable fee under the particular circumstances. Lodestar amounts may be adjusted upward, by use of a *multiplier*, for a variety of reasons including: the nature of the litigation, novelty of the case presented, difficulty of questions involved, skill displayed by the attorneys, success or failure of attorney's efforts, and the extent to which the class action precluded other employment by class counsel.[75] Depending upon the circumstances of the case, it is not uncommon for class counsel to receive attorneys' fee awards with multipliers between 1.0 and 2.0.[76] In *State Farm*, class counsels' lodestar amount was enhanced by a multiplier of 1.25, resulting in an attorneys' fee award of $75 million. These large fee awards are a direct result of the complex nature of class action litigation.

Traditionally, courts could adjust the lodestar based on the contingent nature of the case. However, in 1992, the United States Supreme Court determined that *enhancement for contingency* is not permitted under fee-shifting statutes.[77] Employers should be aware that some states, such as California, still recognize contingency as a reason to enhance a lodestar amount.

The complexity of issues, the breadth of discovery, the bifurcated nature of litigation, and the significant amount of time and resources required to pursue class action litigation greatly increase the lodestar

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[71]*See, e.g., Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971) (named plaintiffs entitled to attorneys' fee award despite court's denial of back pay in Title VII discrimination case, where they secured extensive injunctive relief).

[72]*See Buchannon Bd. and Care Home, Inc. v. Qwest Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001).

[73]*Hensley v. Eckerhart*, 461 U.S. 424 (1983).

[74]*Blum v. Stenson*, 465 U.S. 886, 897 (1984).

[75]*See, e.g., Johnson v. Georgia Highway Express Co.*, 488 F.2d 714, 717-719 (5th Cir. 1974), *abrogated by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

[76]*See, e.g., White v. The Employee Retirement Plan of Amoco Corp. and Participating Cos.*, No. 96-C-4298, 2001 U.S. Dist. Lexis 16380 (N.D. Ill. Oct. 10, 2001) (applying multiplier of 1.3 in ERISA action which plaintiffs settled prior to appeal after having lost summary judgment).

[77]*City of Burlington v. Dague*, 505 U.S. 557 (1992).

amount of an attorneys' fee award. In cases such as *State Farm*, where the court augments the lodestar with a multiplier, the resulting attorneys' fee award can be enormous.

Plaintiffs' attorneys who settle class actions also may claim attorneys' fees based on a percentage of the "common fund" obtained on behalf of the class. However, the Ninth Circuit has ruled that if the percentage amount is not based upon objective measures of the attorneys' contributions, the percentage must be determined by the court, not the litigants.[78]

Settling Class Action Cases[79]

§ 245.4

Regardless of whether a class has been certified or not, any dismissal of class claims, including a settlement, must be approved by the court.[80] However, if a court has denied class certification, at least one court has held that court approval along with notice to potential class members, is not required.[81]

Pre-Class Certification Settlements

Before a class is certified (or before a class certification motion is heard), the parties can agree to settle on an individual or class basis. However, any settlement must be approved by the court and, in some cases, notice must be provided to all absent class members.[82] Since the late 1980's and with the passage of the Civil Rights Act of 1991, an emphasis has been placed upon broadly distributing notice of class action settlement.[83]

Individual Settlements: Settlement with named plaintiff(s) is most readily accomplished just after the lawsuit has been filed and/or little or no publicity exists. Generally, the possibility of settlement at this stage is feasible because absent class members will not have relied on the named plaintiff(s) to litigate the merits of the claims.[84] Generally, a court will approve individual settlements if it is satisfied that absent class members will not otherwise be prejudiced by dismissal of the action, and that the plaintiff(s), with whom the settlement is reached, and class counsel have not privately benefited at the expense of the class.

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[78]*Staton v. The Boeing Co.*, No. 99-36086 (9th Cir. Nov. 26, 2002).

[79]Caution: The information in this chapter pertaining to settlement of class actions is merely a synopsis of information that may be applicable in the settlement context and is not intended to constitute comprehensive legal advice on the subject. It is recommended that employers seek legal counsel regarding the complexities of class settlement.

[80]*See* FED. R. CIV. P. 23(e); *see also McArthur v. Southern Airways, Inc.*, 556 F.2d 298, 302-03 (5th Cir. 1977) (Rule 23(e) approval process applies to all class allegation cases, even when a motion for class certification has not been granted or filed).

[81]*See Wheeler v. American Home Prod. Corp.*, 582 F.2d 891 (5th Cir. 1978).

[82]*See* FED. R. CIV. P. 23(e).

[83]*See Martin v. Wilks*, 490 U.S. 755 (1989); 42 U.S.C. § 2000e-2(n) (prohibiting challenges to consent decree settlement if the challenger had actual notice of the settlement and an opportunity to object).

[84]*See Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770 (2d Cir. 1972) (Rule 23(e) approval of individual settlements not required only if other class members are not affected).

Employers, however, need to be aware that intervenors have been allowed to continue class actions even after the individual named plaintiffs have settled their claims.[85]

Classwide Settlements: Before class certification has been adjudicated, the parties may enter into a proposed class settlement by agreeing to a class for purposes of settlement only. Under these circumstances, the defendant agrees to have a class "certified" if the court approves the settlement. If the settlement fails, this agreement is withdrawn, and, generally, if the employer has reserved its right to do so, the employer may object to the class "certification." Usually, a court will not question the use of a settlement class, but may also insist on an agreement upholding a class certification for all purposes before agreeing to submit a proposed class settlement to class members.

At the pre-class certification stage, a court will normally scrutinize the fairness of the settlement with greater care. If parties do not follow the rules regarding court approval of settlement, an absent class member may be permitted to challenge the validity of the settlement later. In addition, an absent class member may also attempt to intervene and have the class issue reopened.[86]

Post-Class Certification Settlements

Once a class is certified, an employer faces a number of options. First, the parties can decide to conduct discovery on the merits to further determine class issues. After discovery is complete, an employer will generally have enough information to determine whether to attempt to decertify the class, move for summary judgment, settle the case on a classwide basis, or proceed to trial. Second, the parties can also decide to engage in mediation or some other method of negotiation. Third, the parties may decide to go to trial. However, once a class is certified, there are virtually no circumstances under which the court will approve a settlement with the named plaintiff(s) only, as this would most likely be seen as prejudicial to absent class members.

Procedures for Submitting Class Settlements for Approval

When the parties to a class action reach a settlement, they usually will prepare and execute a joint stipulation of settlement, with supporting affidavits, which is submitted to the court for preliminary approval. The documents submitted to the court generally should set forth the essential terms of the agreement, including, but not limited to, the settlement amount, form of payment, and manner of determining the effective date of settlement. If there has been substantial pre-trial discovery prior to settlement, the documents may also be accompanied by an affidavit of class counsel summarizing discovery.

Because employment discrimination laws prohibit discrimination against various classes of employees, an employer may be limited in adopting certain affirmative measures to assist one class of employees that may also be seen as disadvantaging another class of employees. Therefore, any proposed settlement must

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[85]*See, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 389 (1977); *Wheeler v. American Home Prods. Corp.*, 582 F.2d 891, 897 (5th Cir. 1977); *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377 (C.D. Cal. 1987).

[86]Indeed, no matter in what stage of class litigation settlement is reached, courts carefully scrutinize settlements to assure the rights of absent class members are not compromised. *See, e.g., Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999) (disapproving a settlement class where inadequate evidence of arms-length negotiations and fair representation of absent class members existed); *Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997) (class certified for settlement purposes must comply with Federal Rule of Civil Procedure 23(a) and (b) requirements).

include sufficient information or justification for the remedies adopted to ensure that affirmative action goals under employment discrimination laws are not destroyed.[87] Usually the court will informally review these proposed settlement papers with counsel and then direct that a notice of the proposed settlement and of the hearing regarding settlement be issued to all class members by mail, published notice, or a combination thereof. However, because the court must approve any settlement, the parties to a class settlement may be required to submit various proposals before a final settlement is approved.

Any class settlement must be approved by a court as fair, reasonable, and adequate, because the court has an obligation to ensure that the rights of absent class members are protected.[88] Criteria referenced by a court in approving a settlement may include, but are not limited to:

- Likelihood of recovery, or likelihood of success
- Amount and nature of discovery or evidence
- Settlement terms and conditions
- Recommendation and experience of counsel
- Future expense and likely duration of litigation
- Recommendation of neutral parties, if any
- Number of objectors and nature of objections
- The presence of good faith and the absence of collusion

Due to the risks of certifying class actions in mass tort cases, such as asbestos litigation, critics have argued that the mere threat of class certification is so devastating that defendants routinely choose to settle rather than risk the bad publicity and/or bankruptcy. Thus, courts have also considered whether these fears factor into the decision to settle a class action and whether such a settlement could be considered fair, reasonable or adequate.[89]

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[87]*See, e.g., United Steelworkers v. Webber*, 443 U.S. 193 (1979); *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *see also Rutherford v. City of Cleveland*, 137 F.3d 905 (6th Cir. 1998) (non-minority applicants allowed to challenge consent decree).

[88]*See, e.g., Young v. Katz*, 447 F.2d 431 (5th Cir. 1971); *see also Smith v. Josten's Am. Yearbook*, 78 F.R.D. 154 (D. Kan. 1979).

[89]*See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (dealing with a nationwide class of nicotine-dependent persons, along with the estates, spouses, children, relatives, and significant others of nicotine dependent persons, dating back to 1943 against cigarette manufacturers); *In the Matter of Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293 (7th Cir. 1995) (dealing with nationwide class of hemophiliacs infected by AIDS virus against drug companies that manufactured blood solids).

Other Class Action Characteristics

Intervention by the EEOC

§ 245.5

Employers should understand that a private plaintiffs' class action lawsuit, already complicated and costly by its very nature, is fertile ground for EEOC intervention, providing the agency with an opportunity to pursue its congressional mandate in a way that attracts headlines and increases potential exposure for the defendant. However, the EEOC must show that intervention is appropriate by balancing several factors, all of them pertaining to timeliness of the intervention and the potential prejudice caused by any delay. A federal court in Atlanta recently denied the EEOC's motion to intervene when it determined that: (1) the EEOC had known of the existence of the case for over seven months before seeking leave to intervene; (2) during that seven-month period the EEOC was actively involved in interviewing potential witnesses and investigating the claims, without the safeguards and limitations which would normally be attached to that behavior had the EEOC been a party to the suit; and (3) a substantial portion of required discovery had already been completed.[90] The court noted that the "EEOC's right of intervention is narrower than permissive intervention under the Federal Rules," because it is allowed only in cases of "general public importance."[91] However, on the same day that the Atlanta court denied the EEOC's motion to intervene, a Philadelphia federal court allowed the EEOC to intervene in a lawsuit that had been pending for seven months and after the EEOC had been investigating the defendant company for almost three years.[92]

The EEOC's intervention in a putative class action may moot the certification requirements of Rule 23. The Supreme Court determined in *General Telephone Co. v. EEOC* that Rule 23 does not apply when the EEOC brings a "representative action" on behalf of similarly situated employees.[93] Depending upon the scope of the EEOC's intervention permitted by the district court, an employer should anticipate that plaintiffs will contend that this intervention obviates the need for class certification.[94] Accordingly, the EEOC's intervention potentially may resuscitate a class action that appeared defeated.

Class members need not exhaust administrative remedies when the named plaintiff has satisfied such requirements.[95] Moreover, an administrative charge that does not explicitly allege or describe class-wide discrimination may still serve as the basis for a class action if an EEOC investigation of class-wide discrimination could reasonably be expected to grow out of the charge.[96]

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[90] *Reid v. Lockheed Martin Aeronautics Co.*, Nos. 1:00-CV-1182-JOF, 1:00-CV-1183-JOF, 2001 U.S. Dist. LEXIS 991, at **7-10 (N.D. Ga. Jan. 31, 2001).

[91] *Id.* at *5.

[92] *Dube v. Eagle Global Logistics*, No. 00-2461 (E.D. Pa.), *transferred*, (S.D. Tex. Jan. 31, 2001).

[93] 446 U.S. 318 (1980).

[94] *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 682 (5th Cir. 1985) (no reason different rule should apply when EEOC intervenes), *cert. denied*, 475 U.S. 1011 (1986).

[95] *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[96] *Paige v. California*, 102 F.3d 1035 (9th Cir. 1996) (plaintiff's allegations concerned the overall process of promotion, not isolated acts of discrimination against an individual, and thus administrative exhaustion requirement was satisfied); *Fellows v. Universal Rests., Inc.*, 701 F.2d 447 (5th Cir. 1983), *cert. denied*, 464 U.S. 828 (1983).

Statute of Limitations

A class representative whose claim is time-barred by the statute of limitations cannot assert that claim on behalf of the class, as he or she cannot meet the typicality requirement of Rule 23(a).[97] Once a Rule 23 class action is filed, the statute of limitations is tolled for the benefit of the class until such time as the class is denied or decertified.[98]

Class Certification Issues

After a class action lawsuit has been filed, the parties typically engage in pre-certification discovery to determine whether the requisites for class certification have been met. Additionally, a defendant may choose to attack the pleadings by filing a demurrer or motion to dismiss for failure to state a claim, or a motion for summary judgment. Alternatively, a defendant may decide not to oppose certifying a class and instead negotiate a stipulation regarding the definition of the class. While it is incumbent upon the named plaintiffs to file a motion requesting the court to certify a class, defendants often file cross-motions requesting the court to deny class certification.

The plaintiff who seeks class certification bears the burden of meeting Rule 23's requirements. The United States Supreme Court has stressed that a class action should only be certified if, after a rigorous analysis, the trial court is convinced that Rule 23's requirements are satisfied.[99] The Court's decision to certify a class may be altered or amended at any time before the case is decided on the merits.[100] In *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999), the court of appeals affirmed the district court's decertification of a race discrimination class action, even though all of the prerequisites under Rule 23(a) were met. Following class certification, the plaintiffs had proposed a complex two-stage trial system, in which the first stage would decide class-wide liability and punitive damages and the second stage would determine individual liability. The district court decertified the class on its own initiative, concluding that a class action would be inefficient and unfair to the defendant. The court did, however, allow the plaintiffs to introduce at the trial of their individual claims evidence of a "pattern of practice" of discrimination.

An Eighth Circuit disparate impact discrimination case demonstrates a potential trap for unwary plaintiffs.[101] In *Sondel*, the plaintiffs filed identical cases concurrently in federal and state court, the latter cases filed under state law. The class was certified in federal court but was not certified by the state court. The case proceeded to trial in the state court as to the named plaintiffs alone. The plaintiffs lost the state

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But see Schnellbacher v. Baskin Clothing Co., 887 F.2d 124 (7th Cir. 1989) (holding that the charge was insufficient to put the employer on notice of class-wide discrimination because it is related only to an individual's claims).

[97] *See Piazza v. EBSCO Indus., Inc.*, 273 F.3d 1341 (11th Cir. 2001) (citing *Carter v. West Publ'g Co.*, 225 F.3d 1258, 1267 (11th Cir. 2000); *Great Rivers Coop of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 899 (8th Cir. 1997)).

[98] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

[99] *General Tel. v. Falcon*, 457 U.S. 147 (1982).

[100] Fed. R. Civ. P. 23(c)(1); *Forehand v. Florida State Hosp.*, 89 F.3d 1562 (11th Cir. 1996) (class consisting of all black employees of state hospital who had been adversely affected by employment practice was decertified for failure to satisfy numerosity requirement; the court's earlier certification was not based upon a careful estimate of number of black employees having grievances similar to plaintiffs').

[101] *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934 (8th Cir. 1995).

case. The federal court then dismissed the class action, in response to the employer's summary judgment motion, under the legal doctrine of *res judicata*, because the class members were in privity with the plaintiffs in the state action—they had common attorneys, facts, and legal arguments. This case demonstrates the unique nature of class actions, which permits a ruling against one member of the class to affect the rights of all class members.

In 1998, Rule 23 was amended to provided for an immediate discretionary appeal of a district court's decision on class certification.[102] Under Rule 23(f), a federal court of appeals may, in its discretion, permit an appeal from an order of a district court granting or denying class certification. Thus, there is still no automatic right of appeal. A party seeking review must file its appeal within ten days after the entry of the district court's order. Other parties then have seven days to answer the petition or to file a cross-petition. Any appeal, however, will not stay the proceedings in the district court unless the district court or the court of appeals orders a stay. Although Rule 23(f) applies the abuse of discretion standard, it can be an effective defense remedy in cases where a district judge rules improperly.[103]

Class Action Trials

Once a class has been certified, the litigation proceeds to the merits stage. Class action lawsuits are often bifurcated to allow a single trial to determine liability and, if necessary, separate, individualized trials to determine each class member's damages. As with any employment litigation, pretrial discovery, motions, and preparation can be costly and time-consuming. In *State Farm*, the trial to determine State Farm's liability did not begin until six years after the complaint was filed. The trial itself lasted nine months.

While parties can, and do, settle class actions prior to determining liability, once a defendant's liability has been determined, the parties often enter into settlement negotiations to avoid the expense of individual damage trials, which may take years to litigate. Once a settlement has been reached and approved by the court, the question of reasonable attorneys' fees can continue to generate extensive litigation.

C. CLASS ACTIONS & ARBITRATION AGREEMENTS

Some employers have attempted to use arbitration agreements as a way to prohibit employment class actions. While some of the controversy surrounding the application of arbitration agreements to employment cases was resolved by the Supreme Court in *Circuit City* (see Chapter 10 of THE NATIONAL EMPLOYER® for a full discussion on arbitration and *Circuit City*), whether arbitration agreements will be the class action killer employers hope they will be remains to be seen.

The federal courts have generally been zealous in their enforcement of arbitration agreements in accordances with their terms. Only one federal appellate court, however, has directly addressed the more complex issue of whether courts have authority to certify an individual plaintiff as a class representative of similarly-situated parties when that individual's claims are subject to arbitration and the agreement is silent as to the issue of a class action. In *Champ v. Siegel Trading Co., Inc.*,[104] the Seventh Circuit found

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[102]*See* Fed. R. Civ. P. 23(f).

[103]*Bertulli v. Independent Ass'n of Cont'l Pilots*, 242 F.3d 290 (5th Cir. 2001) (details checks and balances provided by Rule 23f); s*ee also Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 973-74, 978 (5th Cir. 2000) (court vacated trial court's class certification because damages predominated over equitable relief, and upheld constitutionality of 28 U.S.C. §1292(e), the authorizing authority for Rule 23(f)).

[104]55 F.3d 269, 275 (7th Cir. 1995).

that arbitration agreements could provide for class action arbitration, but where the parties did not include an express term in their agreement providing for class arbitration, the courts could not impose such a term. Thus, if the arbitration agreement is silent on class arbitration, no class arbitration is allowed under the FAA.

It is important to recognize that this case was decided based on an arbitration agreement that was silent on the issue of class arbitration. If silence prevents a class arbitration, it follows that language specifically excluding class arbitrations would entirely resolve the questions of arbitrability-or does it really?

In an unfortunate and ironic case, a plaintiff successfully argued that his claims were not within the scope of an arbitration agreement between himself and his employer because they were filed as a class action, and the arbitration agreement at issue expressly excluded the arbitration of class actions.[105] Specifically, the plaintiff pointed out that under arbitration agreements established under New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD) rules, class actions were expressly excluded from arbitration. Thus, in trying to stop a classwide arbitration, the employer unwittingly kicked the employee's class action case, and thus its own claim, out of the arbitration setting altogether. Clearly, the issue in this case was how the agreement was drafted, and there is no reason to believe that a better crafted provision regarding the arbitration of a class claim would lead to this same result.

D. OVERVIEW OF EMPLOYMENT CLASS ACTIONS

§ 246

Plaintiffs frequently utilize the class action device to challenge employment discrimination. A sampling of characteristic cases follows.

Traditional Discrimination Class Actions

In what may be the largest race discrimination settlement ever, the Coca-Cola Co. agreed to pay $192.5 million and revamp its human resource policies to settle a class action race bias lawsuit which alleged discrimination in promotion. One extremely unusual aspect of the settlement requires Coca-Cola to create a "promotion pool," wherein an African-American who receives a promotion to an area within the company that had been previously under-represented by minorities is eligible for additional bonuses, in an effort to make up for the past alleged discrimination. The company also will be monitored for four years by a seven-member task force comprised of civil rights officials, university professors, attorneys and local business people, and it must hire an Ombudsperson to oversee investigations of complaints of discrimination and retaliation.[106]

[105] *Olde Discount Corp. v. Hubbard*, 172 F.3d 879 (10th Cir. 1999) (not binding precedent under local rules).

[106] *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001).

In a case that took twenty years to settle, the United States Navy paid $1.4 million to a class of eighty women in professional and technical positions who brought a lawsuit alleging discrimination in pay and working conditions.[107]

In January 1995, the California Public Utilities Commission (PUC) paid $2.1 million to settle three age-discrimination suits.[108] Under the terms of the settlement, the California PUC agreed to provide monetary relief to employees who alleged that they were denied promotions to management positions in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Class members who were still employed by the PUC were presented the option of accepting monetary damages or an enhanced early retirement package.

Hostile Environment Class Actions

§ 246.1

In *Jenson v. Eveleth Taconite Co.*,[109] a court, for the first time, certified a class action alleging hostile work environment and sexual harassment as part of an across-the-board sex discrimination lawsuit. Brought by three women on behalf of a group of female employees, the suit alleged that the mining company had engaged in a gender-based pattern and practice of discriminatory conduct in hiring, promotion, job assignment, discipline, and compensation. The lawsuit also raised a class-based hostile work environment claim, alleging that sexually offensive materials and various forms of sexually oriented conduct occurred at the company's four mining locations. The court, in certifying a class, held that "the common question of law is not how an individual class member reacted, but whether a reasonable woman would find the work environment hostile."[110]

The court's decision in *Taconite* surprised employment lawyers and received considerable attention because it departed from the general thinking that sexual harassment claims are discrete acts involving highly individualized facts not amenable to class action treatment. However, employers should not dismiss *Taconite* as an isolated decision. A group of female employees filed a hostile environment class action lawsuit against Diamond Star Motors Corp., an automobile manufacturer controlled by Mitsubishi.[111] The lawsuit alleged that the company's Japanese management philosophy fostered an environment of hostility and abusive attitudes towards women. Following an investigation into these charges, the EEOC itself filed what has been characterized as the largest sexual harassment lawsuit ever against an employer, seeking relief for a class of over 700 women employees. A federal district court ruled that a pattern or practice action for sexual harassment is authorized by Title VII, and that the EEOC can bring the action.[112] The court noted that "the landscape of the total work environment, rather than the

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[107]*Trout v. Dalton*, Case No. 73-0055 HRG (D.D.C. Nov. 22, 1993).

[108]*EEOC v. California*, Case Nos. C-90-0378-BAC, C-91-2195-BAC, C-93-2786-BAC (N.D. Cal. Jan. 13, 1995).

[109]139 F.R.D. 657 (D. Minn. 1991).

[110]*Id.* at 873.

[111]*Evans v. Diamond Star Motors Corp.*, Case No. 94-1545 (C.D. Ill. Dec. 15, 1994).

[112]*EEOC v. Mitsubishi Motor Mfg.*, 990 F. Supp. 1059 (C.D. Ill. 1998); *see also In re Bemis Co.*, No. 01-8038, 2002 U.S. App. LEXIS 1007 (7th Cir. Jan. 11, 2002) (EEOC bringing racial harassment class action).

subjective experiences of each individual claimant, is the focus for establishing a pattern or practice of unwelcome sexual harassment."[113] Mitsubishi eventually settled with the EEOC for $3 million.

It appears that cases like *Mitsubishi* may become more common. In *Warnell v. Ford Motor Co.*,[114] the district court approved the certification of a class defined as present and former female employees of Ford's Assembly Plant and Stamping Plant in Chicago, Illinois, from December 2, 1993, until the date of the lawsuit. *Id*. at 385. In certifying the class, the court rejected Ford's argument that the affirmative defenses under *Faragher v. City of Boca Raton*,[115] and *Burlington Industries, Inc. v. Ellerth*,[116] indicated that the plaintiffs' claims would be better scrutinized individually than as a class.[117] These cases illustrate that courts will certify hostile environment class actions in situations where the putative class members are able to demonstrate that they were subject to the same or similar conduct. However, where the hostile environment was created by the actions of individual supervisors and the plaintiffs are unable to show that class members shared the same working conditions, courts have found that the individualized nature of the claims precluded class certification.[118]

Glass-Ceiling Class Actions

§ 246.2

Plaintiffs are also turning to the class action device to challenge the artificial barrier, or *glass ceiling*, which prevents qualified women, minorities, and other protected classes from advancing to management or decision-making positions within an organization.[119] The number of glass-ceiling class actions is likely to grow with the increased efforts of the federal government's Glass Ceiling Commission, established pursuant to the Glass Ceiling Act, 42 U.S.C. § 2000(e).[120]

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[113] *Id*. at 1386.

[114] 189 F.R.D. 383 (N.D. Ill. 1999).

[115] 524 U.S. 775 (1998).

[116] 524 U.S. 742 (1998).

[117] *See also Adams v. Pinole Point Steel Co.*, No. C-92-1962-MHP, 1994 U.S. Dist. LEXIS 6692 (N.D. Cal. May 18, 1994)(racial harassment class action certified); *Bremiller v. Cleveland Psychiatric Inst.*, 879 F. Supp. 782 (N.D. Ohio 1995) (sexual harassment).

[118] *See Zapata v. IBP, Inc.*, 167 F.R.D. 147 (D. Kan. 1996) (hostile-work environment class claims focused on individual actions of individual supervisors); *Levels v. Akzo Nobel Salt, Inc.*, 178 F.R.D. 171 (N.D. Ohio 1998) (racial harassment class members worked in different job classifications and were exposed to different co-employees, supervisors, and working conditions; court found requirements of commonality and typicality of claims not met).

[119] *See, e.g., Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001) (certifying in a class of deaf and hearing-impaired workers that alleged the existence of an illegal glass ceiling).

[120] *See EEOC v. CBS Broadcasting, Inc.*, No. 00-8159 (S.D.N.Y. 2000), *consent decree submitted* Oct. 25, 2000 ($8 million settlement for 200 women employed at six stations nationwide); *Rains v. Minneapolis*, Case Nos. 3-91-CIV-138 and 3-91-CIV-139, *settlement approved*, (D. Minn. Jan. 13, 1995) ($3 million settlement for 200 female managers).

Wage-and-Hour Class Actions

§ 246.3

Plaintiffs are increasingly using the class action device in the wage-and-hour setting. Corporations have agreed to pay millions of dollars to settle claims that they improperly classified employees as exempt, failed to pay overtime, or otherwise failed to properly pay employees. In 2001, Pacific Bell agreed to pay $35 million to settle a wage and hour class action involving 1,500 members.[121] Likewise, in February 2001 Taco Bell agreed to pay $9 million to settle an overtime pay dispute with 3,000 California Taco Bell managers, after having already paid $2.8 million in 1997 to settle the same type of suit brought by 2,100 Washington employees.[122]

A consolidation of eight class action lawsuits in Idaho, covering 150,000 employees, has resulted in Albertson's, a nation-wide grocery store chain, settling allegations that it failed to pay employees for all time worked, failed to pay overtime to non-exempt managers, and discouraged employees from filing workers' compensation claims. Although the exact amount of the settlement has not been determined, Albertson's took a $37 million charge against earnings in November 1999 to cover the cost of litigation, and has agreed to pay $17 million in attorneys' fees alone.[123]

In Colorado, a federal judge certified a class of more than 5,000 Wal-Mart pharmacists in a suit under the Fair Labor Standards Act to recover overtime.[124]

Class Actions Challenging Employment Policies

§ 246.4

Class action lawsuits that challenge other employment practices and policies are also on the rise. For example, a class action was filed against a Michigan automotive parts manufacturer seeking reinstatement of full lifetime health benefits to unionized retirees. The suit challenged the employer's decision to change retiree and surviving spouse benefits by requiring monthly premiums and annual deductibles. A federal judge granted a preliminary injunction requiring the employer to reinstate full benefits to a class of over 500 individuals.[125] The class action device has also been used to challenge an employer's maternity leave policy that forced pregnant employees to take maternity leave and to challenge an airline's weight policies for its flight attendants.[126]

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[121]Alexi Oreskovic, *Pacific Bell Settles Overtime Case*, The Recorder, Dec. 6, 2001.

[122]Darryl Van Duch, *Taco Bell Pay Disputes: Not Zesty!: A $9M Settlement and a Verdict to Come*, The Nat'l L.J., Mar. 28, 2001.

[123]*In re Albertson's Inc.*, No. 98-1215 (D.C. Idaho), *approved* Sept. 11, 2000.

[124]*Presley v. Wal-Mart Stores, Inc.*, Nos. 95-Z-1705 and 95-Z-2050, 1996 U.S. Dist. LEXIS 5279 (D. Colo. Apr. 8, 1996); *see also De Asencio v. Tyson Foods, Inc.*, 130 F. Supp 2d 660 (E.D. Pa. 2001).

[125]*Hinkley v. Kelsey-Hayes Co.*, Case No. 93-74537 (E.D. Mich. Nov. 3, 1994).

[126]*See United Airlines, Inc. v. Frank*, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001); *Wooldridge v. Marlene Indus.*, 875 F.2d 540 (6th Cir. 1989).

In a class action suit brought on behalf of 250 hotel employees, class representatives claimed that a Disney hotel's English-only policy discriminated against Haitian and Hispanic housekeepers.[127] Housekeepers alleged that the hotel prohibited them from speaking Spanish or Creole and that all the hotel's employment policies were printed in English, including the employee manual, work instructions, disciplinary notices, and warnings regarding hazardous chemicals.

In 1996, a federal district court in California approved a consent decree settling claims by the EEOC that Shell Western's preemployment physical-strength test discriminated against female applicants for entry-level oil production positions.[128] After nearly seven years of litigation, Shell Western agreed to pay $142,000 in settlement and attorneys' fees, and to conduct a job analysis and validation study to reassess its need for preemployment physical strength tests.

In *Kohl v. American Trial Lawyers Association*,[129] the court certified a class under ERISA alleging that the plan administrator failed to provide the class with cost of living adjustments relating to their pensions. Finding that the primary relief sought by the class was injunctive, the Court held that certification was appropriate.[130]

Unions are increasingly using the class action device to facilitate the organization of employers. The United Food and Commercial Workers, for example, has brought numerous suits against Albertson's, claiming illegal pay practices.[131] By challenging allegedly unlawful employment policies, the union can gain notoriety and create a rallying point for organizing campaigns. This strategy is particularly appealing because the monetary amount in dispute for each individual employee in the class may be very small, or even nonexistent.

These suits serve many purposes in organizing drives. First, the employer may end its opposition to unionization to settle the class action and save litigation costs. Second, by filing the lawsuit, the union forges an image that it is fighting exclusively for the benefit of the employees. Third, the lawsuit draws attention to potential problems an employer may have and suggests that the union will fight to correct them. Fourth, if the class action is successful, the union can point to any monetary awards as a measure of its effectiveness. For these reasons, unions, although frequently unnamed in the lawsuit, are placing class actions in their arsenal of organizing tactics. (The employer named in such a suit may be entitled to documents concerning the union's relationship with the named plaintiffs, since those documents may

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[127] *Campoverdo v. Dolphin Hotel Ass'n*, Case No. 94-1075-CIV-ORL-22 (M.D. Fla. Oct. 12, 1994).

[128] *EEOC v. Shell Western E&P, Inc.*, Case No. 89-5774 JMI (C.D. Cal. 1996).

[129] 183 F.R.D. 475 (D. Md. 1998).

[130] *See also Stewart v. Pension Trust of Bethlehem Steel Corp.*, 12 Fed. Appx. 174 (4th Cir. 2001) (holding trial court improperly denied certification to employees who alleged the plan administrator breached its contract with the participants when it reduced their benefits by deducting cost-of-living adjustments that the participants alleged they never received); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386 (E.D. Pa. 2001) (formerly "leased" employees argue that time period when they worked as leased employees not count towards the company's calculation of benefits under benefit plan).

[131] *See, e.g., Barton v. Albertson's, Inc.*, Nos. 97-0159-S-BLW and 97-0183-S-BLW 1997 U.S. Dist. LEXIS 22570 (D. Idaho Sept. 30, 1997), *Choate v. Albertson's Inc.*, Civil No. 96-2-23900-3-SEA (Wash. Super. Ct., King County 1996) (union backing class action filed to recover allegedly unpaid wages); *Gloege v. Albertson's Inc.*, No. 96-3384 SI (N.D. Cal. 1996).

affect whether the plaintiffs can fairly and adequately represent the interests of the other class members.)[132]

Class Actions under the ADA

§ 246.5

As more cases are filed under the ADA, courts have begun to address the proper use of class actions under that statute. As noted above, courts generally will refuse to certify a class alleging violation of the ADA when the fundamental issue is whether someone is disabled under the Act.[133]

However, class certification has been granted in lawsuits alleging discrimination in violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 706 *et seq.*[134] Because the ADA looks to cases decided under the Rehabilitation Act for guidance, courts are likely to consider class action precedent under that Act in deciding class certification motions under the ADA.

Courts have also permitted ADA class actions when an employer's policies (or lack thereof) are challenged. For example, in Hendricks-Robinson v. Excel Corp., the court permitted a class action to proceed to determine if a company policy, under which employees who have been out on medical leave for twelve months were terminated, violates the ADA. The court found that it was not necessary for the employees to prove they were actually disabled to evaluate the policy.[135] The EEOC filed suit against an airline that is alleged to have a policy of not hiring applicants who are insulin-dependent or who take anti-seizure medication for "cleaner" or "baggage handler" positions.[136] In another case, however, the court refused to certify a class challenging an employment policy as violating the ADA when the plaintiffs could not demonstrate that there was in fact a common policy applied to all applicants.[137]

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[132]*See, e.g., Shores v. Publix Supermarkets, Inc.*, 1996 WL 407850 (M.D. Fla. 1996).

[133]*Lintemuth v. Saturn Corp.*, 3 A.D. Cas. 1490 (M.D. Tenn. 1994) (class certification denied of employees with carpal tunnel syndrome and degenerative disk disease because case-by-case analysis required); *see also Burkett v. U.S. Postal Serv.*, 175 F.R.D. 220 (N.D. W.Va. 1997) (no class certified when plaintiffs sought different jobs with different physical and mental requirements and were denied employment, plaintiffs who could not show that they were similarly situated).

[134]*See, e.g., Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983) (class action on behalf of hearing-impaired individuals challenging school bus drivers' license requirements).

[135]154 F.3d 685 (7th Cir. 1998).

[136]*See EEOC v. Northwest Airlines, Inc.*, No. 01-705 (D. Minn. 2001) (airline policy of not hiring applicants who are insulin-dependent for "cleaner" or "baggage handler" positions challenged as a class action); *Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001) (hearing-impaired employee plaintiffs gained certification in their lawsuit alleging that UPS's failure to adopt specific policies which would have provided for interpreters resulted in deaf employees' not advancing at the company).

[137]*Doe v. City of Chicago*, 1994 WL 691644 (N.D. Ill. 1994) (class representatives lacked commonality because there was no single policy applied to potential class).

III. STATE SURVEY OF CLASS ACTION LITIGATION

A. CALIFORNIA SHOWS HOW STATE LAW CAN VARY

§ 247

In *Champ v. Siegel Trading Co., Inc.*,[138] the court held that litigating a class action contradicts the terms of an arbitration agreement silent on the issue under the FAA. California courts have, however, come to the opposite conclusion under the California Arbitration Act (the "CAA").[139]

Keating v. Superior Court

Unlike the FAA, the CAA expressly provides for the consolidation of arbitrations where the disputes arise from the same transactions or series of related transactions and there are common issues of law or fact creating the possibility of conflicting rulings. In *Keating v. Superior Court*,[140] the California Supreme Court analogized class proceedings to consolidated actions and recognized:

> *It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act authorizing the consolidation of arbitration proceedings, intended to preclude a court from ordering class wide arbitration in an appropriate case. We conclude that a court is not without authority to do so.*

The United State Supreme Court reversed the *Keating* decision on other grounds.[141] However, the Court did not address the question whether claims brought as a class action could be ordered to arbitration on a class basis because there did not appear to be a federal question. The Court noted that the appellant had not argued that the Federal Arbitration Act preempted state class-action procedures, and the California Supreme Court's decision was based on state law.

Blue Cross of California v. Superior Court

The issue whether the FAA precludes class arbitration was presented in *Blue Cross of California v. Superior Court*.[142] The *Blue Cross* court held that classwide arbitration is available under California law and that such a provision is not precluded by the FAA.

The court distinguished *Champ* by finding that:

> [U]nder federal law, as articulated in *Champ* and the cases on which the Seventh Circuit relied, there is no authority for classwide arbitration. Under those circumstances, the

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[138] 55 F.3d 269 (7th Cir. 1995).

[139] CAL. CIV. PROC. CODE § 1281 *et seq.*

[140] 31 Cal. 3d 584, 612-613 (1982).

[141] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[142] 67 Cal. App 4th 42 (1998), *cert. denied*, 527 U.S. 1003 (1999).

> *Champ* court refused to read such authority into the parties' arbitration agreement. Here, on the other hand, state law authorizes classwide arbitration. In the absence of an express agreement not to proceed to arbitration on a classwide basis, ordering the parties to arbitrate class claims as authorized by state law does not conflict with their contractual arrangement.[143]

The clear suggestion made in *Blue Cross* is that there can be an express agreement not to proceed to arbitration a a classwide basis, even though the state arbitration act allows for it. Given the recent U.S. Supreme Court *Circuit City* decision, it remains to be seen how effective arbitration agreements will be in limiting class actions in the employment law arena.

Mandel v. Household Bank, N.A.[144]

This is a class action brought by a credit card customer against the issuer. The bank moved to compel arbitration under the terms of the credit card agreement. The district court denied the bank's motion but was reversed by the court of appeal. The consumer contended that the arbitration agreement was unenforceable because it purports to exclude class actions from the reach of the agreement. The provision in question reads: "No class actions or joinder or consolidation of any Claim with the claim of any other person are permitted in arbitration without written consent of [plaintiff] and [defendant]." The appellate court agreed this provision is unconscionable, but merely severed it from the arbitration agreement, as the agreement required, and compelled the plaintiff to arbitrate her claim under the reformed agreement.

Whether other California courts will follow the lead of the Mandel court remains to be seen. The *Mandel* court emphasized the relatively small amount at stake in individual consumer actions, which makes class actions particularly important in vindicating consumer rights. Thus, it found the exclusion to be unconscionable. Whether these same considerations will apply to employment class actions, where damages may be substantial, remains to be seen. In the meantime, the counseling point is to be sure to include a severability clause in any arbitration agreement.

B. STATE STATUTES PROVIDING ALTERNATIVES TO CLASS CERTIFICATION

California

§ 248

State statutes can also provide an alternative basis for class certification. For example, plaintiffs have increasingly utilized California Business & Professions Code section 17200 to challenge alleged unfair employment practices—including drug, polygraph, psychological, and honesty testing. The code section allows a class action to remedy unfair business practices. Broadly defined as any practice forbidden by

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[143] *Id.* at 63-64.

[144] Superior Ct. No. 00CC12585, 4th App. Dist., Jan. 7, 2003.

law, unfair business practices may also be held to include an employer's violation of wage-and-hour laws.[145]

Under section 17200, an individual may bring an action on behalf of a group, or on behalf of the general public, without filing a class action lawsuit.[146] However, the California Supreme Court has now limited the remedy that can be sought on behalf of a group by section 17200 plaintiffs. While section 17200 still provides for monetary restitution and/or injunctive relief to persons in interest who have been damaged by a defendant's unfair business practice, it cannot serve as a vehicle to recover all profits earned through that business practice, regardless of whether that money was taken from the plaintiff victims.[147]

II. PRACTICAL RECOMMENDATIONS FOR THE HR PROFESSIONAL

A. STEPS FOR AVOIDING CLASS ACTION LAWSUITS

§ 249

The growing trend in employment class actions mandates that employers take immediate and effective preventative measures to minimize the potential for costly and protracted class action litigation. By conducting self-audits, listening carefully to employee complaints, and monitoring class action litigation in its industry, an employer may uncover potential problems and reduce litigation risks accordingly.

Conduct Regular Employment Self-Audits

By using a self-audit of labor and employment policies to identify potential problems before claims are filed, many types of employment litigation will be prevented. In addition, a thorough self-audit will enhance the efficient flow and storage of important employment documents and statistics, which may then be reviewed, updated, and organized on a periodic basis. When all divisions or levels of management participate in a self-audit, the entire company benefits by becoming more sensitized to labor and employment issues.

A good self-audit will include an annual review of workforce data on recruitment, hiring, work assignments, transfers, promotions, compensation, discipline, terminations, layoffs, and other employment practices to identify and correct potential problems. In addition, employers should review

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[145]*See, e.g., Rawson v. Tosco Refining Co.*, 57 Cal. App. 4th 1520 (1997) (union employee brought representative action under the statute for failure to pay overtime rates); *Baker v. IKON Office Solutions Inc.*, No. CV 769081 (Cal. Sup. Ct. 2001) (allowing employees to proceed as a class where employer subjected its employees to chargebacks on their commissions paid for equipment leased and committed improper withholding of wages actually earned by employees, which constitutes unlawful business practice under Section 17200); *People v. Los Angeles Palm, Inc.*, 121 Cal. App. 3d 25 (1981) (employer's practice of crediting tips against minimum wages violates California Labor Code and constitutes an unfair business practice under section 17200).

[146]CAL. BUS. & PROF. CODE § 17200.

[147]*Kraus v. Trinity Mgmt. Servs., Inc*., 23 Cal. 4th 116, 137 (2000); *Cortez v. Purolator Air Filtration Prods. Co*., 23 Cal.4th 163, 172 (2000).

their history regarding discrimination, harassment, safety, and other complaints, conciliations, outstanding or pending administrative claims or lawsuits; review company procedures for skills training, harassment training, and management development; and review compliance with all federal and state labor and employment laws.

A self-audit is merely the first step in confronting potential employment problems. Once problems are identified, employers must act to correct those policies, procedures, and practices that are inconsistent with company goals or legal requirements. Audits should not be regarded as one-time events, but rather as an ongoing process that must be repeated regularly as circumstances and legal requirements change. The regular use of self-audits strengthens an employer's defenses by ensuring that relevant documents and statistics are properly maintained and readily available. This level of preparation allows an employer to present a timely, accurate, and convincing defense that may dispose of a lawsuit quickly and inexpensively.

Although the data underlying a self-audit is not privileged, the analysis and interpretation of the data, and the conclusions regarding any disparities, may be protected if these are provided pursuant to any attorney's legal advice or performed in anticipation of litigation.[148]

Pay Attention to Employees' Complaints

Class actions often originate with the complaint of a single employee who, unable to access management for a solution, turns to his or her coworkers and prompts them to consider legal action. By encouraging open communication between employees and management, an employer can keep abreast of potential problems. Additionally, an internal system of resolving complaints will alert the company to issues or problems. These practices will also assure employees that the employer is interested in their complaints and is willing to take steps to remedy problems.

When an employer becomes aware of an EEOC, Labor Commissioner, or other administrative claim, it must take all steps to ensure full cooperation in any agency investigation. If the complaining employee or the agency perceives that the employer is not actively participating in a resolution of the claim, the employer may find itself faced with multiple claims. Many agencies have plenary power to investigate an employer's practices based on an anonymous tip from employees or even competitors. Claims made by a number of employees may prompt an administrative agency to conduct a full scale audit of the company's employment practices. Illustrative is *EEOC v. Trail Dust Steak Houses, Inc.*,[149] where the EEOC filed a sex discrimination class action against a restaurant chain that allegedly refused to hire male applicants as food servers. The EEOC was prompted to investigate the employer after it received a complaint from a male applicant who was allegedly informed that the company had a policy of employing cowgirls as waitresses to fit the restaurant's western theme.

Monitor Trends in Class Action Litigation

One of the most effective ways for employers to avoid class action litigation is to be aware of the trends in employment class actions and to be prepared to address similar issues as they arise. As the numerous class actions filed against grocery retailers illustrate, class actions often tend to cluster in one industry. Accordingly, employers should take an active role in monitoring employment cases filed against their competitors. If an employer is aware of a class action that has been filed against a competitor, it may have sufficient warning to take steps to prevent a similar complaint in its own workplace.

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[148] *Maloney v. Sisters of Charity*, 165 F.R.D. 26 (W.D.N.Y. 1995).

[149] Case No. 94-C-234 (D. Colo. Jan. 27, 1994).

ACCA 2003 Annual Meeting

"Class Actions: 30 Developments in 90 Minutes"

Securities Cases

1. Higher standard for lead plaintiffs?

The synergy of Rule 23 and the PSLRA now imposes on the plaintiff has the burden of affirmatively demonstrating at the class certification stage the adequacy of both counsel and the named lead plaintiff(s); adequacy is no longer presumed, even if no challenge is made by other class members. *Berger v. Compaq Computer Corp., 279 F. 3d 313 (5th Cir. 2002)* (Rule 23's "adequacy standard must reflect the governing principles of the [PSLRA] and, particularly, Congress's emphatic command that competent plaintiffs, rather than lawyers, direct such cases.")

Establish plaintiff's "willingness and ability…to take an active role in and control the litigation."

Demonstrate plaintiff's understanding of the "basic legal premise" of the case and "care[s] about the progress of the case and [is] committed to maintaining an active role."

2. What adequacy or typicality factors will get such greater scrutiny and impair representative status of a named class plaintiff?

"[S]o little knowledge of and involvement in the class action that they would be unwilling or unable to protect the interests of the class against the possibly competing interests of the attorneys." *Baffa v. Donaldson, Lufkin, etc.*, 222 F. 3d 52 (2d Cir. 2000).

Inability to supervise counsel. *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144 (N.D. Calif. 1991).

No fee agreement with counsel and did not receive regular cost information. *Griffen v. GK Intelligent Systems, Inc.,* 196 F.R.D. 298 (S. D. Tex. 2000).

Fee arrangement with counsel did not require the representative plaintiff to pay a pro rata share of litigation costs. *Wilner v. OSI Collection Svcs., Inc.,* 201 F.R.D. 321 (S.D.N.Y. 2001).

Lack of credibility. *Panzirer v. Wolf*, 663 F. 2d 365 (2d Cir. 1981).

Subject to unique defenses, *The Zemel Family Trust v. Philips Int'l Realty Corp.*, 205 F.R.D. 434 (S.D.N.Y. 2002), such as insider status or other access to non-public information, *In re FirstPlus Fin. Group, Inc. Sec. Litig.,* 2002 WL 3145951 (N.D. Tex., Oct. 28, 2002), or "averaging down" investment strategy, *Rudnick v. Franchard Corp.*, 237 F. Supp 871 (S.D.N.Y. 1965).

3. Can state unfair competition laws, federal anti-trust laws, breach of contract theories, or subsequent repleading to less than 50 plaintiffs, be used to circumvent SLUSA?

SLUSA allows all covered class actions under state statutory or common law in behalf of more than 50 persons and alleging misrepresentations of omissions in the purchase or sale of securities to be removed to federal court. 15 U.S.C. sec. 78bb (f).

State class action based on California's unfair competition statute, Bus. & Prof. Code sec. 17200, seeking disgorgement and restitution of monies paid for securities (the only non-equitable relief allowed under the statute) was a claim for damages and was removable under SLUSA. *Feitelberg v. Merrill Lynch & Co., Inc.*, 234 F. Supp. 1043 (N. D. Cal. 2002) (SLUSA "should be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent" its provisions).

Insurance products like tax-deferred annuities are not immune from SLUSA removal by virtue of the McCarran-Ferguson Act. *Dudek v. Prudential Securities, Inc.*, 295 F. 3d 875 (8th Cir. 2002).

SLUSA preempted state contract claims founded on theory that the defendant's misrepresentations violated industry regulations and guidelines incorporated into the agreements with the customers who thereafter bought or sold stock in reliance thereon. *Dacey v. Morgan Stanley Dean Witter,* Fed. Sec. L. R. (CCH) [Current Binder] ¶ 92,501 (S.D.N.Y., May 20, 2003)

Remand to state court of suit alleging common law fraud induced plaintiffs' stock purchases granted when, after removal, the plaintiffs obtained leave to reduce the number of named plaintiffs to 50, one below SLUA's "trigger." *Spehar v. Fuchs*, 02 Civ. 9352 (CM) (S.D.N.Y. June 17, 2002).

4. Are remand orders under SLUSA appealable?

No federal appellate jurisdiction over a federal district court order remanding to state court securities claims (initially removed under SLUSA) for lack of a sufficient relationship to a purchase or sale of securities. *Spielman v. Merrill, Lynch, Pierce, Fenner & Smith Inc*., 332 F. 3d 116 (2d Cir. 2003)

5. Can class actions for "holding" claims remain in state court?

State claims for fraud and negligent misrepresentation could be asserted by a plaintiffs claiming that the defendant's misrepresentations induced them not to sell their securities. *Small v. Fritz Companies, Inc*., 30 Cal. 4th 167, 132 Cal. Rptr. 490 (2003). The California Supreme Court stated it was not deciding whether class certification was appropriate, *n*. 1, but asserted that the SLUSA did not affect its decision because it only applies to purchases or sales of securities, not "holding" claims. 132 Cal. Rptr. at 498.

However, SLUSA preemption cannot be avoided by plaintiffs' asserting they seek damages only from holding stock. *Professional Management Associates, Inc. v. KPMG LLP*, 335 F. 3d 800 (8th Cir. 2003). *Cf. Dacey v. Morgan Stanley Dean Witter,* Fed. Sec. L. R. (CCH) [Current Binder] ¶ 92,501 (S.D.N.Y., May 20, 2003)

(state contract claims of class who continued to hold stock not preempted as SLUSA requires a purchase or sale of securities).

Note: Even if such state class actions survive SLUSA removal they should not prevail substantively. *Small* stressed "that in view of the danger of non-meritorious suits" for purported holding claims that "specific reliance" must be pleaded, i.e., "actions, as distinguished from unspoken and unrecorded thoughts and decisions." *Ibid.* at 503. It is difficult to see how a state class case could survive the predominance of such individual issues and *Mirkin v. Wasserman*, 5 Cal 4th 1082, 23 Cal. Rptr. 2d 101 (1993) rejects the "fraud on the market" theory as a substitute for the reliance element of state law claims.

6. Derivative actions as substitute for class actions?

SLUSA expressly exempts derivative actions from its removal jurisdiction. 15 U.S.C. 78bb (f) (5) (C).

The plaintiffs' bar has used this as a substitute for a class action because still can have large recovery and fee potential. Also not subject to the tougher rules re adequacy of the plaintiff so the lawyers can control the litigation more.

But there are some downsides for potential derivative plaintiffs. Without the required formal demand on the board to file suit a plaintiff must plead with particularity the futility of making such a demand. *Shields v. Singleton*, 15 Cal. App. 4th 1611, 19 Cal. Rptr. 459 (1993) (allege "facts specific as to each director…that [such] director could or could not be fairly expected to evaluate the claims of the shareholder plaintiff.")

Note: Although a special litigation committee of board members can decide not to file suit and thereby strip a putative derivative of the right to assert such a claim, the grounds for challenging their independence have been expanded beyond merely financial connections. *In re Oracle Corp. Deriv. Litigation*, 824 A. 2d 917 (Del. Ch. 2003) (any substantial personal, social or institutional ties

may constitute "bias-creating factors" that prevent the SLC from terminating the derivative action).

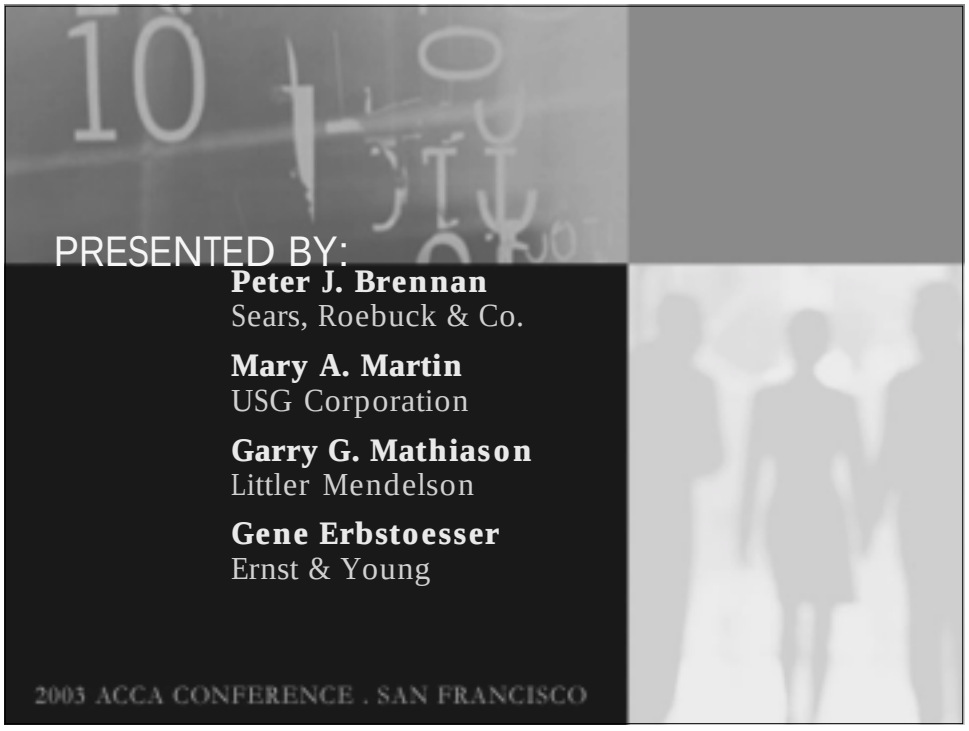
Civil derivative litigation is not the proper forum against defendants who had ADR agreements with the company because the derivative plaintiff "stands in the shoes" of the corporation in enforcing the corporation's cause of action and have no greater rights. *Frederick v. First Union Secs., Inc.*, 100 Cal. App 4th 694, 122 Cal. Rptr. 774 (2002); *Sasaki v. McKinnon*, 124 Ohio App. 613, 707 N.E.2d 9 (1997).

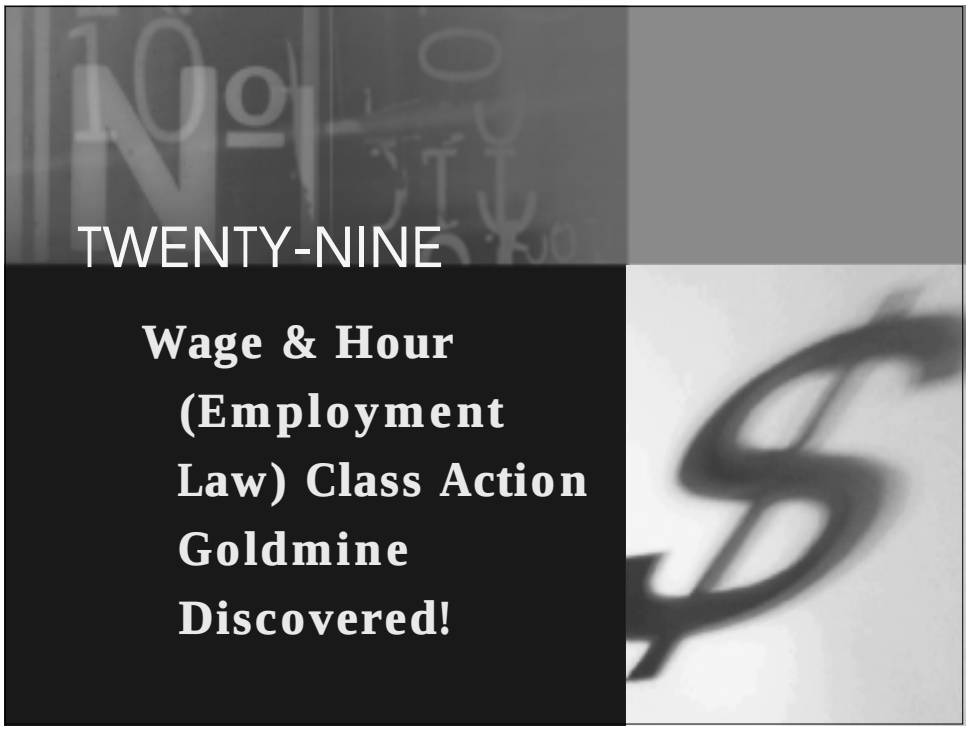
7. Arbitration of class actions if the class members have individual ADR agreements which are silent on class arbitration? Who decides?

Federal courts have held that such class arbitrations are prohibited unless expressly permitted by the terms of the ADR contract. *Dominium Austin Partners, LLC v. Lindquist*, 248 F.3d 720 (8th Cir. 2001); *Iowa Grain Co. v. Brown*, 171 F.3d 504 (7th Cir. 1999).

Several states have gone the other way and allowed class arbitrations unless expressly prohibited. *Blue Cross of California*, 78 Cal. Rptr 2d 779 (Ct. App. 2d Dist. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A. 2d 860 (Pa. Super. Ct. 1991).

Whether the ADR contract allows or prohibits such classwide arbitration is an issue the arbitrator, not the court, must decide as a matter of contract interpretation. *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003).





What Does This Number Have To Do With Employment Law Class Actions?

206

Tobacco Litigation, Death, and Public Anger

The impact of $206 Billion and beyond

- A small number of firms and individuals have great influence
- New challenges need identification

Employment Law Meets The Test

- Deep pockets
- Scores of causes of action
- Public outrage---the evils of alleged discrimination!
- Jury trials with punitive damages

What is the highest hourly rate billed for a successful class action?

1. $4,000 (Alabama)
2. $7,716 (Florida)
3. $130,000 (Texas)

Class Actions and Wage & Hour Compliance

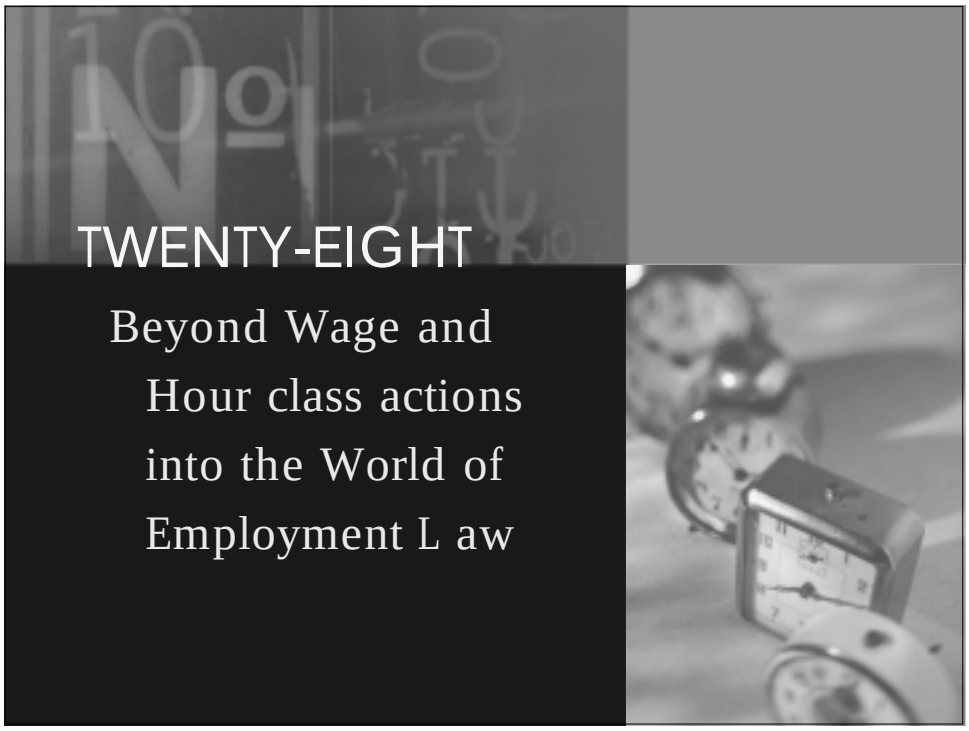
- 400% Increase in 2 Years!
- #1 Most Frequent: Wage & Hour

--Collective Actions ($100 Billion Liability) (Classification and Off-The-Clock Issues)

- New Topics: Meals, Breaks, and Bonuses

Class Actions and Wage & Hour Compliance

- State Law Specific (300 in LA)
- Collective Actions Under the FLSA
- Maturing Area of Litigation



Class Actions and Employment Law

- Microsoft ($97 Million Misclassification)
- Ford 1,043/$9M (Several)
- Lockheed Martin (Racial)
- United Airlines
- Coca-Cola $195.5 Million Settlement
- Pacific Bell ($35 Million)
- Mitsubishi ($3 Million) Harassment
- Texaco (Race)
- State Farm (Gender) $200 M Plus

Class Actions and Employment Law

- Even For The Largest of US Employers These Are Very Serious Challenges
- Dukes et al. v. Wal-Mart—Size and applicant flow issues (pending Certification Motion)
- The Battle over Statistics
- How Are Punitives Determined?

Conservative Prediction

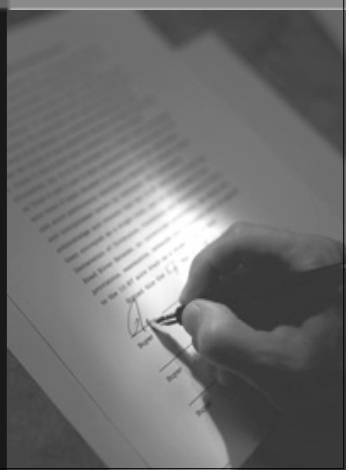
- Fortune 1000 --- 90% Will Have One Or More Employment Law Class Actions Within 5 Years!

TWENTY-SEVEN

Technical violations of statutes that provide liquidated damages.

TWENTY-SIX

Quasi-Class Actions And Their Growth



Public Policy Claims

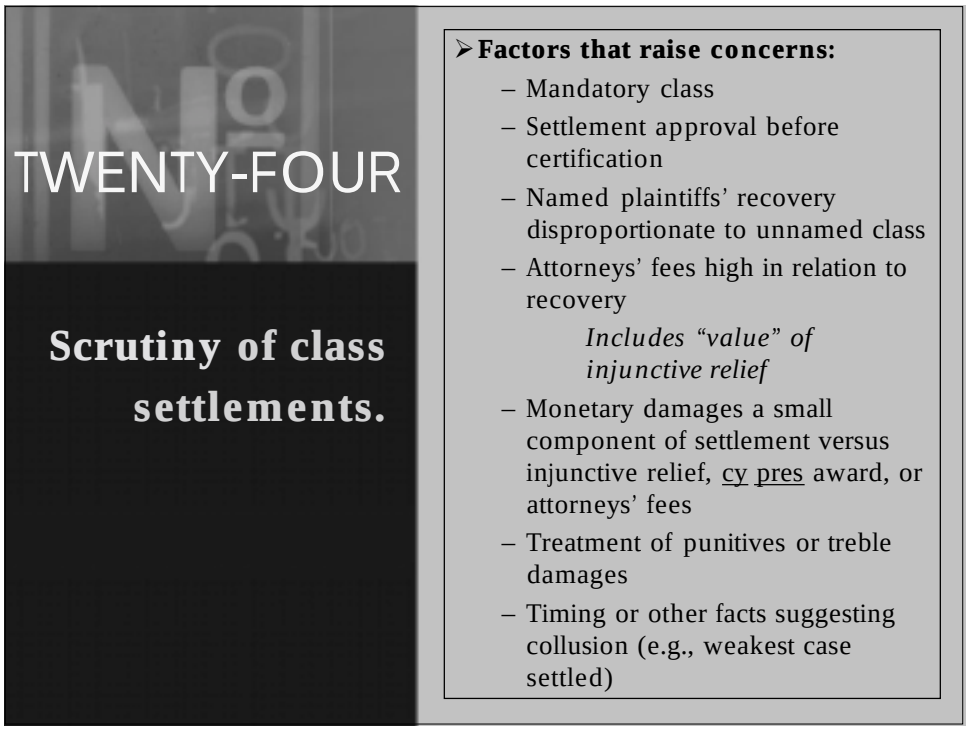
- Calif. Bus. & Prof. Code Section 17200
- Wages v. Penalty Conflict---New California Legislation (AB 1723 and SB 796); DLSE Locker Opinion Letter
- The Schwarzenegger Factor

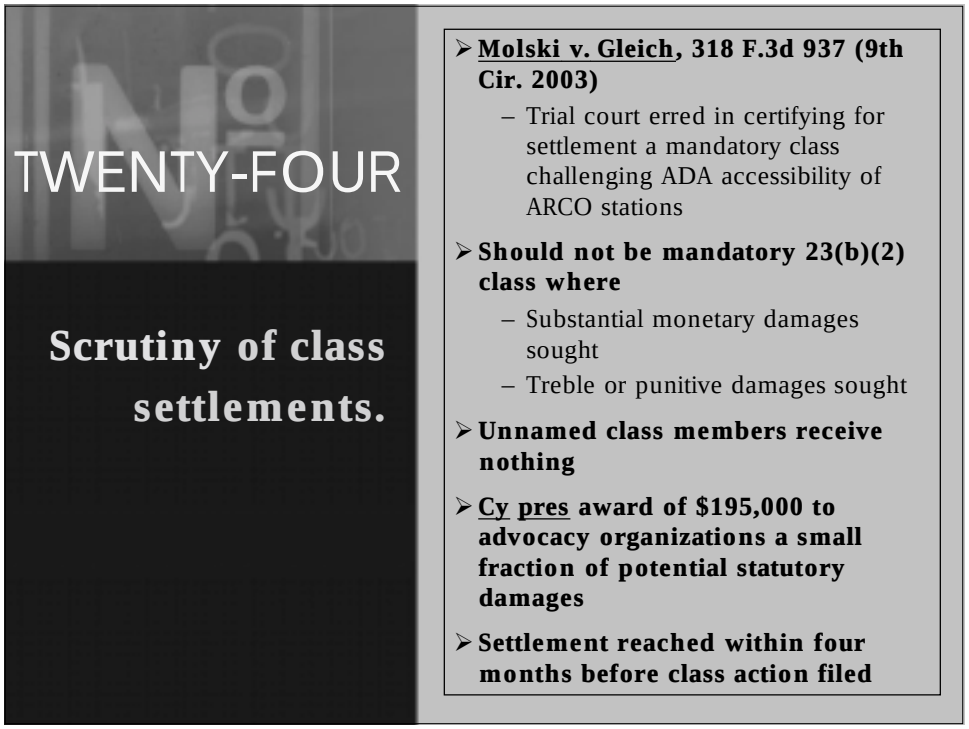
Class Action Arbitrations

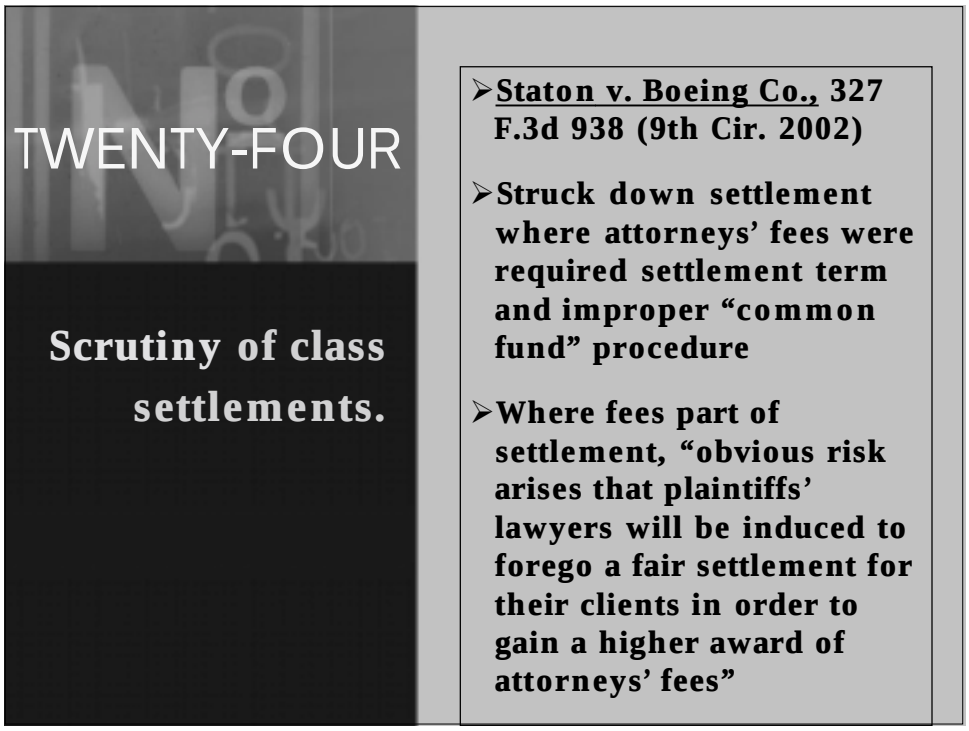
- Green Tree Financial Corporation v. Bazzle (S.Ct. June 24, 2003)
- Dangerous California Arbitration Provision – Who Decides? CCP Section 1281.3
- Is There A Magic Bullet? Ask Mary Martin

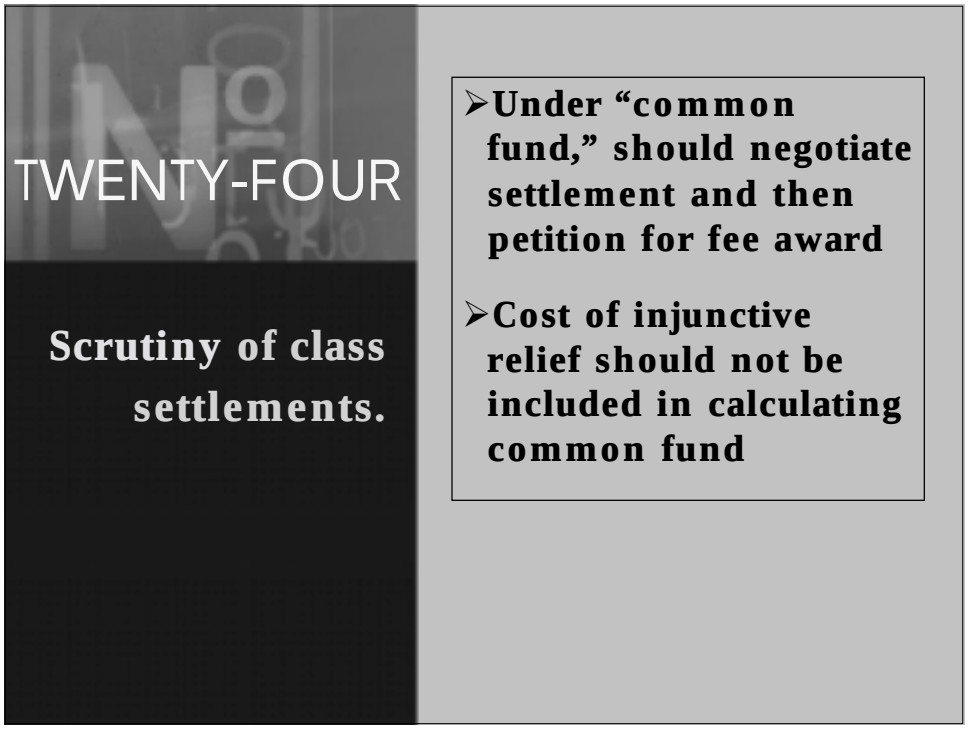
Scrutiny of class settlements.

- **District Court acts as class "fiduciary"**
  - Concerns of collusion, "reverse auction," adequate representation
- **Key questions:**
  - What is named plaintiff getting?
  - What is class counsel getting?
  - What is class getting?
  - Process: notice; representation; opt-out v. non opt-out









TWENTY-FOUR

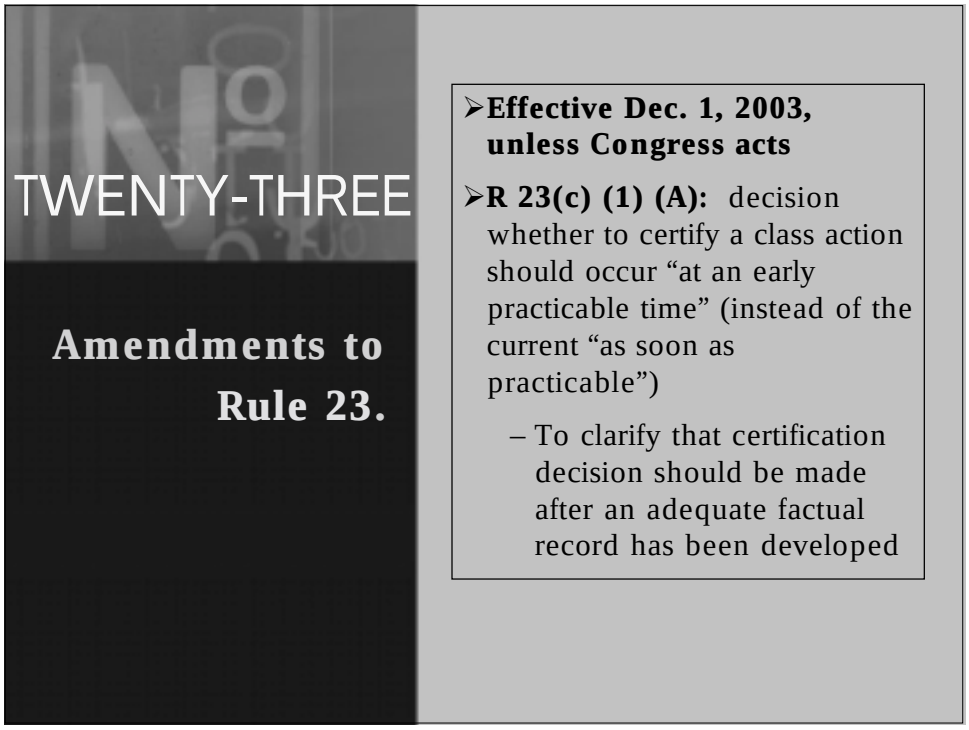
Scrutiny of class settlements.

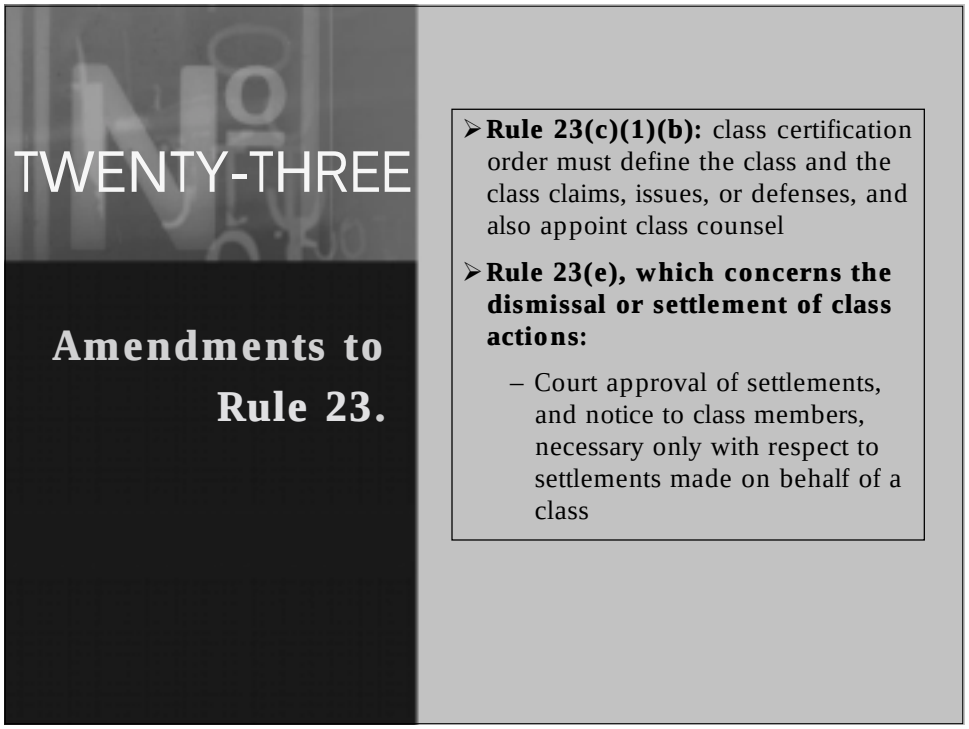
- **Reynolds v. Beneficial Financial Bank, 288 F.3d 277 (7th Cir. 2002)**
- **Reverse auction and collusion:** defendant in multiple class actions settles with weakest advocate
  - Attorneys' fees exchanged for lower recovery for class

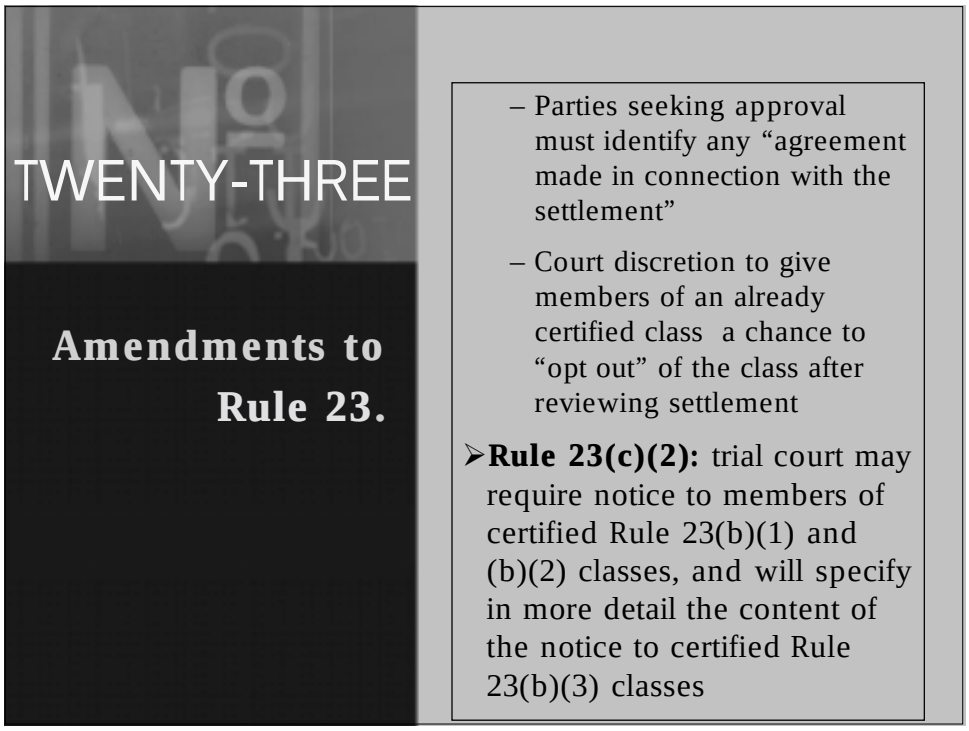
TWENTY-FOUR

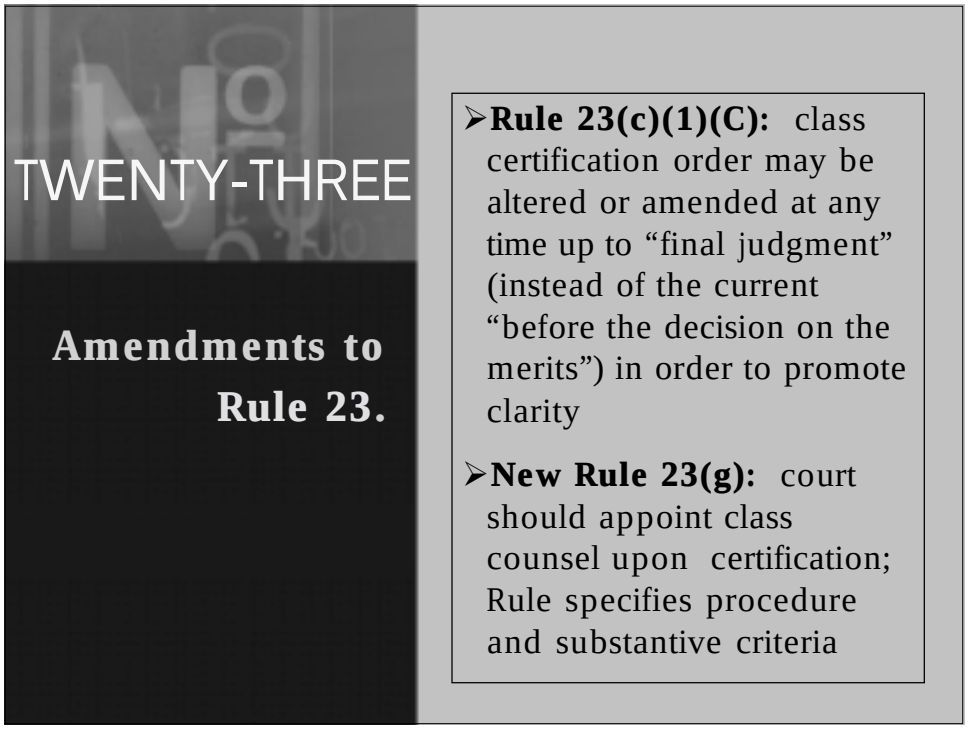
Scrutiny of class settlements.

- **District judge acts as fiduciary of class in scrutinizing settlements**
- **Seventh Cir. says trial judge did not scrutinize**
  - Substantial part of settlement fund likely would revert to defendants
  - Enjoined related Texas action
  - Class counsel devoted little time to case with no real clients
  - Trial judge should have done more to quantify net expected value of claims
  - Fee application sealed









TWENTY-THREE

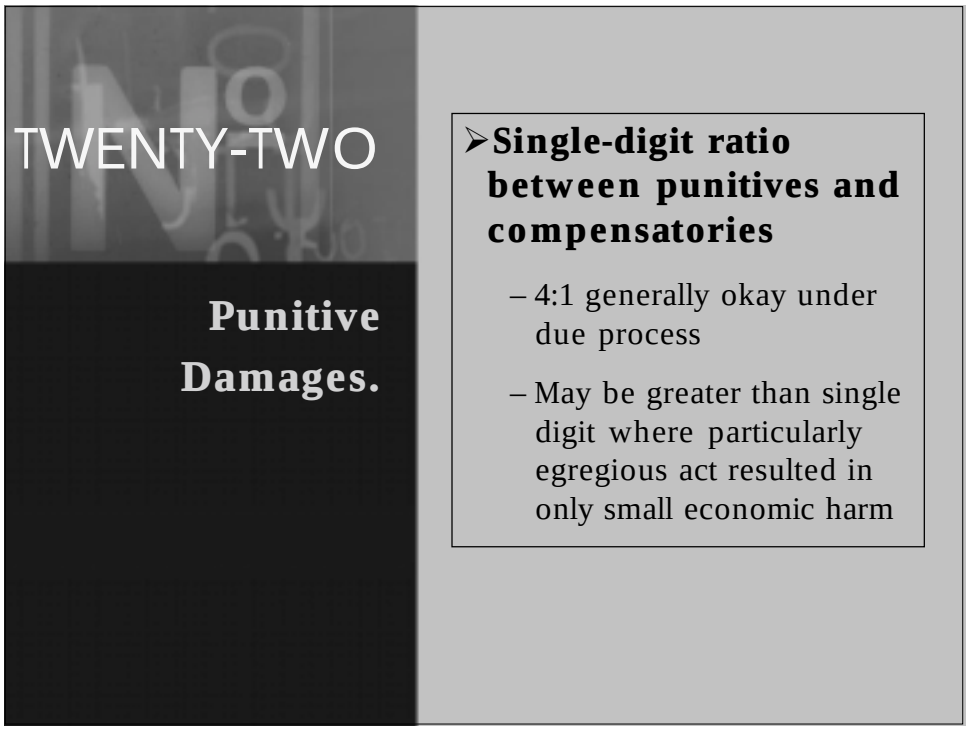
Amendments to Rule 23.

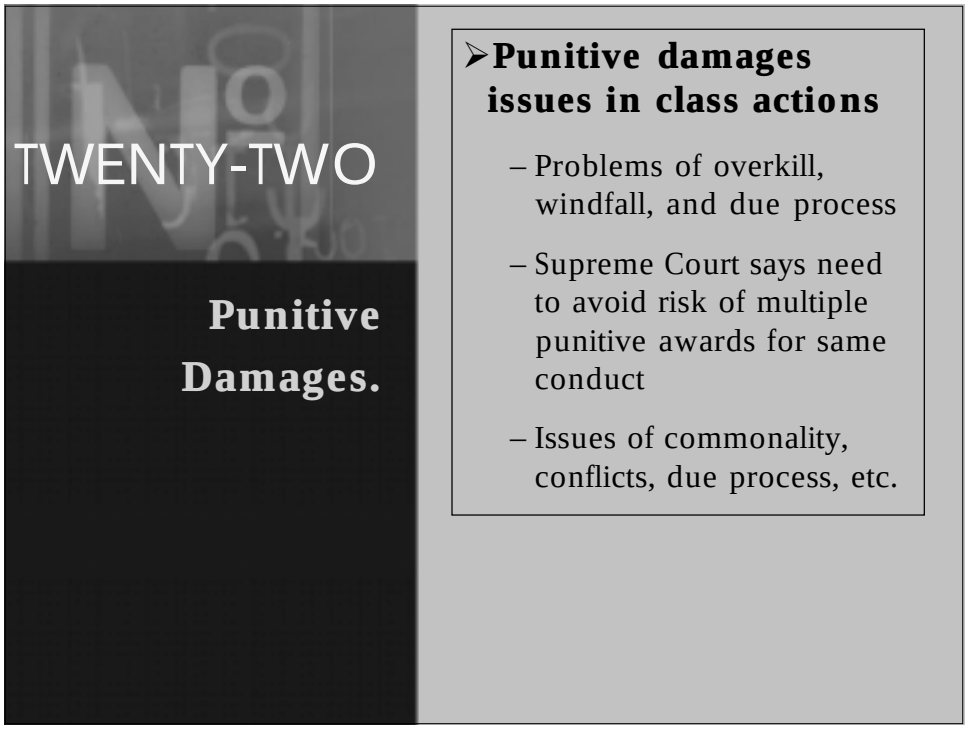
- **New Rule 23(h):** procedure for awarding attorney fees (but not modifying any substantive rules about the availability and amounts of such fee awards)

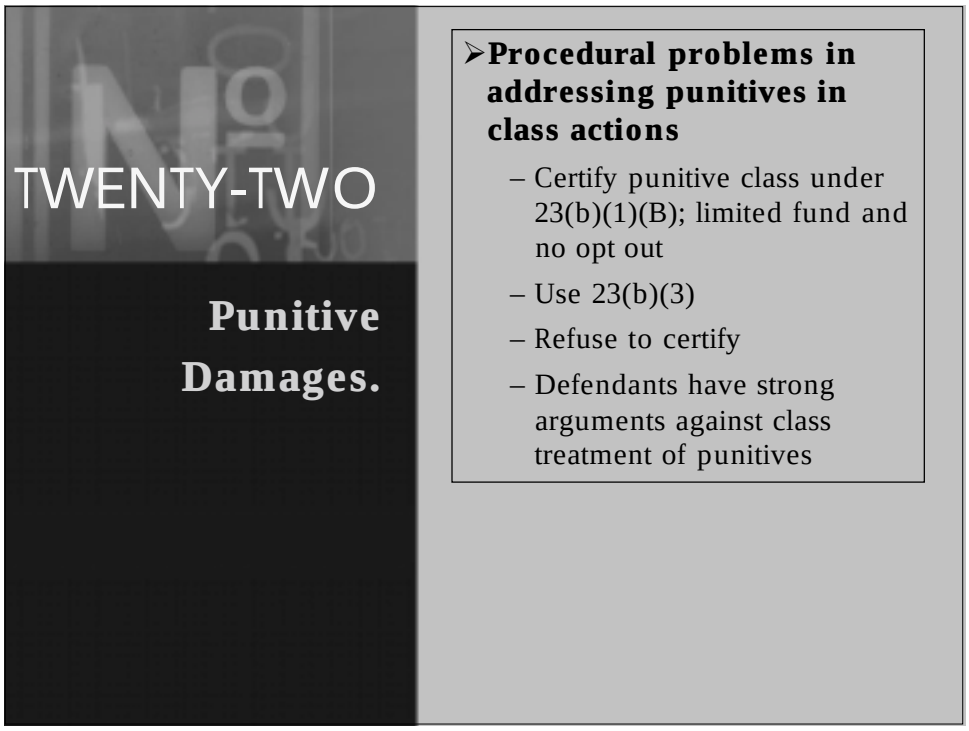
TWENTY-TWO

Punitive Damages.

- **Supreme Court's decision in State Farm v. Campbell, 123 S.Ct. 1513 (2003)**
  - Limits on punitives derive from:
    - Due process - excessive fines
    - Conflict of laws
    - Limits on states' power - federalism
- **Factors of BMW v. Gore in assessing constitutionality of punitives**
  - Reprehensibility of conduct
  - Disparity between actual or potential harm to plaintiff v. punitive award
  - Comparable civil and criminal penalties







TWENTY-ONE

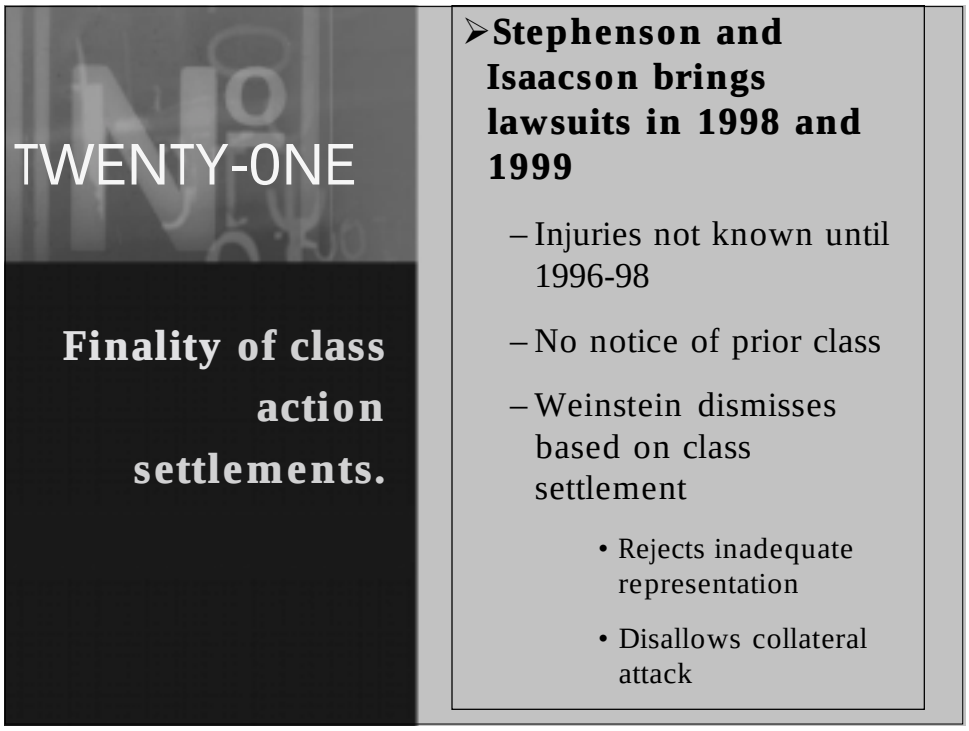
Finality of class action settlements.

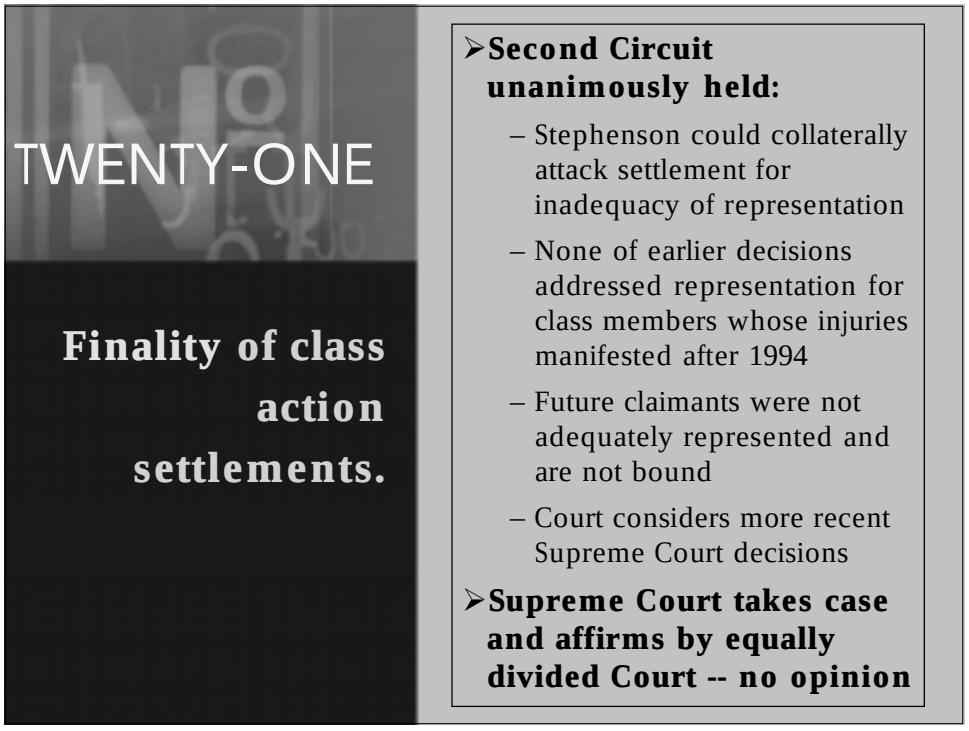
- **Tension between due process rights of finality and due process rights to notice and opportunity to be heard.**
- **Dow Chemicals Co. v. Stephenson, 123 S.Ct. 2161 (2003)**
- **Supreme Court lets stand Second Cir. ruling**
  - Future claimants can collaterally attack class settlement on "adequacy of representation"
  - If inadequate representation, prior judgment is not binding on plaintiff
  - "Adequacy of representation" determined by current standards

TWENTY-ONE

Finality of class action settlements.

- **Agent Orange class settlement approved in 1984**
  - Class included persons who had not manifested injury
  - Cut-off date of 1994 for payment
  - Publication notice
- **Issue of future claims and adequacy of representation directly raised in**
  - 1984 settlement hearing and motion for reconsideration
  - Direct appeal to Second Circuit
  - Subsequent 1989 and 1990 class actions the dismissal of which were affirmed by Second Circuit in 1993





TWENTY-ONE

Finality of class action settlements.

- **Current state of law unclear**
  - To increase odds of finality, future claimants should be represented
  - Settlement should not blatantly discriminate against future claimants

TWENTY

Can state unfair competition laws, federal anti-trust laws, or subsequent repleading to less than 50 plaintiffs be used to circumvent SLUSA?

NINTEEN

Are remand orders under SLUSA appealable?

EIGHTEEN

Can class actions for holding claims remain in state court?

SEVENTEEN

Class actions against fiduciaries of plans.

SIXTEEN

Volume of securities litigation filings.

FIFTEEN

Settlements in securities litigation.

Fourteen

EEOC continues to be a major force in bringing and participating in class action litigation.

Role of the EEOC

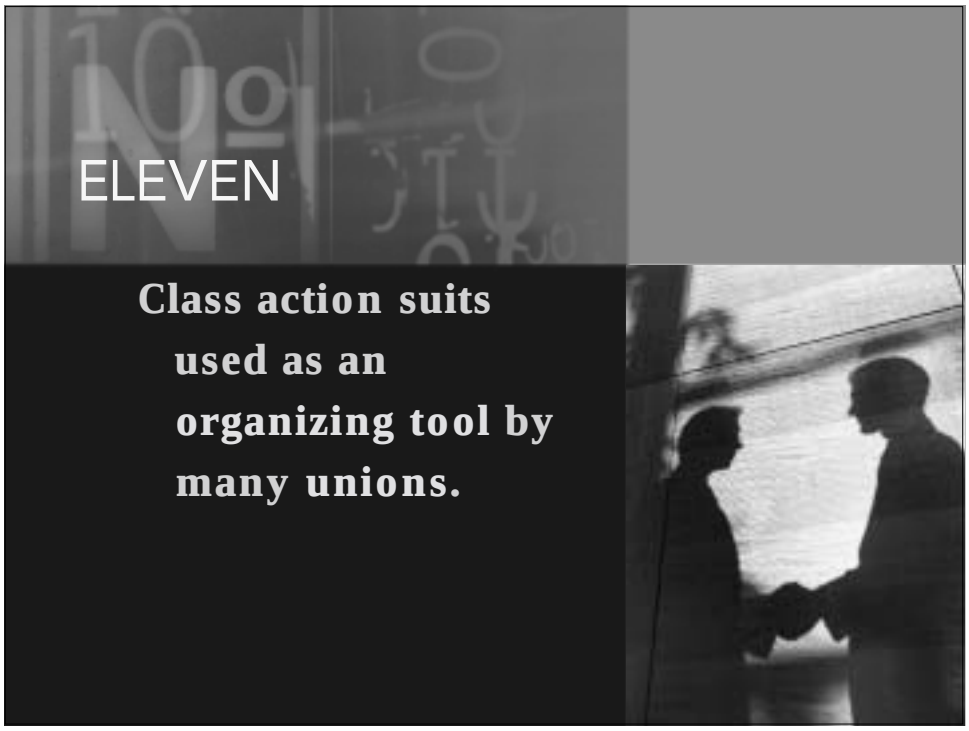
- EEOC 1/3 of Cases Are Class Actions
- EEOC Web Site (East Indian Workers)
- Intervention/"Representative Action" Standard

THIRTEEN

EEOC cannot assert nationwide class based on single worksite.

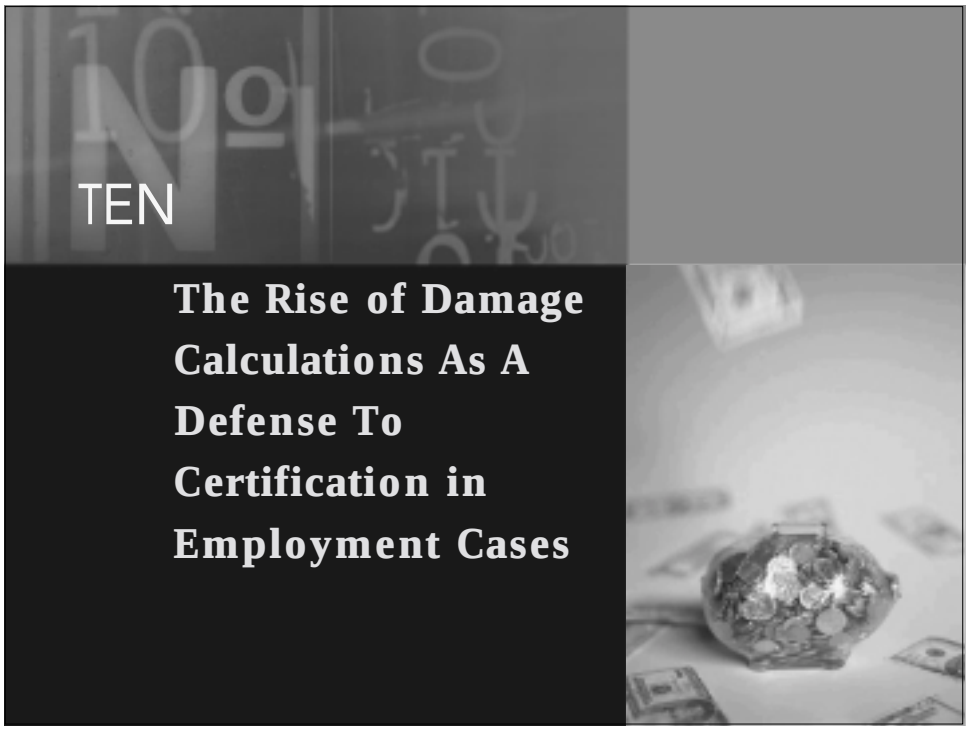
EEOC & Single Worksite

- The Single Site Investigation Challenge
- Sex Discrimination Regarding Indiana Restaurant Investigation
- EEOC v. Jillian's of Indianapolis, Inc. (6/16/03) S.D. Ind.



Union Organizing & Class Actions

- Unrelated Relationships
- Fighting For Employees; Identities
- Illegal Action by Employers
- Financially Rewarding



Damage Calculation Defense

- Dukes Issue on Punitives
- Bell Atlantic Corp. v. AT&T Corp., (5th Cir. July 16, 2003)
- Individual Causation, but Damages Can Defeat Class
- Rule 23(b)(3) more demanding than Rule 23(a) Reject "Formulaic calculation of damages."

NINE

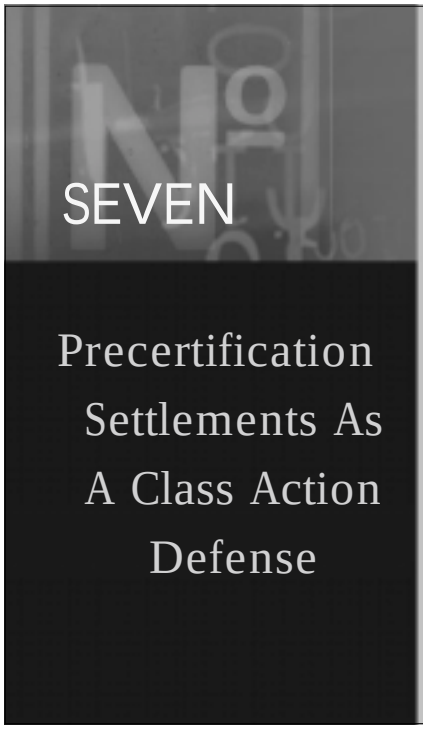
Greater Court Scrutiny of Class Actions in Employment Cases

EIGHT

How far can class action trend extend — 9/11 and the Gap

The New Frontier

- Gap Clothing Requirement
- 9/11 (In re: September 11 Litigation)
- The New Doctrine of Failure to Plan



Paying Named Plaintiff in Full Before Certification

- Third Circuit: offer of judgment to named plaintiff before certification motion moots class action
  - Vacated and remanded -- appeal improvidently granted because offer not for total relief
- Eastern District New York: Split on this practice
- Standing
- Nonnamed class members who objected to class settlement have standing to appeal even if they did not intervene. Devlin v. Scardelletti, 536 U.S. 1 (2002)

SIX

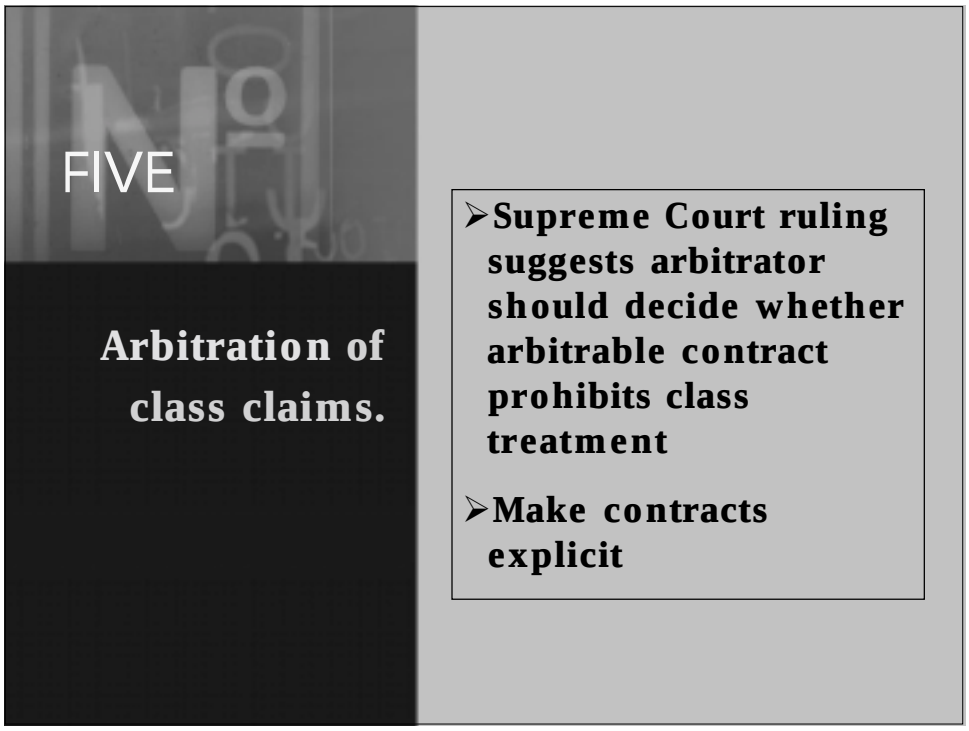
Confidentiality of Class Action Settlements and Class Action Discovery

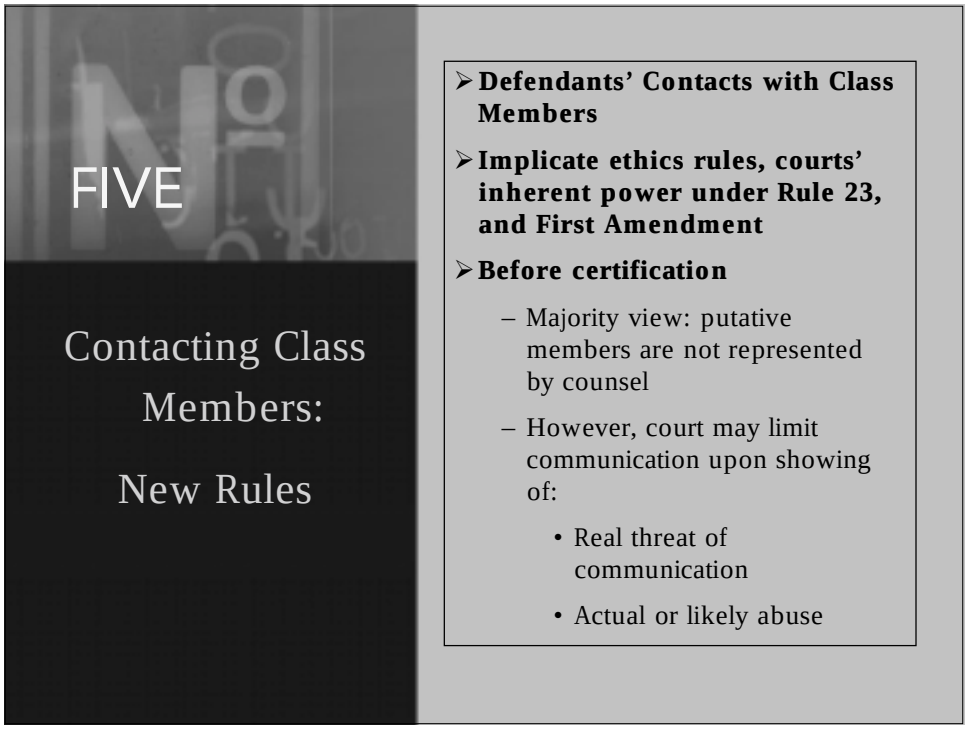
- **Confidentiality of Discovery or Settlement Terms**
- **Protective Orders, Sealed Files, and Confidential Settlements**
- **Ethics Rules:**
  - Okay to agree not to **disclose or reveal** information learned in case
  - Not okay to agree not to **use** information in future representation
- **"Sunshine in Litigation" Laws**
  - No confidentiality where case involves alleged public hazard or probable adverse effect on public health or safety
  - Florida and Texas

FIVE

Arbitration of class claims.

- **Contract explicitly prohibits class treatment of claims in arbitration**
  - California appellate courts split on enforceability
  - California Supreme Court will decide
- **Contract is silent on arbitrability of class claims**
  - Seventh Circuit and other federal district courts earlier held silence means no classwide arbitration
  - Green Tree Case: South Carolina Supreme Court says classwide arbitration permitted when contract is silent
  - But U.S. Supreme Court reverses, saying this is arbitrator's decision





FIVE

Contacting Class Members: New Rules

- Don't encourage class exclusion, make false statements, undermine class counsel
- Okay to communicate settlement offers unless
  - Inherently coercive relationship or misleading offer

➢ **After certification**

- Communications in ordinary course of business okay
- Do not purport to directly or indirectly address or limit class rights in class action
- Claimants who have not opted out are deemed represented by counsel

FOUR

Arbitration of class actions if the class members have individual ADR agreements which are silent on class arbitration? Who decides?

THREE

Derivative actions as a substitute for class actions?

TWO

Higher Standards For Lead Plaintiffs

ONE

Class Actions In Madison County Illinois

THIRTY

Update on Class Action Fairness Act.