704:30 Class Action Developments in 90 Minutes

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Grace E. Speights
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Faculty Biographies

Paul Miltonberger

Paul Miltonberger is associate general counsel - corporate litigation for Sears, Roebuck and Co. He is the chief litigation attorney responsible for managing and directing litigation related to the corporate and securities functions as well as to real estate, mergers and acquisitions, and enterprise-wide litigation including information technology, ERISA, and asbestos. He has managed numerous class actions involving a variety of issues including securities, privacy, deceptive trade practices including California's Section 17200, truth-in-lending, and consumer fraud.

Before joining Sears, Mr. Miltonberger was a trial lawyer in private practice. He has tried many cases, including multi-million dollar claims, to jury verdict. He began his career with O'Connor, Cavanagh in Phoenix, Arizona. Thereafter, he moved back to Illinois and he joined Katten, Muchin & Zavis. Mr. Miltonberger has also managed his own office.

Mr. Miltonberger received his undergraduate degree from the University of Illinois, graduating Phi Beta Kappa. He obtained his JD, cum laude, from the University of Illinois College of Law.

Steven M. Morgan

Steven M. Morgan is vice president and assistant general counsel-regulatory/HSE with Waste Management, Inc., located in Houston. Mr. Morgan has overall responsibility for managing the legal affairs of the company in all matters involving environmental, health, and safety law, including toxic tort litigation, Superfund, and regulatory compliance.

Mr. Morgan was formerly a partner at Akin, Gump, Strauss, Hauer & Feld, L.L.P. where he represented clients in all areas of environmental law, including issues arising under the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), the Resource Conservation and Recovery Act, the Clean Water and Clean Air Acts, and other state and federal environmental statutes. Mr. Morgan began his legal career at Aluminum Company of America. Thereafter, he joined Texas Instruments Incorporated in Dallas where he worked as environmental and safety counsel. After working as an attorney at the Dallas law firm of Arter, Hadden & Witts, Mr. Morgan joined Akin, Gump, Strauss, Hauer & Feld, L.L.P. and became a partner.

Mr. Morgan's professional activities include memberships in the State Bar of Texas and the ABA. He is a member of ABA's section of natural resources, energy and environmental law where he is on the special committee on environmental litigation and the energy and natural resources litigation committee. Mr. Morgan has served as chair of the Dallas Bar Association's environmental law section. Mr. Morgan is also a member of the Houston Bar Association and serves on the board of ACC's Houston Chapter. Mr. Morgan published "Achieving Finality in Environmental Litigation" in the *Environmental Liability, Enforcement & Penalties Reporter.* He is the coauthor of "Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders," in the *Southwestern Law Journal.*

Mr. Morgan received his BA, cum laude. from Northwestern University, and his JD from Vanderbilt University School of Law, where he was associate editor of *The Journal of Transnational Law.*

Grace E. Speights

Grace E. Speights is a partner in the labor and employment practice and cochairs the complex employment litigation practice group at Morgan, Lewis & Bockius LLP. Ms. Speights' practice focuses on counseling and defending clients in connection with employment discrimination claims, primarily those involving class claims. Ms. Speights has handled several employment discrimination class action cases. She has also defended several cases involving claims of discrimination of public accommodations.

Prior to joining the labor and employment law practice, Ms. Speights was an associate and partner in the firm's litigation practice, where she focused on employment discrimination litigation, employee benefits litigation, and insurance coverage litigation. She has litigation and trial experience in federal courts nationwide and in the local courts in the District of Columbia. Ms. Speights joined Morgan Lewis after having clerked for late Judge Aubrey E. Robinson, Jr., United States District Court for the District of Columbia.

Ms. Speights has served on the adjunct faculty of the Washington College of Law of the American University. She has coauthored several articles, the most recent concerning mediation of employment discrimination class actions. Ms. Speights is very active in bar association activities and has served as an officer in several associations in the Washington, D.C., area. Ms. Speights also served for six years as a member of the District of Columbia Court of Appeals Committee on Admissions, which is responsible for preparing and grading the essay examination of the District of Columbia Bar, and for making recommendations to the Court regarding the admission of applicants to the bar and the District of Columbia Commission on Judicial Tenure and Disabilities.

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Class Action Overview 2003-2004

Presentation will cover recent trends and developments of interest to all who deal with class actions, highlighting:

- Securities Class Actions
- Employment Actions
- Snapshot of Other Types of Cases

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Class Action Overview 2003-2004

- **We hope to cover 30 Key Developments, including case filing trends, case law developments, and hot topics in class action litigation, such as:**
  - The "Battle of Statistics"
  - "Excessive subjectivity" theory in employment discrimination class actions
  - Lessons learned from *Dukes v. Walmart*
  - Settlement class actions
  - Reform efforts

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1. Filing Trends in Securities Class Actions

- High profile cases today, increase in public awareness of securities class actions
- Statistical probability that the average public corporation will face at least one securities class action: 9 % over a 5-year period*

* Source: National Economic Research Associates, Inc. (Feb. 2004)

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1. Filing Trends in Securities Class Actions

- The Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act (SOX) has been a factor.
- Surprisingly, there is no statistically significant change in the number of filings since the passage of SOX
- Pace of 2003 filings down from 2002:
  2002: 279 federal filings, 239 "standard"
  2003: 224 federal filings, 210 "standard"

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1. Filing Trends in Securities Class Actions

- Under SOX, there is a statistically significant decrease in the number of dismissals
  - 1/3 fewer dismissals
  - Reasons for decline:
    (1) Cases proceeding more slowly
    (2) Judges more generous in evaluating merits
    (3) Reversals by Circuit Courts of Appeals

2. Filing Trends in Employment Class Actions

- Resurgence of employment class actions
- Started in late 1990s
- Steady increase in class actions filed
- Since 2000, there have been more class action suits related to employment practices than during the previous 20 to 25 years combined*

* *Source: Human Resources Executive (June 21, 2004)*

2. Filing Trends in Employment Class Actions

Type	1998	2000	2003
Discrimination	71	170	159
ERISA	114	126	183
Other Labor Suits	113	145	204
Total	298	441	546

* Data from 1998, 2000 and 2003 Reports on the Judicial Business of the United States Courts

2. Filing Trends in Employment Class Actions

- Reasons for increase in employment class actions since late 1990s:
  - (1) Civil Rights Act of 1991
  - (2) Narrowing of claims by plaintiffs
  - (3) Increased use of social science theories as a basis for commonality
  - (4) More sophisticated plaintiffs and counsel
  - (5) ERISA class actions brought in conjunction with securities claims

3. Impact of Technology

- Internet and media have contributed to increase in class actions
- Enhanced opportunity to "troll" for class members
- "Selling" plaintiffs' case to the public through coordinated media coverage

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3. Impact of Technology

- Internet sites fuel class actions

  Ex. www.bigclassaction.com
- More than 50,000 cases evaluated in past 12 months
- Directory of law firms, Newsletter, Complaint Registry, "Hot Issues" identifies latest targets

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3. Impact of Technology

- Employment discrimination class action lawsuits publicized in ways not available even 10 years ago
- Plaintiffs' counsel routinely establish web sites devoted to particular case. Examples:
  - www.walmartclass.com
  - www.genderclassactionagainstcostco.com

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4. Value of Securities Class Action Settlements

- **Settlements Are Headline News: Some of the Largest Securities Class Action Settlements Ever Occurred in 2003-2004**
  - WorldCom: $2.65 billion
  - Lucent Technologies: $563 million
  - Raytheon: $460 million
  - Oxford Health Plans: $325 million
  - DaimlerChrysler: $300 million
  - Bristol-Myers: $300 million

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4. Value of Securities Class Action Settlements

- **Total Value of Securities Class Action Settlements in 2003**
  - Depending on the data, $2 to 3 billion dollars
  - Average settlement: $21 million
  - 69% settled for less than $10 million
- **Big settlements are bigger, while average and median settlement values are down**

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5. Value of Employment Class Action Settlements

- **Employment Class Action Settlements in 2003-2004**
  - Boeing Co.: $72.5 million
  - Morgan Stanley & Co., Inc.: $54 million
  - University of California Regents: $10.6 million
  - Dr. Pepper Bottling Co. of Texas: $122,880

6. Tactics Used by Class Counsel to Force Settlement Without Trial

- **Class Counsel's Objective is to Force Settlement Without Trial**
  - Class action litigation is expensive
  - Damage and irritation from on-going, negative publicity
  - Incumbent employee management and morale issues when there are pending employment class actions

6. Tactics Used by Class Counsel to Force Settlement Without Trial

- **New Strategies to Force Companies to Settle:**
  - Use of adverse publicity and picketing
  - Release and use of record portions and e-mails
  - Claims of harassment
  - Making plaintiffs/adverse witnesses available for interviews
  - Release of executive compensation and demographics data
  - Use of the OFCCP

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7. Trends in the Kinds of Claims at Issue in Employment Discrimination Class Actions

(1) Workforce Profile

- Occupational segregation
- Glass Ceiling
- Under-representation of minorities and/or females

(2) Compensation and Promotion

- Statistical disparities
- Subjective system
- Inability to explain and justify with valid business reasons

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8. Trends in the Kinds of Employers Subject to Employment Discrimination Class Actions

- **Industries Currently Targeted in Employment Class Actions:**
  - (1) Retail
  - (2) Utility
  - (3) Manufacturing
  - (4) Financial Services

9. Recent Headline Employment Discrimination Class Actions

***Dukes v. Wal-Mart Stores, Inc.*, N.D. Cal., No. C01-2252 (June 21, 2004) -- Gender Discrimination**

- Largest class action in U.S. civil rights history
- Certified nationwide class of more than 1.5 million current and former Wal-Mart employees in approximately 3,400 stores
- Regarding mostly low-level jobs
- Pay and promotion claims: commonality established primarily through theory of "excessive subjectivity"

9. Recent Headline Employment Discrimination Class Actions

- ***Ellis v. Costco Wholesale Corp.*, N.D. Cal., No. C04-3341 (August 17, 2004) - Gender Discrimination**
  - Newly filed suit in same court as *Wal-Mart* case
  - Claiming gender discrimination promotions to higher paying managerial positions
  - Same theory of excessive subjectivity in promotion decisions
  - Claiming that there are no promotion standards or criteria and no job postings

10. Battle of Statistics

- ***Dukes v. Wal-Mart* is a good illustration of the use of statistical evidence in employment cases:**
  - Statistical evidence played critical role
  - Plaintiffs used social science evidence to tie statistics to alleged company-wide discrimination
  - Significant statistical issues:
    (1) Court considered only plaintiffs' analysis
    (2) Court accepted "aggregated" analysis

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11. Aggregation of Statistics

- **Key issue in employment class action cases is whether court will consider aggregated statistical data**
  - In Wal-Mart Plaintiffs' experts use aggregated approach:
    - Broad data set encompassing multiple stores, regions, or even the entire company
  - Defendant's experts rebut "aggregated" analysis:
    - Utilizing disaggregated data sets that more logically track the organization of corporate units and the way decisions are made
    - Did over 7,000 regression analysis

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11. Aggregation of Statistics

- **Courts differ on approach to use of aggregated statistical data:**
  - Growing number of courts have declined to consider merits of defendant's competing statistical analysis at the class certification stage:
    - *Dukes v. Walmart*, N.D. Cal., No. C01-2252 (June 21, 2004)
    - *McReynolds v. Sodexho Marriott Svcs*., 208 F.R.D. 428 (D.D.C. 2002)
    - *Ketchum v. Sunoco*, 217 F.R.D. 354 (E.D. Pa. 2003)
    - *Warren v. Xerox Corp.*, No. 01-CV-2909, 2004 WL 1562884 (E.D.N.Y. 2004).

11. Aggregation of Statistics

- **Courts differ on approach to use of aggregated statistical data (cont'd):**
  - Other courts have specifically rejected an aggregated approach:
    - *Morgan v. UPS*, 2004 WL 1920198 (8th Cir. Aug. 30, 2004)
    - *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999)
    - Stastny v. S. Bell Tel., 628 F.2d 267 (4th Cir. 1980)
    - *Beck v. Boeing Co.*, 203 F.R.D. 459 (W.D. Wash. 2003)
    - *Carson v. Giant Food*, 187 F. Supp. 2d 462 (D. Md. 2002)
    - *Webb v. Merck & Co.*, 206 F.R.D. 399 (E.D. Pa. 2002)

12. Are Expert Opinions Subject to *Daubert* Analysis at Class Certification Stage?

- **Expanded use of experts in class actions who are offering new kinds of theories and evidence (e.g. social scientist who offer evidence regarding "excessive subjectivity" and "stereotyping") raises *Daubert* considerations**
- **Federal courts are split on whether *Daubert* analysis is required at class certification stage:**
  - *Daubert* Analysis Not Required:
    - *Drayton v. W. Auto Supply Co.*, 2002 WL 32508918 (11th Cir. 2002)
    - *In Re Via Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001)
    - *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466 (S.D. Ohio 2001)

12. Are Expert Opinions Subject to *Daubert* Analysis at Class Certification Stage?

- **Federal courts are split on whether Daubert analysis is required at class certification stage (cont'd):**
  - *Daubert*-like Analysis of Reliability Is Required:
    - *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002)
    - *Cooper, et al. v. S. Co.*, 205 F.R.D. 596 (N.D. Ga. 2001)
    - *In Re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 194 F.R.D. 484 (D.N.J. 2000)

13. Use of "Excessive Subjectivity" Theory to Establish Commonality in Employment Class Actions

- ***Dukes v. Wal-Mart* illustrates a class action theory being used more and more by plaintiffs' counsel to obtain class certification.**
  - Plaintiffs and Court in *Wal-Mart* focused on "commonality" issue, examining:
    (1) Company-wide policies and practices
    (2) Statistical evidence of alleged gender-based compensation and promotion disparities
    (3) Anecdotal evidence of discrimination

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13. Use of "Excessive Subjectivity" Theory to Establish Commonality in Employment Class Actions

- **The theory is not new but its use is more frequent**
- **Espoused by Dr. William Bielby and its pretty simple:**
  - Gender stereotypes likely to influence subjective personnel decisions
  - Discretion allows managers to ignore information that defines and disproves stereotypes
  - Managers likely to make decisions based on stereotypes if given discretion and subjective criteria

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13. Use of "Excessive Subjectivity" Theory to Establish Commonality in Employment Class Actions

- **Evidence relied on by Dr. Bielby and the Court to support a finding of "excessive subjectivity" and therefore commonality:**
  - Little written guidance
  - Subjective criteria used in making decisions
  - Little corporate oversight
  - Weak EEO and diversity programs
  - Strong corporate culture
  - Potential gender stereotyping

13. Use of "Excessive Subjectivity" Theory to Establish Commonality

- **In sum, the social science framework operates on the following formula:**

  Male Dominated Management
  + Gender Stereotyping
  + Discretion and excessive subjective decision-making

  = Gender Discrimination

13. Use of "Excessive Subjectivity" Theory to Establish Commonality in Employment Class Actions

- ***Dukes v. Wal-Mart:*** **Significant because court relied so heavily on "Excessive Subjectivity" evidence**
- **Several federal courts, however, have declined to accept the "excessive subjectivity" argument.**
  - *Cooper v. Southern Co.*, 205 F.R.D. 596 (N.D. Ga. 2001)
  - *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526 (N.D. Ala. 2001)
  - *Abram v. UPS*, 200 F.R.*D. 424* (E.D. Wis. 2001)
  - *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536 (D.N.J. 2001)
  - ***But see*** *McReynolds v. Sodexho Marriott Svcs.*, 208 F.R.D. 428 (D.D.C. 2002)

14. Lessons Learned from *Wal-Mart* Decision

- Employers Should Consider Engaging In Critical Self Analysis
  - (1) Review of employment policies and practices (e.g., is there too much subjectivity and is there sufficient monitoring)
  - (2) Statistical analysis of employer data -- in an aggregated and disaggregated manner
- Consider privilege issues carefully
- Must be prepared to correct disparities

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15. Is Class Action Reform on the Way? Class Action Fairness Act

- **Class Action Fairness Act (CAFA)**
  - Discussed over past decade
  - Would have created federal jurisdiction over any civil action with minimal jurisdiction where amount in controversy exceeds $5 million
  - Would have provided for removal of interstate class actions and review on appeal of remand orders
  - Most recent attempt to pass CAFA died on a procedural vote in Senate in July 2004

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16. Amendments to Rule 23 of the Federal Rules of Civil Procedure

- **Amendments to Rule 23**
  - Trial plan requirement
  - Advisory committee calls for courts to perform a "rigorous analysis" and use a "cautious approach" to class certification
  - Controlled discovery into merits appropriate
  - Informed basis for certification decision

17. Proposed Illinois Rule to Mirror Rule 23

- **Illinois Proposed Rule 225 - Mirror Amendment to Federal Rule 23**
  - Proposed Rule 225 would:
    (1) Require determination that class action is superior
    (2) Require allegation of nexus with Illinois
    (3) Mandate that dispositive motions be decided before class certification is decided
  - Rule would impact Madison County, IL -- a favorite plaintiffs' venue

18. Multi-Party, Multiforum Trial Jurisdiction Act (MMTJA)

- **Multi-Party, Multiforum Trial Jurisdiction Act (MMTJA)**
  - Permits minimal diversity jurisdiction in federal courts for cases arising from a single accident where at least 75 people have died.
  - First application was consolidation of numerous federal and state suits arising out of February 2003 Rhode Island nightclub fire.

19. State vs. Federal Forum for Class Actions

- **Is State Court a More Favorable Environment for Plaintiffs?**
  - Study published in April 2004 considered whether existing Rule 23, as interpreted in *Amchem* and *Ortiz* line of cases to restrict class certification for settlement class actions, induced attorneys to litigate class actions in state rather than federal court?
  - Results of study refute common perceptions:*
    - Federal and state judges almost equally likely to certify class actions for trial or settlement
    - Federal and state judges equally likely to approve class settlements

** Source: Willging and Wheatman, Federal Judicial Center (April 2004)*

20. Certification of Hybrid Class Actions

- **What are the proper standards for certification of Hybrid class actions?**
  - Classes seeking both injunctive relief and monetary damages
  - Rule 23(b)(2) - injunctive
  - Rule 23 (b)(3) - monetary
  - ***American Nat'l Insurance Co. v. Bratcher***, No. 04-27 -- U.S. Supreme Court urged to grant review

21. Common Liability vs. Individual Damages

- ***Carnegie v. Household Int'l, Inc.*, No. 04-8008, 2004 WL 1588083 (7th Cir. July 16, 2004)**
  - High-interest tax refund anticipation loans
  - Class of millions of consumers
  - Class certified with regard to liability
  - Judge Posner ruled that issue of injury can "be parceled out to secondary proceedings"
  - Case will settle before second stage, or district court has discretion "to devise imaginative solutions" to the problem of individual hearings

21. Common Liability vs. Individual Damages

- ***In re St. Jude Medical, Inc. Silizone Heart Valves Prod. Liab. Litig.*, 2003 WL 1589527 (D. Minn. 2003), *rev'd in part*, 2004 U.S. Dist. LEXIS 149 (D. Minn. 2004)**
  - Similar reasoning and result as *Carnegie v. Household Int'l*, applied in personal injury context
  - Single product, one manufacturer, one alleged defect
  - Court certified nationwide class dismissing the "potential individual differences among the plaintiffs"

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22. Caution Required in Stipulating to a Class "For Settlement Purposes Only"

- ***Carnegie v. Household Int'l, Inc.*, No. 04-8008, 2004 WL 1588083 (7th Cir. July 16, 2004)**
  - Be cautious in stipulating to a class "For Settlement Purposes Only"
  - What if the settlement is disapproved?
  - Back to square one? Plaintiff will file motion for certification?
  - *Carnegie* shifts the burden -- Defendant must explain why the settlement class should not be certified for the litigation

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23. Certification of Nationwide Classes

- **When are nationwide classes appropriate?**
  - Differences in substantive law
    - Fraud/Consumer Fraud Statutes
    - Punitive damages -- limited fund
  - ***In Re Simon II Litigation v. Philip Morris***, No. 03-7140-L (appeal to the Second Circuit)
    - Question on Appeal: Whether millions of smokers should have been certified as a nationwide class?
    - Differences in substantive law re: fraud & punitives

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23. Certification of Nationwide Classes

- **When are nationwide classes appropriate?**
  - ***State Farm v. Avery***, appeal to Illinois Supreme Court, No. 91494
    - Question on Appeal: Does the Illinois Consumer Fraud Act apply to non-Illinois consumers and thus able to support a nationwide class?
  - ***See also Price v. Phillip Morris; State Farm v. Gridley***

24. Arbitration of Class Claims

- **Can class claims be subject to arbitration?**
  - ***Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003)**
    - U.S. Supreme Court deferred to an arbitrator's judgment as to whether an arbitration clause in a contract between a financial company and its customers allows or bars arbitration of a class action.
  - **In response to *Green Tree***: American Arbitration Association (AAA) released rules for the administration of class arbitrations.

25. SLUSA Developments

- **Securities Litigation Uniform Standards Act (SLUSA) Developments**
  - Private Securities Litigation Reform Act of 1995 (PSLRA) established new rules for federal securities class actions: heightened pleading requirements, automatic stay of discovery during pendency of motions to dismiss, and "safe harbor" for certain forward-looking statements.
  - Plaintiffs sought to avoid effects of PSLRA by filing national securities class actions in state court under state law.

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25. SLUSA Developments

- **Securities Litigation Uniform Standards Act (SLUSA) Developments**
  - **SLUSA:** Sought to enact national standards for securities class action lawsuits involving nationally traded securities -- preempting state lawsuits.
  - **Recent SLUSA Case Law Developments:**
    - Courts are split on whether state lawsuit with both SLUSA claims and 1933 Act claims must be remanded to state court. *Compare In re Tyco Int'l, Ltd. Multidistrict Litig.*, 2004 WL 1403009 (D.N.H. June 21, 2004) (yes), *with Alkow v. TXU Corp.*, 2003 WL 21056750 (N.D. Tex. May 8, 2003) (no).

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25. SLUSA Developments

- **Recent SLUSA Case Law Developments (Cont'd):**
  - *WorldCom* case demonstrated that plaintiffs cannot evade SLUSA by joining claims of up to 49 plaintiffs to avoid triggering the 50 person requirement of SLUSA for covered class actions.
  - SLUSA permits federal court to enjoin discovery in state court action that would interfere with the PSLRA's automatic stay of discovery even if the state court action is not a class action. *See Newby v. Enron Corp.*, 338 F. 3d 467 (5th Cir. 2003).
  - Circuit Courts are split on whether the decision to remand a case that has been removed under SLUSA is appealable.

26. Preclusive Effect of Denial of Class Certification

- ***In the Matter of Bridgestone/Firestone Tire Product Liability Litigation*, 333 F.3d 763 (7th Cir. 2003)**
  - Seventh Circuit holds:
    - Denial of class certification can have preclusive effect in state and federal court

27. Enforcement of Federal Class Action Settlement in Subsequent State Court Suit

- ***Dow Chemical v. Stephenson*, U.S. Supreme Court Case**
  - All Writs Act, 28 U.S.C. § 1651, does not provide a basis for removal jurisdiction.
  - Eliminates one way to enforce federal class action settlement in subsequent state court suit.

28. Antitrust Class Action Developments

- ***F. Hoffman-LaRoche v. Empagran*, 124 S. Ct. 2359 (2004)**
  - U.S. Supreme Court interprets Sherman Act and Foreign Trade Antitrust Improvements Act of 1982 to exclude antitrust class actions brought by foreign parties for antitrust conspiracies abroad alleged to have caused injury outside the U.S., unless there are effects within the U.S.

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29. Other Noteworthy Decisions

- ***Dura Pharms v. Broudo*, 124 S. Ct. 2904 (2004)**
  - U.S. Supreme Court grants certiorari in securities case
  - Question: Does loss causation exist if an allegedly corrective disclosure does not move the market price?
- ***New York v. Berretta U.S.A. Corp.*, No. 00 CV 3641 (E.D.N.Y April 12, 2004)**
  - New York City may proceed with nuisance suit against firearms industry
- ***Wagner v. Express Scripts, Inc.*, No. 04 Civ. 1018 (S.D.N.Y. May 11, 2004)**
  - State prescription drug program members can aggregate their claims to fulfill the $75,000 amount in controversy requirement

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30. Global View

- **Securities Class Actions: Where do we go from here?**
  - "The UK and Europe are set to face a wave of US-style securities litigation."*
  - European companies with securities listed in the U.S. are possible targets.
  - If investors believe they have been defrauded -- European companies are vulnerable.

* *Source: National Economic Research Associates, Inc. (July 1, 2004)*

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October 25-27, 2004
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Scheduled: Tuesday, October 26th
4:30-6:00 pm

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Associate General Counsel
Corporate Litigation

Class Action Overview 2003-2004

RECENT TRENDS & DEVELOPMENTS

The class action headlines for 2003-2004 dominate two fields – securities litigation & employment litigation, more specifically gender bias.

What follows is an overview of developments and discussion of significant issues for the 2003-2004 time period in the areas of securities class action litigation and employment class action litigation along with a compendium of noteworthy decisions.

The statistical data that has been relied upon in this overview includes: 1) *Recent Trends in Securities Class Action Litigation: 2003 Early Update* prepared by NERA, Inc. Economic Consulting, published February 2004;[1] 2) *Securities Class Action Case Filings – 2003: A Year in Review* prepared by Cornerstone Research (an economics and finance consultant) working in conjunction with Stanford Law School's Securities Class Action Clearing House, published April 2004;[2] 3) the *2003 Annual Report of the Director – U.S. District Courts Class Action Civil Cases Commenced During the 12-Month Period Ending September 30, 2003*;[3] and 4) *Attorney Reports on the Impact of Amchem and Ortiz on Choice of a Federal or State Forum in Class Action Litigation* prepared by Thomas E. Willging and Shannon R. Wheatman, published by the Federal Judicial Center April, 2004.[4]

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[1] ELAINE BUCKBERG, TODD FOSTER, AND STEPHANIE PLANCICH, NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2003 EARLY UPDATE, (February 2004)

[2] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION CASE FILINGS – 2003: A YEAR IN REVIEW (2004)

[3] 2003 Annual Report of the Director, Table X-5. U.S. District Courts – Class Action Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending September 30, 2003 at http://www.uscourts.gov/judbususc/judbus.html

[4] THOMAS E. WILLGING AND SHANNON R. WHEATMAN, FEDERAL JUDICIAL CENTER, ATTORNEY REPORTS ON THE IMPACT OF AMCHEM AND ORTIZ ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION (April 2004)

* The presenters wish to acknowledge the assitance of Carmen Pokluda and James Wetwiska (Akin, Gump, Strauss, Hauer & Feld, LLP) in preparing this paper.

SECURITIES CLASS ACTIONS

Securities class actions are typically filed by a group of shareholders against a company and its executives and/or board when the value of the company stock or the profitability of the company declines dramatically. The plaintiffs' bar believes (or has convinced itself) that they are providing a public service in that this type of litigation strengthens corporate governance – corporations likely see it differently. NERA puts the statistical probability that the average public corporation will face at least one securities class action lawsuit at 9% over a five-year period.[5] And, Michele Odorizzi, a defense attorney and partner at Much Shelist Freed Denenberg Ament & Rubenstein says, "A suit is pretty much ensured when a company alters its financial statements."[6]

Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act

Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act (SOX) was enacted in July 2002 with the goal of deterring securities fraud by increasing the accountability of company executives and directors by requiring more oversight in terms of stricter disclosure requirements, stricter independent auditor standards, and the extension of the statute of limitations for violations to two years after the disclosure of a fraud and five years after its occurrence. (Formerly one and three years, respectively.)

The passage of SOX intuitively suggested that the number of securities filings would increase, but that has not happened. According to Elaine Buckberg, Todd Foster, and Stephanie Plancich, the authors of *Recent Trends in Securities Class Action Litigation: 2003 Early Update*, "NERA's research finds that while securities litigation continues to increase as a long-term trend, there is no statistically significant change in the number of filings or the size of settlements since the passage of SOX. The only statistically significant change since SOX relates to the frequency of dismissals, which remains down by one-third."[7]

Further, NERA's 2004 research results show that the pace of 2003 filings is down.[8] In 2002, there were 279 federal filings, 239 of those "standard."[9] In 2003, there were 224 federal filings, 210 "standard."[10] The category of "standard" federal filings is the balance of filings less "laddering" and "analyst" cases – "laddering" cases alleged that underwriters engaged in unfair IPO allocation practices – "analyst" cases alleged that analyst recommendations were influenced by the investment banks' interest in winning business from the recommended companies.[11]

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[5] Buckberg, *supra* note 1, at 4.

[6] David Ferrara, *Big Securities Class Actions Keep Rising*, CHICAGO LAWYER, April 2004

[7] Buckberg, *supra* note 1, at 2.

[8] *See id*. at 2.

[9] *See id*. at 2.

[10] *See id.* at 2.

[11] Buckberg, *supra* note 1, at 2.

Anecdotally, it is interesting to note that NERA's 2004 numbers also show that the 2nd Circuit (considered to have the lowest pleading standard)[12] and the 9th Circuit (considered to have the most stringent pleading standard)[13] continue to lead in the number of filings with 60 and 43, respectively for 2003.[14] Settlements occur most frequently in the 9th Circuit and tend to be lower in the 4th and 7th Circuits.[15]

And, while the passage of SOX has not dramatically increased the number of securities litigation filings, it has had an effect on dismissals with one-third fewer dismissals since its enactment.[16] The 4th Circuit leads with 22% of the dismissals in 2003 – the 6th, 7th, and 10th Circuits tie for the fewest dismissals at 4% each for 2003.[17] Theories proposed to explain the decline in dismissals include: 1) cases are proceeding more slowly;[18] 2) judges are being more generous in evaluating case merits;[19] and/or 3) more courts of appeal are reversing dismissals by district courts.[20]

SOX has also implicated another issue: "whether [SOX] will act to revive claims that were already time-barred when SOX became effective at the end of July 2002."[21] *See In re Enterprise Mortgage Acceptance Co.*, 295 F. Supp. 2d 307, S.D.N.Y., Nov. 14, 2003, where the court held that the legislation does not revive previously time-barred claims, but it is unclear if other courts will follow. If courts determine that claims can be revived, filings may increase.

Then, there are the unintended consequences of SOX. According to C. Evan Stewart, partner with Brown Raysman Millstein Felder & Steiner LLP and adjunct professor of law at Brooklyn Law School and Fordham Law School, SOX has made the plaintiffs' bar more concentrated, not less.[22] Mr. Stewart's theory is validated in a report by Cornerstone Research, released in early May 2004 showing that one firm, Milberg Weiss Bershad Hynes & Lerach (which split into two

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[12] C. Evan Stewart, THE BUREAU OF NATIONAL AFFAIRS, INC., *Securities Class Actions: Beginning of the End, or End of the Beginning?*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 4 (February 27, 2004), at http://pubs.bna.com

[13] *Id.* at 142.

[14] Buckberg, *supra* note 1, at 2.

[15] Gary Young, *Total Settlements Down in Class Actions*, THE NATIONAL LAW JOURNAL, May 17, 2004, at 4.

[16] Buckberg, *supra* note 1, at 4.

[17] Buckberg, *supra* note 1, at 5.

[18] Buckberg, *supra* note 1, at 4.

[19] Buckberg, *supra* note 1, at 4.

[20] Stewart, *supra* note 12, at 142.

[21] Stewart, *supra* note 12, at 141.

[22] Stewart, *supra* note 12, at 140.

firms May 4, 2004) had 53% of the class action settlements from December 22, 1995 to December 31, 2003, with a handful of other firms splitting the balance.[23]

The concentration of the plaintiffs' bar will likely be re-enforced by the December 1, 2003, addition of F.R.C.P. 23(g) as well, though the rule change is too recent to document statistically. Likewise, 2005 statistics will provide insight into the impact of the amendments to F.R.C.P. 23(c) and (e) and the addition of (h).

Securities Class Action Settlements[24]

But the headline news has to do with securities litigation settlements – Enron's implosion a few years back created a wave of securities fraud cases that have reached enough maturity to begin settling. The result has been that the big settlements are bigger while the average and median settlement values have shown a downward trend. Overall, settlements are down. Buckberg, Foster, and Plancich believe that the single most powerful predictor of settlement size is investor losses and that trends in investor losses explain both the highs and lows of 2003. The investor losses in the large settlements were extraordinary while the losses in more typical lawsuits were down by approximately 15%. Some of the largest securities class action settlements ever occurred in 2003-2004:

- Lucent Technologies Inc.[25] (*In re Lucent Technologies Inc. Securities Litigation*, D.N.J., No. 00-CV-621 (JAP), settled 3/27/03) – $563 million settlement – investors were allegedly misled in connection with the purchase of company stock. The global settlement resolved 54 related lawsuits, including the class action, and all related Employee Retirement Income Security Act, bondholder, derivative, and state securities cases.

- Oxford Health Plans[26] (*In re Oxford Health Plans, Inc.*, S.D.N.Y., Master File, No. 97-CV-2295, 6/12/03) – $325 million to settle a securities class action where complaints generally alleged that defendants violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 making false and misleading statements and failing to disclose material information. The complaints also asserted individual claims.

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[23] Young, *supra* note 15.

[24] STANFORD LAW SCHOOL SECURITIES CLASS ACTION CLEARINGHOUSE, *Three of The Largest Securities Class Action Settlements Of All Time Occurred In 2003, Reports NERA Economic Consulting* (February 6, 2004) at http://securitites.stanford.edu

[25] STANFORD LAW SCHOOL SECURITIES CLASS ACTION CLEARINGHOUSE, *Post-Reform Act Securities Case Settlements, Securities Fraud "Top Ten Mega-Settlements" List* (2001) at http://securitites.stanford.edu

[26] STANFORD LAW SCHOOL SECURITIES CLASS ACTION CLEARINGHOUSE, *Oxford Health Plans, Inc.* (2001) at http://securitites.stanford.edu

- DaimlerChrysler[27] (*In re DaimlerChrysler AG Securities Litigation,* S.D.N.Y., Master File, No. 00-CV-993, 10/06/03) – $300 million to settle a dispute between DaimlerChrysler and institutional investors. The original complaint charged that defendants violated Sections 10(b), 14(a), and 20(a) of the Securities Exchange Act of 1934, and Rules 10b-5 and 14a-9 along with several sections of the Securities Act of 1933 for materially false representations of fact in connection with a merger.

- WorldCom Inc.[28] (*In re WorldCom, Inc. Securities Litigation,* S.D.N.Y., No. 02 Civ.3288, 5/10/04) – $2.65 billion to settle a class action litigation brought on behalf of purchasers of WorldCom securities. The settlement class consists of all persons who purchased or otherwise acquired publicly-traded securities of WorldCom from April 29, 1999 through June 25, 2002.

- Bristol-Myers[29] (*In re BMS Securities Litigation*, S.D.N.Y., Master File, No. 02-CV-2551, 7/30/04) – $300 million to settle a securities class action related to its dealing with ImClone Systems Inc. The lawsuit arguably had been won – dismissed with prejudice, but was on appeal.

State Court v. Federal Court Debate

For some time, there has been the perception that state courts are a more favorable environment for plaintiffs in class action litigation and defendants fare better in federal courts. In a study conducted by the Federal Judicial Center, entitled *Attorney Reports on the Impact of Amchem and Ortiz on Choice of a Federal or State Forum in Class Action Litigation*, published April 2004, researchers addressed "whether existing Rule 23, as interpreted and applied in the *Amchem* and *Ortiz* line of cases to restrict class certification for settlement class actions, induced attorneys to file and litigate class actions in state rather than federal court."[30] The findings refute traditional wisdom and tell us the following:[31]

- "Despite attorneys' perceptions that federal judges were less receptive than state judges to motions to certify class actions, federal and state judges were almost equally likely to certify class actions and to certify those cases for litigation and trial or for settlement;"

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[27] STANFORD LAW SCHOOL SECURITIES CLASS ACTION CLEARINGHOUSE, *DaimlerChrysler AG* (2001) at http://securitites.stanford.edu

[28] THE BUREAU OF NATIONAL AFFAIRS, INC., *Citigroup Will Pay $2.65 Billion to Settle Class Litigation by WorldCom Stockholders*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 9 (May 14, 2004), at http://pubs.bna.com

[29] THE BUREAU OF NATIONAL AFFAIRS, INC., *Bristol-Myers Squibb to Pay $300 Million to Settle Class Action Over Accounting*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 15 (August 13, 2004), at http://pubs.bna.com

[30] Willging, *supra* note 4, at 4.

[31] *Id.* at 4.

- "Federal and state judges were equally likely to approve class settlements;" and

- "Federal judges were more likely than state judges to deny class certification, while state judges were more likely than federal judges to not rule on certification."

Procedural Trends[32]

That takes us to procedural trends. The recent procedural trends relate to: 1) class certification, 2) "supplemental" jurisdiction, and 3) the arbitration of class actions. C. Evan Stewart in his article, *Securities Class Actions: Beginning of the End, or End of the Beginning?* discusses each.

Class Certification: Class certification has become a battleground where more defendants are vigorously challenging certification and the federal judiciary is becoming more receptive to the idea that class actions may not always generate the best result. This is seen especially in the employment class actions of the past few months and discussed in greater detail below.

Supplemental Jurisdiction: The Judicial Improvement Act of 1990 codified the doctrines of "pendant" jurisdiction and "ancillary" jurisdiction under a new term, "supplemental" jurisdiction. The purpose of the codification was to "authorize federal courts to exercise pendant jurisdiction over parties without a federal jurisdictional basis." The specific issue is whether each and every member of a class must meet the jurisdictional requirement of $75,000 or whether it is sufficient for the class representatives to meet the jurisdictional limit requirement. In 1973, the U.S. Supreme Court in *Zahn v. International Paper Co.* found that each member must in fact meet the threshold; however, in 1990, federal courts began to take sides on whether the Congressional action overruled *Zahn.* When the U.S. Supreme Court had a chance to resolve the issue in 2000, it split 4-4. As a result, the 3rd, 8th, and 10th Circuits have ruled that *Zahn* is still law. The 4th, 5th, 7th, 9th, and 11th Circuits have ruled that *Zahn* is no longer good law. *See also Wagner v. Express Scripts Inc.*, S.D.N.Y., No. 04 Civ. 1018, 5/11/04 where the court allowed class member claims to be aggregated. This case is discussed in greater detail below.

Arbitrating Class Actions: In *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), the parties' arbitration agreement was silent regarding class-wide relief. The U.S. Supreme Court agreed to defer to an arbitrator's judgment as to whether an arbitration clause in a contract between a financial company and its customers allows or bars arbitration of a class action. The Green Tree opinion does not address the question of whether or not complete, contractual bans on class-wide arbitrations are enforceable or not. The 5th Circuit in an August 13, 2003 decision in *Pedcor Management Co. v. Nations Personnel of Texas Inc.*, 5th Cir., No. 02-20878, 8/13/03, held that arbitrators, not courts, should decide whether class arbitration is available or forbidden. Then, the Texas Supreme Court in *In re Wood,* Tex., No. 03-0754, 7/9/04, held that the authority to rule on class certification issue resides with an arbitrator rather than a court when the parties have agreed to commit all disputes rising out of an agreement to an arbitrator.

[32] Stewart, *supra* note 12.

In response to the Supreme Court's Green Tree decision, the American Arbitration Association (AAA) drafted and released rules for the administration of class arbitrations. The AAA wrote its class-wide arbitration rules based largely on Fed. R. Civ. P. 23. See Lawrence J.Bracken II and Caroline H. Dixon, AAA Releases Rules on the Administration of Class Actions, 23 Franchise L.J. 215 (Spring 2004). Unlike individual arbitrations, class action arbitrations are open to the public and pleadings are posted on the AAA's web site. Id. The rules allow a party to petition the court to vacate the arbitrator's decision at two different times - upon the arbitrator's decision whether or not to let the class-wide arbitration commence, and upon a ruling on class certification. Rule 3. However, the grounds adopted by a majority of the states for reversal of arbitration are very narrow, and occur only when one of six circumstances exists: (1) the award was procured by corruption; (2) the arbitrators exceeded their powers; (3) an arbitrator was biased or corrupt; (4) the arbitrators refused to postpone the hearing, even though sufficient cause was shown; (5) the arbitrators refused to consider material evidence; or (6) there was no valid agreement to arbitrate. Bracken at 2; Unif. Arbitration Act § 12 (amended 1956), 7 U.L.A. 280-281 (1997).

More Reform? Class Action Fairness Act

There was the Private Securities Litigation Reform Act of 1995 (PSLRA) designed to reduce abusive strike suits, raise pleading standards, and limit certain plaintiff's lawyers from dominating the class action litigation suits.

Then, there was the Securities Litigation Uniform Standards Act of 1998 (SLUSA) which was an attempt at keeping plaintiff's lawyers out of state court and in federal court where the PSLRA would control.

Followed by SOX in 2002.

But, the litigation continues without much change. Stewart says, "…Congressional action has not and did not stop the plaintiffs' bar in it tracks."[33]

Efforts to pass the Class Action Fairness Act (CAFA) have been ongoing over the past decade. The House of Representatives passed its version of the legislation in June 2003. The most recent Senate attempt failed when CAFA died on a procedural cloture vote in early July 2004. It is doubtful that it will be resurrected before the Senate recesses on October 8th.

Certain parts of the proposed CAFA seek to: 1) discourage worthless coupon settlements and abuse in "coupon settlement" situations by, for example, requiring that legal fees in coupon settlements be based on the number of coupons redeemed or on the number of hours the lawyers actually worked; and 2) stop venue shopping in the state courts by creating broader federal jurisdiction and increasing removal rights thereby allowing federal courts to hear more class action lawsuits.

[33] Stewart, *supra* note 12, at 141.

Securities Class Actions – From Here to Where???[34]

Where does securities class action litigation go from here??? Europe. In an interesting NERA article, *Analysis: A Class of Its Own,* published July 1, 2004, Des Cahill says, "The UK and Europe are set to face a wave of US-style securities litigation, according to class action veteran Melvyn Weiss." The article suggests that securities class action litigation has "reached a high watermark in the US" and it is "ready to spill over into Europe." If European companies have securities listed in the U.S., with investors who believe they have been defrauded, they are vulnerable. In the same article, Mike McAlevey, chief governance and securities counsel for General Electric, says that he believes tort reform will become a bigger issue on the White House's agenda, and notes that the Fairness Act, while not yet law, has wide support from the business community. Larry Smith, director of strategy at U.S. Consultancy Levick Strategic Communications, suggests that "this [increased legislation] and the mature nature of the U.S. market is forcing the plaintiffs' bar to look abroad." Mr. Smith says, "The plaintiffs' bar may become increasingly global in its ambitions if class action litigation becomes less viable or less profitable in the U.S."

EMPLOYMENT CLASS ACTIONS[35]

Carol Patton says in her article *Heading Off Trouble*, published June 21, 2004, in Human Resource Executive, "Since 2000, there have been more class-action suits related to employment practices than during the previous 20 to 25 years combined, according to Marsh Inc. a global risk and insurance services firm based in New York." Ms. Patton suggests that employment-practice claims began building in the 1990's with the Anita Hill/Clarence Thomas entanglement followed by the President Clinton/Paula Jones sexual harassment entanglement sensitizing the public and making complainants more comfortable about speaking out. The biggest news of 2003-2004 in terms of employment class actions has been the certification of large nationwide classes in gender bias suits and large settlements of claims in gender bias suits brought by both employees and regulatory agencies.

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[34] NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., ANALYSIS: A CLASS OF ITS OWN, (July 1, 2004), at http://www.nera.com

[35] Carol Patton, NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., *Heading Off Trouble*, HUMAN RESOURCE EXECUTIVE (June 21, 2004), at http://www.nera.com

Class Certifications

- Wal-Mart Stores Inc.[36] – In *Dukes v. Wal-Mart Stores Inc.*, N.D. Cal., No. C01-2252, *certification order released* 6/22/04, the court certified a nationwide class of up to 1.6 million former and current Wal-Mart Stores Inc. female employees who allege they were discriminated against in pay and promotion. The class was certified for purposes of liability, injunctive and declaratory relief, punitive damages, and lost pay. The court ruled that because the monetary damages are "substantial," there will be notice and opt-out rights. In certifying the class, the court found that Wal-Mart's pay policies are significantly uniform across stores and that the policies "contain a common feature of subjectivity" to claims class-wide. Interestingly, the court noted that "plaintiff's class certification request is being ruled upon in a year marking the 50th anniversary of the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). "This anniversary serves as a reminder of the importance of the court in addressing the denial of equal treatment under the law wherever and by whomever it occurs." Defense and plaintiff counsel agree that this will be the largest class action in U.S. civil rights history.

Wal-Mart is also defending itself in lawsuits alleging wage and hour violations in New Jersey, Oregon, and Minnesota.

- In Sav-On Drug Stores, Inc. v. Superior Court, Ca S. Ct. No. S106718, filed August 26, 2004, the California Supreme Court, in a unanimous opinion, affirmed the trial court's order certifying as a class action this suit for recovery of unpaid overtime compensation. The Court held that the appropriate standard of review in these cases is "abuse of discretion" with respect to whether common issues predominate and noted that where the trial court's decision is supported by "substantial evidence," it will not be disturbed unless improper criteria were used or erroneous legal assumptions were made.

Sav-On argued, as do most employers, that whether any particular member of the class was exempt or non-exempt was inextricably tied to the tasks the person actually performed and the amount of time actually spent performing the tasks. In this regard, the defendant argued that activities performed by each class member varied significantly from store to store and person to person, pointing to differences such as store location, store size, store layout, sales volume, hours of operation, management structure and style, experience level of managers, and number of hourly workers requiring supervision. From these factors, supported by 51 declarations, the defendant asserted that no meaningful generalizations about the employment circumstances of its managers could be made. Therefore, Sav-On argued, class certification was inappropriate.

Holding against Sav-On, the California Supreme Court stated:

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[36] THE BUREAU OF NATIONAL AFFAIRS, INC., *Federal Court in California Certifies Class of 1.6 Million Women Claiming Wal-Mart Bias*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 12 (June 25, 2004), at http://pubs.bna.com

"A class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of her or her damages."

"Individual issues do not render class certification inappropriate so long as such issues may be effectively managed."

"Accordingly, neither variation in the actual work activities undertaken during the class period by individual AM's and OM's, nor differences in the total unpaid overtime compensation owed each class member, bars class certification as a matter of law."

- Costco Wholesale Corp.[37] – August 17, 2004, The Impact Fund in *Ellis v. Costco Wholesale Corp.*, N.D. Cal., No. C04-3341, 8/17/04, filed a class action alleging gender discrimination. The suit was filed in the U.S. District Court for the Northern District of California – the same court that certified the Wal-Mart class discussed above. It is alleged that Costco consistently denied women promotions to higher paying managerial positions. The complaint also alleges that Costco has no job-posting or application procedures for assistant manager and general manager positions, nor are there promotion standards or criteria for these jobs.

Gender Bias Class Action Settlements

- University of California Regents[38] – November 11, 2003, the University of California Regents approved a $10.6 million settlement for women who are current and former Lawrence Livermore National Laboratory employees. (*Singleton v. Regents of the University of California,* Cal. Super. Ct., Alameda Cnty., No. 807233-1, *settlement approved by regents 11/19/03).* The lawsuit alleged that the lab discriminated against women in pay and promotion and used an overly subjective performance ranking system and that the lab documented, but failed to correct, discrimination against women for more than a decade. In the original class certification, plaintiffs made a statistical showing that women at the lab across a variety of job classifications and salary scales had fewer promotions and thus received less pay than their male counterparts. The class was later divided into 13 subclasses.

- Dr. Pepper Bottling Co. of Texas[39] – March 16, 2004, Dr. Pepper Bottling Co. of Texas agreed to pay $126,880 to settle charges by the Office of Federal Contract Compliance

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[37] Justin M. Norton, *Costco Latest in Wave of Gender Bias Suits*, THE RECORDER, August 18, 2004

[38] THE BUREAU OF NATIONAL AFFAIRS, INC., *University of California OKs $10.6 Million Sex Bias Settlement for Livermore Workers*, CLASS ACTION LITIGATION REPORT, vol. 4. no. 22 (November 28, 2003), at http://pubs.bna.com

[39] THE BUREAU OF NATIONAL AFFAIRS, INC., *Dr. Pepper to Settle for $126,000 Charges of Gender Bias in Texas*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 7 (April 9, 2004), at http://pubs.bna.com

Programs that the company's hiring practices resulted in the disparate treatment of women who applied for merchandiser jobs. (*OFCCP v. Dr. Pepper Co. of Tex.*, DOL OALJ, No. 2004-OFC-00001, consent decree approved 3/16/04).

- Morgan Stanley & Co. Inc.[40] – July 12, 2004, Morgan Stanley & Co. Inc. in *EEOC v. Morgan Stanley & Co. Inc.*, S.D.N.Y., No. 01-8421, *consent decree approved 7/12/04*, agreed to pay $54 million to settle a sex discrimination class suit brought by the EEOC. The EEOC filed the lawsuit in September 2001, charging Morgan Stanley with engaging in a widespread pattern of discrimination against women in violation of Title VII. The complaint arose from a 1998 female employee being denied promotion to managing director while lesser or equally qualified men were promoted ahead of her. The EEOC issued a reasonable cause finding in June 2000. The employee was subsequently fired.

- The Boeing Co.[41] – July 16, 2004, The Boeing Co. in *Beck v. Boeing Co.*, W.D. Wash., No. C00-0301P, *consent decree signed* 7/16/04, Boeing agreed to pay up to $72.5 million to settle a sex discrimination class action involving 29,000 salaried and hourly female employees who alleged that they were discriminated against in pay, promotions, overtime, assignments, bonuses, and other conditions of employment. The dispute began more than four years ago and while settlement negotiations had been conducted "sporadically," they resumed with "greater urgency" as the May 17, 2004 trial date approached.

In a second phase of the Boeing litigation, the company was found not to have discriminated in pay practices against a class of 1,800 former and current employees of Asian and Middle Eastern national origin or ethnic background. (*Nouri v. Boeing Co.*, W.D. Wash., No. C99-1227L, 6/4/04).

Battle of Statistics[42]

Where some class actions are known for their "gotcha evidence," i.e., toxic tort, the gender bias cases have been and will likely continue to be "a battle of statistics" according to analysts and experts generally. In considering the Wal-Mart case, Christopher Erath, senior vice president of NERA, Inc. Economic Consulting said, "The use of statistics will predominate, barring the discovery of a corporate edict that says, 'Thou shall not promote women.'" It is believed that the case will depend on statistical proof that women and men are not given the same opportunities at Wal-Mart. Erath says, "The role of a statistician in the courtroom is to show how statistically

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[40] THE BUREAU OF NATIONAL AFFAIRS, INC., *Morgan Stanley to Pay $54 Million To Settle 2001 Bias Lawsuit by EEOC*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 14 (July 23, 2004), at http://pubs.bna.com

[41] THE BUREAU OF NATIONAL AFFAIRS, INC., *Boeing Agrees to Pay Up to $72.5 Million to Settle Sex Discrimination Class Action*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 14 (July 23, 2004), at http://pubs.bna.com

[42] Alex Daniels, NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., *No Smoking Gun Likely in Bias Suit*, ARKANSAS DEMOCRAT-GAZETTE, INC. (August 15, 2004), at http://www.nera.com

significant an event is. An event or pattern is statistically significant when it can be shown that it has a relatively small chance of randomly occurring." It will be plaintiff's statistics against Wal-Mart's. In addition, the court will likely use its own statistical expert. Expert demeanor and credibility will be as important as the "technical soundness of their statistical methods."

NOTEWORTHY DECISIONS

- *New York v. Beretta U.S.A. Corp.*, E.D.N.Y., No. 00 CV 3641, 4/12/04[43] – New York City may proceed with its nuisance suit against the firearms industry finding the city had presented enough evidence to warrant going to trial on its claims that the gun industry's marketing and distribution practices enable criminals and juveniles to obtain guns in an illegal secondary market.

- *Compaq Computer Corp. v. Lapray*, Tex., No. 02-0705, 5/7/04[44] – The Texas Supreme Court decertified the class in a nationwide suit over a computer defect. The high court concluded that it had jurisdiction to hear the appeal because the intermediate court failed to analyze predominance and superiority under applicable Texas rules. The lower court was faulted for certifying a mandatory, no opt-out, no-notice class that could negatively impact putative class members.

- *Wagner v. Express Scripts Inc.*, S.D.N.Y., No. 04 Civ. 1018, 5/11/04[45] – State prescription drug program members can aggregate their claims to fulfill the $75,000 federal amount-in-controversy requirement in their suit alleging a pharmacy benefits manager obtained kickbacks from drug manufacturers.

- *Basco v. Wal-Mart Stores Inc.*, E.D. La., No. 00-3184, 7/1/04[46] – The court held that employees alleging they did not receive overtime pay because of a "Wal-Mart mentality" cannot proceed with a proposed collective action under the Fair Labor Standards Act. The court said that if the case were certified as a collective action, there would be "enormous manageability problems" as the employees come from different departments, groups, organizations, sub organizations, units and local offices within the organization. The employees

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[43] THE BUREAU OF NATIONAL AFFAIRS, INC., *New York City's Suit Against Gun Industry Will Go to Trial, Federal Judge Rules*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 8 (April 23, 2004), at http://pubs.bna.com

[44] THE BUREAU OF NATIONAL AFFAIRS, INC., *Texas Supreme Court Decertifies Class In Suit Against Compaq Over Disk Defect*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 10 (May 28, 2004), at http://pubs.bna.com

[45] THE BUREAU OF NATIONAL AFFAIRS, INC., *State Prescription Drug Program Members Can Aggregate Their Claims to Bring Action*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 10 (May 28, 2004), at http://pubs.bna.com

[46] THE BUREAU OF NATIONAL AFFAIRS, INC., *Federal Judge In Louisiana Blocks Workers' Bid for Collective Action Against Wal-Mart*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 15 (August 13, 2004), at http://pubs.bna.com

allege that Wal-Mart required them to work off the clock without pay, locked them in the stores at night off the clock while waiting for management to let them out, had them perform work duties unpaid while on rest and meal breaks, and that managers manipulated time and wage records to reduce the amounts paid to employees, including overtime.

- *In re Wood*, Tex., No. 03-0754, 7/9/04[47] – The Texas Supreme Court held that the authority to rule on class certification issues resides with an arbitrator rather than a court when the parties have agreed to commit all disputes rising out of an agreement to an arbitrator.

- *Carnegie v. Household International Inc.*, 7th Cir., No. 04-8008, ---F.3d ---, 2004 WL 1588083 7/16/04[48] – The U.S. Court of Appeals for the 7th Circuit found that common issues predominate and certified a class of millions of consumers in a case involving high-interest tax refund anticipation loans despite the prospect that potentially millions of second stage hearings would be required to resolve issues pertaining to the damages sustained by individual class members. Writing for the court, Judge Posner held that a class could be certified with regard to liability and consequently separated from the question of individual injury because "the issue of injury could be parceled out to satellite proceedings." The court reasoned that the case would either settle before the proceedings reached that stage or, if it did not, that the district court has discretion "to devise imaginative solutions" to the problem of individual hearings.

Moreover, the 7th Circuit also held that, despite the fact that defendant had agreed to a class for settlement purposes only, if a proposed class settlement is disapproved, the litigation will proceed thereafter as a class unless the defendant can convince the court that a class should not be certified. This potential shifting of the burden must hereafter be considered carefully by all practitioners in considering whether to stipulate to a class "for settlement purposes only."

- *In re Citigroup Inc. Capital Accumulation Plan Litigation (Lomas v. Travelers Prop. Cas. Corp.)*, 1st Cir. No. 03-2221, 7/16/04[49] – Citigroup's failure to inform participants in a securities class action that the company intended to arbitrate some claims prevents it from arbitrating any of the claims and allows the class to move to trial.

CONCLUSION

[47] THE BUREAU OF NATIONAL AFFAIRS, INC., *Texas Supreme Court Says Arbitrator Must Decide Class Certification Issue*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 14 (July 23, 2004), at http://pubs.bna.com

[48] THE BUREAU OF NATIONAL AFFAIRS, INC., *Tax Refund Loan Litigation Class Certified After Proposed Settlement Was Disapproved*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 14 (July 23, 2004), at http://pubs.bna.com

[49] THE BUREAU OF NATIONAL AFFAIRS, INC., *Citigroup's Delay in Notifying Class Signifies Arbitration Claims Waived, First Circuit Says*, CLASS ACTION LITIGATION REPORT, vol. 5. no. 15 (August 13, 2004), at http://pubs.bna.com

Securities class actions are destined to endure despite legislative regulation and should the U.S. forum prove too restrictive or less profitable, look out Europe. In terms of employment class actions, the political and societal environments appear to be combining with public rage to fuel mass litigation and, similar to the securities settlements of the recent months, may yield extraordinary results.

American Corporate Counsel Association

30 Class Action Developments in 90 Minutes

October 25-27, 2004
Sheraton Chicago

Scheduled: Tuesday, October 26th
4:30-6:00 pm

Grace E. Speights
Partner
Labor & Employment Law Practice Group
Morgan, Lewis & Bockius LLP

Class Action Overview 2003-2004

LESSONS LEARNED FROM THE RECENT *WAL-MART* CLASS CERTIFICATION LITIGATION

I. INTRODUCTION

To be sure, employment discrimination class action litigation is *not* a new phenomenon. However, the last decade has made clear that: (1) the willingness of the plaintiffs' bar to fund and prosecute major putative class actions alleging employment discrimination against high profile employers has grown significantly after a dropoff in cases in the late 1980s and early 1990s and (2) the approach of plaintiffs' counsel in prosecuting putative class actions cases, and of the courts in considering whether to certify them as class actions, has evolved in significant and important ways. Now, more than ever, employers must be keenly aware of the issues that are important to the putative class action.

A mere sampling of the employers who have been the subject of major employment discrimination class action litigation in the last decade alone reads like a who's who of the nation's corporate elite spanning a diverse range of employers in various industries, including retail, utility, manufacturing, and financial services:

- **Amtrak** (*Campbell v. Amtrak*, race discrimination, D.D.C. Filed 1999)
- **BellSouth** (*Jenkins v. BellSouth*, race discrimination, M.D. Ala. 2002)
- **Boeing** (*Beck v. Boeing Co.*, gender discrimination, W.D. Wash. 2000)
- **Coca-Cola** (*Abdallah v. Coca-Cola*, race discrimination, N.D. Ga. 1998)
- **Costco** (*Ellis v. Costco Wholesale Corp.*, gender discrimination, N.D. Cal. 2004)
- **Cracker Barrel** (*Rhodes v. Cracker Barrel*, race discrimination, N.D. Ga. 1999)
- **Federal Res. Bank of Chicago** (*Daniels v. Fed. Res. Bank*, race disc., N.D. Ill. 1998)
- **Home Depot** (*Butler v. Home Depot*, gender discrimination, N.D. Cal. 1994)
- **J&J** (*Gutierrez v. Johnson & Johnson*, race discrimination, D.N.J. 2001)
- **Kodak** (*Alston v. Eastman Kodak Co.*, race discrimination, W.D.N.Y. 2004)
- **Merck** (*Webb v. Merck & Co.*, race discrimination, E.D. Pa. 1999)
- **Merrill Lynch** (*Cremin v. Merrill Lynch*, gender discrimination, N.D. Ill. 1996)
- **Microsoft** (*Donaldson v. Microsoft*, race/gender discrimination, W.D. Wash. 2000)
- **Morgan Stanley** (EEOC v. Morgan Stanley, gender discrimination, S.D.N.Y. 2001)
- **Publix** (*Shores v. Publix Super Markets*, race discrimination, M.D. Fla. 1995)
- **Texaco** (*Roberts v. Texaco*, race discrimination, S.D.N.Y. 1994)
- **UPS** (*Morgan v. UPS*, race discrimination, E.D. Mo. 2001)
- **Wal-Mart** (*Dukes v. Wal-Mart*, gender discrimination, N.D. Cal., 2001)
- **Xerox** (*Warren v. Xerox Corp.*, race discrimination, E.D.N.Y. 2001)

Importantly, in recent years, the approach to class action employment discrimination litigation—that is, the theories utilized by plaintiffs in an attempt to obtain class certification—has also evolved. Whereas motions for class certification once primarily relied on the presentation of statistical evidence adverse to employers and the assembly of anecdotal evidence sufficient to demonstrate to a court that discrimination was an employer's "standard operating procedure"

(*see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 248 (1977)), plaintiffs are relying more heavily than ever on statistical evidence coupled with attacks on a company's employment policies (or the lack thereof) and the existence of "excessive subjectivity" in the decision-making processes challenged in the class action litigation. Indeed, the important role that statistical evidence, corporate employment policies and a "excessive subjectivity" theory play in today's employment discrimination class action was plainly evident in the court's recent decision granting plaintiff's motion for class certification in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). In *Wal-Mart*, plaintiffs relied on company-wide Wal-Mart policies to link statistical evidence of gender disparities in promotion and compensation to unlawful gender bias through the use of a sociological expert who opined that excessive subjectivity in Wal-Mart's decision-making processes served as a conduit for gender bias that might affect all putative class members. In certifying the largest class in the history of employment discrimination litigation history (a class of more than 1 million current and former female Wal-Mart employees from 3,400 different stores), the court accepted and relied upon that precise theory.

Because it is all but certain that more employment discrimination class actions will be prosecuted utilizing the very theory presented in *Wal-Mart*, it is important that employers in all industries consider the import of the *Wal-Mart* ruling and the lessons to be learned from it. Indeed, the *Wal-Mart* ruling provides employers with guidance on engaging in critical self-analysis to determine whether they may be vulnerable to the same legal theories which led to class certification in that case.

This paper will first discuss the increased use of employment class actions and note the recent trends which differentiate today's class actions from those of the past. The paper will next discuss the *Wal-Mart* decision and explain how employers may use its lessons as a guide to assessing their own litigation risk. Finally, the paper will suggest ways in which employers can act to assess their own vulnerability to a class action suit and possibly reduce their risk of substantial liability at the hands of class action litigation.

II. THE CHANGING LANDSCAPE OF CLASS ACTION LITIGATION

In 1976, 1,174 employment discrimination class action cases were filed in the federal courts. *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 820 (2004). During the 1980's and early 1990's, however, the number of such cases dropped dramatically, to a low of 32 filed cases in 1991. *Id.* This dropoff was likely due in part to the U.S. Supreme Court's ruling in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), which curtailed the frequent certification of cases alleging "across-the-board" discrimination—that is, cases which made generalized claims of discrimination as to a wide range of an employer's employment practices (for example, promotion, compensation, hiring, termination, training, discipline, etc.). The *Falcon* Court, by requiring that, in order to obtain class certification, class representatives must demonstrate that they actually share relevant claims with absent class members in order to satisfy the commonality and typicality requirements of Rule 23(a), made certifying an employment discrimination class harder than ever before. Moreover, the downturn in class action employment discrimination litigation after the 1970's is also likely due to the fact employers, over time, became far more sophisticated in the way they dealt with class cases.

While *Falcon's* criticism of "across-the-board" class actions and rising employer sophistication may have limited the number of class actions filed in the 1980's and the early 1990's, several developments have likely led to a resurgence in the filing of employment discrimination class actions since the early 1990's. First, the passage of the Civil Rights Act of 1991 (which made *punitive and compensatory damages* available to Title VII plaintiffs claiming intentional discrimination) has undoubtedly led to an increased interest in such cases by plaintiffs' lawyers. Second, plaintiffs have narrowed their claims in employment discrimination class actions so that *Falcon's* limitation on the certification of "across-the-board" claims is not as substantial an impediment to class certification as it was in the years immediately following *Falcon.* Third, as discussed in greater detail below and as is evident in the *Wal-Mart* ruling, plaintiffs have refined the legal theories that they present in an attempt to satisfy the commonality requirement of Rule 23 and have achieved more and more success of late utilizing that approach.

Importantly, as the employment discrimination class action has regained popularity over the last decade, certain notable trends have emerged, including:

- **Emphasis On "Excessive Subjectivity":** Plaintiffs have placed increasing emphasis on the existence of "excessive subjectivity" in an employer's uniform decision-making processes to satisfy the "commonality" prong of Rule 23(a).

- **Statistical Evidence Is Still Extremely Important:** Plaintiffs continue to make statistical evidence of disparities in challenged employment actions (i.e., promotion, compensation, termination) a centerpiece of their class certification effort. Though much of the focus of the *Wal-Mart* opinion is on the degree to which the court accepted plaintiffs' "excessive subjectivity" arguments, statistics played an extraordinarily important role in *Wal-Mart* and continue to do so in virtually every class action employment discrimination case. Statistical analyses of employment decisions are highly influential in driving both the bringing of these class cases and the results of those cases. Indeed, employers should consider focusing on key statistical issues (including the percentage of women and minorities in their workforce, the compensation of women and minorities compared to that of similarly situated white males, glass ceilings, and occupational segregation) in attempting to prevent themselves from becoming the target of class action employment discrimination litigation.

- **Use of Social Scientists To Support Commonality Showing:** Plaintiffs now routinely retain sociologists and industrial psychologists as testifying experts to opine regarding:

    - the effect of an employer's "**corporate culture**;"

    - whether the employer maintains written **employment policies**;

- the **dissemination of those employment policies**;
- the **training of decisionmakers** regarding those policies;
- the **adherence to corporate policies** in making relevant decisions;
- the degree to which employment decisions are made by decisionmakers with **significant discretion** and on the basis of **subjective criteria**;
- the degree to which an employer's human resources function provides **oversight into the decision-making process**; and
- **gender or race stereotyping** and the role that stereotyping plays in a corporate environment where decisions are made on the basis of subjective criteria.

- **Plaintiffs Challenge "Hard Targets" As Well As "Softer Targets"**: Increasingly, plaintiffs have filed class action suits challenging "hard targets" – that is, quantifiable decisions in hiring, promoting, termination, compensation, evaluations and general distributions of resources – as well as "softer targets" – non-quantifiable decisions and actions such as mentoring, training, prizes/awards and informal support.

- **Plaintiffs Use The Internet To Their Advantage:** Today's employment discrimination class action lawsuit is publicized in ways not available even 10 years ago. Now, as a matter of course, plaintiffs' counsel establish web sites solely devoted to a particular class action case. These web sites include a myriad of information about the cases and provide easy public access to pleadings, press releases, plaintiff profiles, deposition transcripts, court orders, etc. Moreover, these web sites serve as a public forum for counsel to reach out to putative class members who might otherwise stay behind the scenes. Prominent examples include:
  - www.walmartclass.com
  - www.genderclassactionagainstcostco.com

- **Plaintiffs Use The Media To Their Advantage:** Though nationwide employment discrimination class action cases have long received media attention, the use of the media by plaintiffs' counsel to disseminate information to the public regarding class action cases is more prominent than ever. Increasingly, plaintiffs' counsel coordinate media coverage of a new class action to occur almost simultaneously with the filing of the suit. This was apparent earlier this

year when, within hours of the filing of a class action lawsuit against Costco wholesale alleging gender discrimination, the case filing was prominently reported by numerous web-based news organizations together with statements from plaintiffs' counsel. These efforts are significant because they serve to increase pressure on the targets of their lawsuits by "selling" plaintiffs' case to the public.

For employers, the *Wal-Mart* case is significant not simply because of its record size and scope, but because it is a microcosm of each of the above trends. Most significantly, *Wal-Mart* provides employers with a clear view of the factors that may leave a company susceptible to class certification. To be sure, understanding the critical factors that led to class certification in *Wal-Mart* can benefit employers in assessing their own vulnerability to employment discrimination class action litigation.

III. THE WAL-MART CASE

On June 21, 2004, the United States District Court for the Northern District of California certified the largest private civil rights class action in United States history in *Dukes v. Wal-Mart Stores, Inc.* There, the court certified a Title VII class action brought by seven female named plaintiffs claiming that Wal-Mart discriminated against them and a class of similarly situated current and former female Wal-Mart employees with regard to pay and promotion. The *Wal-Mart* class encompasses claims of more than 1.5 million women in hourly and salaried positions in approximately 3,400 Wal-Mart stores across the country. Remarkably, despite the enormous size of the class, the disparate geographic locations from which class members are drawn, and the variety of positions they held, the court ruled that the Rule 23 requirements for class certification had been met. Indeed, the crux of the *Wal-Mart* decision was plaintiffs' presentation of statistical evidence showing gender-based disparities in promotions and compensation, coupled with the alleged presence of an excessive level of subjectivity in Wal-Mart's employment policies and practices (which, as the court noted, may itself be "an employment practice susceptible of being infected by discriminatory animus." *Wal-Mart*, 222 F.R.D. at 149).

It is important to recognize that the *Wal-Mart* decision has been appealed to the Ninth Circuit Court of Appeals and, thus, the decision may be overturned. Indeed, other federal district courts have rejected the very "excessive subjectivity" argument that the plaintiffs, and the court, relied on in Wal-Mart. *See* discussion, *supra,* at pp. 11-12 (noting federal courts which have rejected the "excessive subjectivity" argument in the class certification context). Moreover, there are important distinctions regarding the *Wal-Mart* case that bear noting. First, *Wal-Mart* involved legal challenges to decisions largely affecting case lower-level jobs, whereas employers may find themselves facing legal challenges to decisions relating to higher-level positions. This distinction is important because many high-level jobs necessarily involve greater degrees of subjectivity regarding the establishment of job requirements and the evaluation of job performance. Second, *Wal-Mart* involved a challenge to employment practices at thousands of facilities nation-wide, whereas many employers do not have many different facilities outside of a headquarters. Clearly, not all employers will face large, multi-facility challenges to their employment practices, or legal challenges involving lower-level employees. However, the *Wal-*

Mart decision is instructive because the general principles which drove the decision may apply even in cases in which employers are challenged based on a single-facility or with regard to higher-level positions.

A. Prerequisites to Class Certification

In order to achieve class action certification, a putative class must satisfy all of Rule 23(a)'s requirements and *one* of Rule 23(b)'s standards for maintaining a class action. The requirements of Rule 23(a) are:

- Numerosity;
- Commonality;
- Typicality; and
- Adequacy of representation.

The 23(b) standard the court relied upon when it certified the *Wal-Mart* class was Rule 23(b)(2), which requires a finding that that the defendant "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").[1]

As in many class actions, the *Wal-Mart* court's discussion of Rule 23(a)'s requirements primarily concentrated on whether the putative class members met the **commonality** requirement. In so doing, the court analyzed three broad categories of facts to assess commonality:

- Facts and expert opinion supporting the existence of company-wide policies and practices and the use of "excessive subjectivity" in making challenged employment decisions;
- Expert statistical evidence of class-wide gender disparities attributable to discrimination; and
- Anecdotal evidence of a discriminatory attitude tolerated by management.

For employers, it is the first two of these broad categories that are most important to understand since those formed the backbone of the court's decision to certify a class in *Wal-Mart.*

[1] It is important to note that the requirements of Rule 23 do not apply to "collective actions" brought under the Age Discrimination in Employment Act or the Fair Labor Standards Act. Those actions are governed by the "collective action" provision of Section 216(b) of the Fair Labor Standards Act. Additionally, it is worth noting that the EEOC, in bringing an action on behalf of a "class" of plaintiffs, even under Title VII, is not bound by the requirements of Rule 23 in order to maintain a class action.

B. The Commonality Requirement and "Excessive Subjectivity"

1. Plaintiffs' Reliance On Wal-Mart's Company-Wide Policies and Practices To Establish Commonality

Plaintiffs relied on Wal-Mart's company-wide policies to link the statistical disparities found by their expert (discussed below) to unlawful gender-motivation (as opposed to some non-discriminatory cause). To do so, plaintiffs offered the expert testimony of a social scientist, Dr. William Bielby, who had reviewed, among other things, Wal-Mart's written policies governing promotions and compensation, EEO policies, and diversity program. Dr. Bielby found little written guidance and criteria for decision-makers and a weak EEO and diversity program.

In its discussion of whether the putative class met the commonality requirement, the *Wal-Mart* court first focused on three critical factual elements:

- The similarity of Wal-Mart's policies governing compensation and promotion across all stores;
- The applicability of these uniform policies to putative class members; and
- The policies' "feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion."

Wal-Mart, 222 F.R.D. at 145.

The court explained several aspects of Wal-Mart's policies that it found problematic. It prefaced its remarks by noting "a basic organizational structure that is consistent across store types and throughout the company's domestic stores . . . [and] policies governing in-store compensation and promotions uniformly provide for managers to exercise significant subjectivity in making pay and promotion decisions." *Id.* For example, with regard to compensation policies, the court found it significant that:

- **Managers Have Substantial Discretion In Setting Salaries:** The compensation of salaried employees, including assistant managers and co-managers, is primarily left to the subjective discretion of their superiors; and
- **Managers Make Compensation Decisions Based On Subjective Criteria:** At Wal-Mart, store managers "are granted substantial discretion in making salary decisions for hourly employees in their respective stores[,] . . . are allowed to depart from the minimum start rates, within a two dollar per hour range, without being constrained by objective criteria and with limited oversight[, and] . . . are allowed to increase pay for exceptional performance . . . with limited guidance or oversight." Id. at 147.

Notably, rather than focusing on the established range of salaries provided as a *limit* to a supervisors' discretion, the court viewed the compensation ranges as allowing for an excessively broad range of discretion and subjectivity common to the entire class.

Along the same lines, the court focused on the following as to Wal-Mart's promotion policies:

- **Managers Make Promotion Decisions Based On Subjective Criteria:** Wal-Mart Store Managers used subjective criteria when selecting candidates for the position that serves as the primary feeder for the company's Management Training Program. Moreover, Wal-Mart's District and Regional Managers made decisions regarding these candidates using only minimum guidelines that are required for advancement, and largely relied on subjective criteria (which the court noted "is fairly characterized as a 'tap on the shoulder' process."). *Id.* at 148.

- **No Corporate Oversight of Promotion Decisions:** Wal-Mart failed to monitor promotion decisions or "otherwise systematically review the grounds on which candidates are selected for promotion." *Id.* at 149.

- **Failure to Post Available Positions:** Until January 2003, Wal-Mart did not post job vacancies for its Assistant Store Manager Training Program and only posted a few vacancies for the Co-Manager position. *Id.* Though Wal-Mart's policy was to post hourly Support Manager positions, in fact, approximately 80 percent of those available positions were not posted. The court observed that, "[a]s a result, Managers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process." Id.

- **Manager Permission Required To Apply:** Even if positions were posted, candidates were required to obtain permission from managers in order to apply and such permission was based upon subjective criteria beyond the minimum corporate guidelines.

In opposing plaintiffs' motion for class certification, Wal-Mart conceded that pay and promotion decisions were largely subjective, but argued that subjectivity alone was not enough to find commonality. Commonality was destroyed, Wal-Mart argued, because those same pay and promotion decisions are made locally by individual store managers.

Significantly, the court acknowledged that, while "the presence of excessive subjectivity, alone, does not necessarily create a common question of fact," *plaintiffs did not limit their evidence to subjective decision making*. Instead, they also submitted two forms of "other evidence" to raise an inference of discrimination:

- **Wal-Mart's Strong "Corporate Culture"**: Following the lead of plaintiff's sociological expert, Dr. Bielby, the court made much of Wal-Mart's strong "corporate culture," reflected in company-wide policies and practices, and potential gender stereotyping. In discussing Wal-Mart's strong, centralized corporate culture as a further indicator of commonality and of the likelihood that gender stereotyping exists at Wal-Mart, the court described what it terms a "carefully constructed and actively foster[ed] strong and distinctive, centrally controlled, corporate culture." *Id.* at 151. Clearly, the court shared

Dr. Bielby's view that "a strong and widely shared organizational culture promotes uniformity of practices throughout the organization." Specifically, the court pointed to Wal-Mart's emphasis on a uniform culture, including:

- **Uniform Orientation**: A standard corporate-wide orientation program for new Wal-Mart employees;
- **Promotion From Within**: Wal-Mart maintained a policy of "promoting from within" (thus maintaining the effectiveness of prior Wal-Mart culture lessons);
- **Wal-Mart Cheer:** Wal-Mart employees performed a "Wal-Mart cheer" at meetings;
- **The "Wal-Mart Way":** Wal-Mart conducted regular meetings regarding its corporate culture and the "Wal-Mart Way" of conducting business.
- **Company-Wide Communications:** Wal-Mart communicated to its stores from corporate headquarters in a uniform manner via computers and its "Wal-Mart TV" network; and
- **Transfers Between Stores and Divisions:** Wal-Mart employees routinely transferred between stores and divisions, demonstrating a high degree of store-to-store uniformity.

- **Potential Gender Stereotyping:** The court also relied on Dr. Bielby's opinion that gender stereotyping *may* be part of Wal-Mart's corporate culture. Specifically, Bielby opined that gender stereotypes are especially likely to influence personnel decisions when those decisions are based on subjective criteria. *Id.* at 153. Bielby further opined that, absent systematic assessment and monitoring, subjective decisions like those involved in the pay and promotion decisions at Wal-Mart are likely to be biased.

  Dr. Bielby considered the ability of Wal-Mart's diversity and equal opportunity policies to minimize gender bias. However, Dr. Bielby pointed to the following factors in opining that "identifiable weaknesses [in those policies] limit their effectiveness for identifying and eliminating discriminatory barriers":

  - **No Assessment of Barriers to Promotion:** Despite Wal-Mart's regular statistical analysis of the gender composition of its workforce, it has not systematically assessed possible barriers to women's advancement;
  - **Ad-Hoc Diversity Goals:** Wal-Mart's diversity goals for female representation in management appear to be mostly ad-hoc, rather than

based upon the number of qualified and interested women available for a given position;

- **No Relationship Between Diversity Efforts and Managers' Compensation:** Though Wal-Mart had taken steps to raise awareness of diversity issues, it failed to implement sufficient accountability measures such as tying management compensation to diversity achievement;

- **No Surveys Regarding Diversity or Gender Issues:** Though Wal-Mart conducted employee surveys, it did not survey employees regarding the company's diversity efforts or gender issues; and

- **No Specific Measures Taken To Decrease Gender Differences In Pay and Promotion:** Despite Wal-Mart's efforts to emphasize diversity issues, the company failed to initiate practical and effective measures for decreasing the differentials.

The significance of the *Wal-Mart* decision, insofar as it relies heavily on the existence of excessive subjectivity in finding that commonality existed, is great precisely because the "excessive subjectivity" argument has not routinely carried the day in the commonality fight. *But see McReynolds v. Sodexho Marriott Svcs.*, 208 F.R.D. 428, 440 (D.D.C. 2002) (granting plaintiffs' motion for class certification in Title VII race discrimination case where plaintiffs argued that decisionmakers had unfettered discretion and utilized subjective criteria). Indeed, several federal courts have declined to accept the "excessive subjectivity" argument as a basis for establishing commonality and certifying a class. For example:

- ***Cooper v. Southern Co.*, 205 F.R.D. 596, 619-20, 627 (N.D. Ga. 2001)** (rejecting plaintiffs' attempt to satisfy commonality requirement by arguing the existence of excessive subjectivity and stating that "Plaintiffs evidence does show that Defendants' managers exercise discretion [in the areas of hiring, promotion, and compensation], but that is different from an 'entirely subjective decision-making process.'")

- ***Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 540-41 (N.D. Ala. 2001)** (where plaintiffs argued that most employment decision were made "by various levels of management and were based upon subjective criteria", court denied motion for class certification, finding that "the purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof.")

- ***Abram v. UPS*, 200 F.R.D. 424, 430 (E.D. Wis. 2001)** (the "decision to permit some consideration of subjective factors is not, *in and of itself*, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist.")

- ***Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 544 (D.N.J. 2001)** ("disparate treatment claims alleging that a company's policy of delegating discretionary employment decisions to local supervisors are not appropriate for class certification absent an allegation that the company intended to use this policy to discriminate against a protected class.")

- ***Betts v. Sundstrand Corp.*, No. 97 Civ. 50188, 1999 WL 436579 at * 7 (N.D. Ill. June 21, 1999)** (denying plaintiffs' motion for class certification based, in part, on alleged use of subjective criteria in decision-making and stating that "where there are objective factors, even a generally subjective process will not satisfy Rule 23's commonality and typicality requirements. Here, while defendant's hiring practices allow for a certain amount of subjectivity, the managers are not completely unfettered.")

These cases demonstrate not only the tenuous nature of the "excessive subjectivity" approach, but also the very fact-specific analysis social science experts, and courts, will engage in as a means of analyzing the role and degree of subjective decision-making within the organization of particular defendant-employer. Moreover, the cases reveal the distinction between corporate policies implemented with some discretion and subjectivity, but also an element of objectivity, and those, as the court believed was the case at Wal-Mart, where objective criteria was almost absent.

Importantly, while the use of subjective criteria in decision-making, the uniformity and centralized nature of employment policies, and the failure to post the availability of many positions, for example, were cited as reasons the court believed class certification was warranted in *Wal-Mart*, it should be recognized that whether to decentralize policies, have uniform policies, post openings for higher-level positions, or to allow decisionmakers to consider subjective criteria is as much a business consideration as it is a question of potential liability. Thus, while the *Wal-Mart* case may offer guidance on the factors one court found important to the class certification issue, employers must consider the valid business reasons for the way in which they make employment decisions and apply employment policies. For example, as to very high-level positions, a posting policy may not be practical. Likewise, as to high-level positions, the stronger consideration of subjective criteria may also be necessary. Thus, the considerations discussed in these materials should be evaluated against the backdrop of the employer's legitimate business considerations.

2. Expert Statistical Evidence of Class-Wide Gender Disparities

As in the vast majority of class action employment discrimination cases, statistics played a very important role in the *Wal-Mart* court's analysis of commonality. The *Wal-Mart* court relied heavily on statistical evidence of class-wide gender disparities in compensation and promotion at *Wal-Mart* in determining that commonality existed. Though the court's treatment of the statistical evidence in *Wal-Mart* was not particularly unique, it highlights how courts may look at workforce data during litigation, and therefore, how employers should perform statistical analyses during their own litigation risk assessments. In *Wal-Mart*, as in many employment discrimination class action cases, a key issue in the court's consideration of the reports submitted

by the parties' respective statistical experts is whether aggregated data – that is, the analysis of a broad data set encompassing multiple stores, regions, or even the entire company – is reliable and can support a finding of commonality and, in turn, class certification.

As a general matter, plaintiffs' experts in most recent class cases have taken an aggregated approach in order to find statistically significant disparities because such an approach will very often yield such disparities. Defense experts, on the other hand, will generally rebut an "aggregated" analysis by utilizing disaggregated data sets that more logically track the organization of corporate units and the way employment decisions are made. Significantly, statistically significant disparities often disappear when disaggregated data is analyzed.

In *Wal-Mart*, for example, Plaintiffs' statistical expert ran regression analyses of the compensation data for each of Wal-Mart's 41 regions. Wal-Mart objected to *aggregation* of the data at the regional level because it claimed that such an analysis failed to reflect how decisions were actually made. Instead, Wal-Mart offered an alternative expert analysis that performed 7,500 separate regression analyses of the data at the sub-store level. Not surprisingly, Plaintiffs' expert found statistically significant disparities in compensation across all regions while Wal-Mart's expert found a lack of broad-based gender differential in compensation.

Some courts have addressed the aggregation vs. disaggregation issue head on in the class action context. For its part, the *Wal-Mart* court declined to consider the merits of the two competing approaches, stating that the only relevant question at class certification was whether plaintiffs' "regional" approach was at least "a reasonable means" of conducting a statistical analysis. The court found that plaintiffs' analysis met this standard and it accepted plaintiffs' expert's report as evidence that significant gender-based disparities existed within Wal-Mart. Though the *Wal-Mart* case follows a growing number of decisions in which district courts have declined to consider the merits of a defendant's competing statistical analysis (*see McReynolds*, 208 F.R.D. at 443; *Ketchum v. Sunoco*, 217 F.R.D. 354, 356 (E.D. Pa. 2003) and which have accepted analyses utilizing company-wide aggregated data (*see Warren v. Xerox Corp.*, No. 01-CV-2909, 2004 WL 1562884 at *9 (E.D.N.Y.)), a number of courts have explicitly rejected an aggregated approach to data analysis when presented with the same on class certification:

- ***Morgan v. UPS*, --- F.3d ----, 2004 WL 1920198 (8th Cir., Aug. 30, 2004)** (declining to certify class where plaintiffs' statistical analysis omitted key variables, and implicitly recognizing disfavor with aggregation approach in observing that "proof of discrimination in some districts and not others tends to defeat the argument that discrimination was UPS's nationwide standard operating procedure.")

- ***Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999)** (rejecting plaintiffs' statistical analysis where "work units were pooled incorrectly" when plaintiffs were placed into "work-groups that included workers to whom the plaintiff was not directly compared . . , and who were, in fact, rated by different decisionmakers.")

- ***Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278-80 (4th Cir. 1980)** (affirming the district court's denial of class certification in part based upon a rejection of statistical evidence because the statistics were not probative of separate facilities, but only showed overall disparities)

- ***Beck v. Boeing Co.*, 203 F.R.D. 459, 463-64 (W.D. Wash. 2003)** (district court declined to certify class that included employees at multiple Boeing facilities in multiple locations, and thus rejected plaintiffs' statistical analysis utilizing aggregated data across those facilities and locations, where plaintiffs' claims related to different facilities in different locations with different compensation policies)

- ***Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 n.8 (D. Md. 2002)** (denying class certification in part because plaintiffs' "statistics are not separated by facilities or departments")

- ***Webb v. Merck & Co.*, 206 F.R.D. 399, 408 n.2 (E.D. Pa. 2002)** (rejecting plaintiffs' statistical analysis on motion for class certification where analysis aggregated all employees regardless of job grade)

- ***Cooper v. Southern Co.*, 205 F.R.D. 596, 613-15 (N.D. Ga. 2001) (**denying plaintiffs' motion for class certification and observing that the analysis of plaintiffs' expert, which aggregated promotions data across departments and job families and failed to compare similarly situated individuals, was inadequate to establish commonality)

- ***Abram v. UPS*, 200 F.R.D. 424, 431 (E.D. Wis. 2001)** (stating that aggregate statistical evidence "masks differences from district to district and from supervisor to supervisor that preclude a finding of 'commonality'").

3. Anecdotal Evidence from Class Members

Finally, the *Wal-Mart* court relied upon anecdotal evidence of discrimination, which gave disproportionate life to a few stories of discrimination (relative to the million-plus class members). "Circumstantial and anecdotal evidence of discrimination is commonly used in Title VII pattern and practice cases to bolster the statistical proof by bringing 'the cold numbers convincingly to life.'" *Wal-Mart*, 222 F.R.D. at 165 (internal citation omitted). Of note, however, is the fact that out of more than one million putative class members, plaintiffs only submitted 121 declarations, the court cited only three, and discussed this aspect of the case in only one paragraph. Although the declarations cited may demonstrate that some plaintiffs were subjected to individual sexist acts, three declarations do not typically demonstrate a corporate culture embedded with gender discrimination.

IV. A CLASS ACTION GUIDANCE FOR EMPLOYERS: USING THE *WAL-MART* DECISION TO ENGAGE IN CRITICAL SELF-ANALYSIS

As the class action employment discrimination lawsuit regains popularity with the plaintiffs' bar, and plaintiffs' lawyers refine their approach to litigating class claims, it is critical that employers are aware of and understand issues relevant to class certification and liability. It is recommended that employers consider also engaging in a critical self-analysis to assess potential exposure to class action employment discrimination litigation. The detailed commonality analysis in the *Wal-Mart* decision provides employers with guidance on engaging in this analysis.

In focusing on Wal-Mart's employment policies, the alleged "excessive subjectivity" associated with the way those policies were implemented, and the plaintiffs' statistical evidence showing gender-based disparities in promotion and compensation, the *Wal-Mart* decision underscored the most important areas for self-analysis and risk assessment relating to commonly challenged employment actions:

- **Review of Employment Policies and Practices**; and
- **Statistical Analysis of Employer Data.**

The following outline is intended to provide employers with information critical to conducting a self-assessment of its vulnerability to class action employment discrimination litigation and class certification. **First**, the outline provides employers with a checklist of the important issues and questions to consider in conducting a thorough review of employment policies and practices. **Second**, the outline discusses necessary considerations related to an employer's self-critical analysis through a statistical analysis of employment practices likely to be challenged in class action litigation. **Third**, the outline addresses important considerations regarding the discoverability of such analyses and the application of privilege to attempt to prevent disclosure in later litigation.

A. Review of Employment Policies and Practices

1. Practices To Consider Regarding Employment Policies

a. **Consider Maximizing Objective Guidelines:** The "best" employment policies (at least from the standpoint of avoiding discrimination litigation and avoiding company-wide class certification in any such litigation) are those that maximize the number of objective guidelines for managers who are making decisions, and which contain systemic oversight procedures to ensure compliance with those objective guidelines. As noted above, however, such decisions must be considered in the context of the employer's business concerns. For example, there are many jobs in the securities and financial services industries that simply do not lend themselves to the consideration of only objective criteria. Thus, it is recognized that the maximization of objective criteria with regard to employment decisions may not work in all

contexts. Moreover, employers should recognize that the more *objective* employment standards and criteria are, the more likely it is that employees can challenge those standards/criteria on an individual basis. Employers should consider these issues in establishing their own policies, standards, and criteria.

b. **Consider Scrutinizing Policies for Excessive Subjectivity:** Employers should consider scrutinizing their employment policies to determine whether they contain language that could be construed as authorizing excessive subjectivity in employment decisions.

(i) Avoid phrases that explicitly grant managers "wide discretion," "latitude" or "flexibility," or permit them to make decisions based on their "own judgment" or "past experience", temper policies with concrete lists of objective criteria that managers are required to consider when making decisions or implement oversight procedures that guard against biased outcomes.

(ii) Effects of stereotypes and outgroup bias can be greatly minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences that their actions have for equal employment opportunity.

(iii) Again, though, it is important to recognize that avoiding employment decisions based on subjective criteria may not be practical, as in the circumstance, noted above, regarding high-level positions.

2. Specific Recommendations To Consider Regarding Compensation, Hiring and Promotions Policies

a. **Compensation Policies**

(i) **Consider Maximizing Objective Criteria.**

(a) Employers should consider whether to maximize the number of *objective* criteria that managers must consider when setting pay rates and determining raise and bonus amounts by:

(1) Establishing specific pay ranges for different job categories, annual increases and merit

awards that have as little room as practicable for managerial discretion, and

(2) Tying pay decisions to assessments of whether employees have met pre-defined, objective performance targets.

(b) The more objective, non-discretionary factors that exist, the less likely the compensation policy will be subject to challenge on excessive subjectivity grounds.

(ii) **Consider Implementing Systemic Oversight Procedures That Hold Managers Accountable For Their Decisions.**

(a) Employers should consider holding decision-making managers accountable for their pay decisions by requiring them to keep written records of their decisions and having Human Resources periodically review the results.

(b) Employers should consider having their compensation policy expressly reference the company's commitment to making pay decisions that are free from subconscious stereotypes.

(c) Employers should consider rating managers' performance with respect to unbiased pay decisions as part of their regular management review process.

(d) Part of holding managers accountable also includes soliciting employee feedback as to pay decisions on a systemic basis (perhaps through periodic, anonymous surveys).

(1) Any feedback that evidences employee perception of pay inequities should be investigated and addressed.

(2) Specific avenues for complaint should also be made available to employees.

(3) The complaint procedures should be incorporated into and expressly referenced in the compensation policy itself, so that managers are reminded that they will be

held accountable for any biased pay decisions.

(e) Employers should also consider training managers regarding the objective criteria contained in the compensation policy. The training should be mandatory and attendance records kept.

(iii) **Consider Conducting Routine Statistical Audits.**

(a) Employers should consider regularly analyzing statistical patterns of pay difference along race or gender lines a routine part of their compensation system.

(1) By analyzing those statistics in advance of litigation, employers can assess can assess whether race/gender disparities are based on legitimate business factors, such as job-related knowledge, skills, abilities, and performance histories, or whether they are unexplainable in the absence of stereotyping and discrimination.

(2) If vulnerabilities appear, they can be remedied and/or defended, and data can be marshaled to defend against potential future allegations of discrimination.

b. **Hiring and Promotion Policies**

(i) **Recommendations to Consider Regarding Compensation Policies Are Also True of Promotion/Hiring Policies.**

(a) *Consider maximizing the objective criteria* managers must consider when making hiring and promotion decisions;

(b) *Consider holding decision-makers accountable* for their decisions by monitoring their decision-making; and

(c) *Consider conducting regular statistical auditing* of hiring and promotion results.

(ii) **Specific Recommendations To Consider Regarding Hiring and Promotions Policies**

(a) **Consider Posting Available Jobs.**

(1) To the maximum extent possible, employers should consider posting all job vacancies.

(2) Posting will enable all interested employees to apply for open positions and may shield the employer from the attack that white males selected other white males without considering minority or women candidates.

(3) There may be exceptions, especially in the promotions context (where a manager has already determined that the perfect candidate exists for a vacancy within a unit, and it is a waste of time and resources to go through a posting "charade").

(4) The promotions policy should expressly provide for such exceptions and require that they be documented, and that such documentation be forwarded to Human Resources for oversight purposes.

(b) **Consider Requiring Written Records of the Process.**

(1) Employers should consider requiring managers to keep a written record of their promotion decisions, including a list of all applications they receive for a vacancy and all applicants whom they interview.

(2) Managers can be required to take notes during their interviews and to keep documentation that explains the process they followed in reaching the decision as to whom to hire or promote and the reasons for that decision.

(3) Manager's documentation should be forwarded to Human Resources for oversight.

(4) Employers should consider sending employees who post for a vacancy, but who are not selected, written notification that

their application was considered, but that the position was otherwise filled.

(c) **Consider Diversity Initiatives.**

(1) Consistent with an EEOC guidance on this topic, employers should consider examining their recruiting practices to ensure that they are selecting candidates for both entry-level and management positions from as broad and diverse an applicant pool as possible.

(2) Employers should consider making certain that the company:

i) Implements, maintains and appropriately monitors hiring data to identify potential disparities along race and gender lines;

ii) Recruits applicants through a variety of sources, including professional organizations, educational institutions, job fairs, and employee referral programs; and

iii) Trains managers on appropriate interviewing techniques and criteria for hiring decisions.

(3) It is important that a diversity program have realistic goals and be tied to practical and effective measures. *See Wal-Mart,* 222 F.R.D. at 153 (the court accepted expert's testimony that Wal-Mart's diversity policies had "identifiable weaknesses that limited their effectiveness for identifying and eliminating discriminatory barriers.")

3. Critical Issues to Consider In General Review of Employment Policies and Practices: A Checklist For Policy Review

a. **What Policies Are Likely To Be At Issue In Class Litigation?**

(i) Hiring/staffing

(ii) Promotion

(iii) Compensation

(iv) Training

(v) Evaluation/Performance Review

(vi) Termination

(vii) Discipline

(viii) Diversity goals or initiatives

b. **Does The Company Maintain Written Policies?**

(i) If so, how are policies communicated to employees? Managers?

(ii) If not, how are policies communicated to employees? Managers?

(iii) Are managers and decisionmakers trained with regard to employment policies?

(a) What degree of training is provided?

(b) How often is training provided?

(c) In what form is training provided?

(iv) How often are policies updated?

(a) Are updates or changes to policies communicated to employees? Managers?

(b) How are updates or changes communicated?

c. **Do Policies Contain Any Obvious Violations of the Law?**

d. **Are Policies Applied As Written?**

(i) Do managers follow policies in practice?

(ii) In what ways do managers fail to follow policies as written?

(iii) Are policies applied in ways that violate the law?

(iv) Have managers been instructed to apply policies in a manner other than as written?

e. **Are Policies Uniform Throughout the Organization?**

(i) Are written policies created and disseminated by a central human resources department on a national basis?

(ii) If so, are written policies the same as to all portions (i.e., regions, divisions, districts, stores, facilities, etc.) of the company nationwide?

(iii) Are uniform policies applicable to all employees across the company?

(iv) Though the questions above focus on issues considered by courts in ruling on motions for class certification, it should be noted that whether an employer chooses to centralize or decentralize their business practices and employment policies is as much a business decision as it is a liability question. Employers should simply consider the risks associated with a centralized approach in the litigation context.

f. **Are Employment Decisions Made On A Centralized, National Basis or On A Decentralized, Local Basis?**

(i) Does the company maintain a basic organizational structure that is consistent across facilities nationwide?

(ii) If decisions are not made on a centralized, national basis, are they made at the local (i.e., store by store, or facility by facility) basis or on a regional basis?

(iii) Even if decisions are made on a local basis, does the company have, as discussed in *Wal-Mart*, a "strong and distinctive, centrally controlled, corporate culture," which promotes uniformity of practice throughout the organization?

g. **Do Existing Policies Allow For Subjectivity In Decision-making (i.e., in hiring, promotion, evaluation, compensation)?**

(i) Are criteria for making employment decisions (i.e., a promotion or compensation decision) written?

(ii) Are criteria for making employment decisions clearly communicated to decisionmakers?

(iii) Are decisionmakers required to consider objective criteria in making employment decisions?

(a) What types of objective criteria are to be considered?

(b) Does the company have a process in place to ensure that the information necessary for a decisionmaker to consider objective criteria is made available to decisionmakers before decisions are made?

(c) Are the objective criteria to be considered related to the employment action? (i.e., "job-related" as to promotion decisions)

(iv) Are decisionmakers allowed or required to consider subjective criteria in making employment decisions?

(a) Are decisionmakers provided with any guidance on the types of subjective criteria that are proper to consider?

(b) Are the subjective criteria to be considered related to the employment action? (i.e., "job-related" as to promotion decisions)

(c) Are decisionmakers allowed to consider only subjective criteria in making employment decisions?

(v) Irrespective of any written policy, are employment decisions, in practice, made on the basis of solely objective or solely subjective criteria?

(vi) In instances in which both objective and subjective criteria are considered by decisionmakers, can it be said that the decision is based almost entirely on subjective criteria?

(vii) Are employment decisions made on the basis of subjective criteria made by only one individual, or do multiple individuals have input?

(viii) As discussed above, the use of objective criteria in making employment decisions is not always practical and, thus, employers must consider the litigation risks discussed in these materials against the backdrop of their legitimate

business reasons for making decisions in a particular manner.

h. **Is There Oversight of Management Employment Decisions?**

(i) Does any written policy exist that requires scrutiny or oversight of employment decisions by higher-level managers or by human resources?

(ii) Are employment decisions scrutinized by higher-level management or by human resources?

(iii) Are decisionmakers required to justify the grounds for their decisions? In writing?

(iv) In the selection context, are decisionmakers required to justify their non-selection of a candidate? In writing?

(v) Even if an oversight component is built into the company's decision-making process, are employment decisions actually overturned in practice?

(vi) On what basis are decisionmakers' employment decisions overturned?

(vii) If employment decisions are not scrutinized, does the company, as the *Wal-Mart* court observed, "otherwise systematically review the grounds on which" decisions are made?

i. **Does The Company Maintain A Diversity Program And Written Diversity Goals?**

(i) Does the company maintain written diversity policies or goals?

(ii) Are the company's written diversity policies or goals available to all employees?

(iii) Are these policies and goals clearly communicated to managers and decisionmakers?

(a) In what way?

(b) Are formal diversity training sessions held to provide decisionmakers with such information?

(c) Are the company's EEO policies addressed during these training sessions?

(d) How often are these training sessions held?

(e) Are these training sessions mandatory?

(iv) Does the company's policy require any type of review of an individual decisionmaker's compliance with the company's diversity policies or goals?

(v) Are decisionmakers evaluated, in part, on the basis of their compliance with the company's diversity policies or goals?

(vi) What steps does the company take to make managers and decisionmakers accountable for complying with diversity policies or goals?

(vii) Is the compensation of managers and decisionmakers tied in any way to their compliance with the company's diversity policies or goals?

(a) How is compliance assessed?

(b) Who assesses compliance?

(viii) With regard to promotion, for example, are the company's diversity goals for a particular position based on the actual number of qualified and available members of a protected class?

j. **Does The Company Undertake Regular Statistical Analyses Of Its Employment Practices?**

(i) What employment practices are analyzed?

(ii) How often are analyses conducted?

(iii) Has the company taken any affirmative steps to decrease any gender- or race-based difference revealed by any such statistical analysis?

(iv) As discussed above, some of the more important statistical issues for employers to consider in evaluating their potential for becoming a target of class action litigation are the percentage of women and minorities in their workforce, the compensation of women and minorities compared to

that of similarly situated white males, glass ceilings, and occupational segregation.

4. Particularized Issues to Consider In Reviewing Promotion Policies

a. Are Employees Are Notified of Available Positions?

b. Does The Company Maintain A Written Policy Requiring The Posting of Available Positions?

(i) If so, are all available positions posted without exception?

(ii) What exceptions are made to the posting policy?

(iii) Under what circumstances are exceptions made?

(iv) Who decides whether exceptions are made to the posting policy?

(v) How are available jobs posted?

(a) Do all potentially interested employees have access to position postings?

(b) Are positions posted in a central location? On computer? In employee break rooms?

(c) Are postings regularly updated?

(vi) Are employees required to obtain permission from managers to apply for vacant positions?

(a) Is there a written policy requiring management permission?

(b) Are there established criteria for managers to consider in deciding whether to approve a request to apply for a vacant position?

(c) Are such decisions based on subjective criteria? Is any objective criteria considered?

(vii) As discussed above, it is recognized that the posting of positions may not be practical in all situations (e.g., with regard to high-level positions). Thus, employers need to consider the utility of employing a posting policy in the context of their business needs.

5. Particularized Issues to Consider In Reviewing Compensation Policies

a. Do Policies Exist To Limit The Role Managerial Discretion Plays In Compensation Setting?

(i) Is only one decisionmaker involved in setting employee salaries or do multiple managers have input?

(ii) Are any objective criteria, such as measurable productivity, tied to employee salary?

(iii) Is compensation tied at all to an employee's performance review rating?

(a) If so, are the underlying employee reviews based on entirely subjective criteria or are objective standards involved?

(b) Does policy require that the same individual who completes an employee's performance review also determine their salary?

(iv) Does company policy require a minimum and/or maximum starting salary for employees in certain positions?

(a) Are decisionmakers given discretion to make exceptions to the minimum or maximum starting salaries?

(b) Are such exceptions made in practice?

(c) Are written criteria set for the making of such exceptions?

(d) Is any objective criteria considered in making such exceptions?

(e) Are decisionmakers required to obtain approval from their supervisors or human resources to make such exceptions to starting salaries?

(f) Is any corporate oversight provided regarding the setting of employee starting salaries by decisionmakers?

(v) Are employee salaries limited to specific ranges based on a job or salary grade?

(a) Are decisionmakers given discretion to make exceptions to allow an employee to be compensated outside of the employee's grade?

(b) Are such exceptions made in practice?

(c) Are written criteria set for the making of such exceptions?

(d) Is any objective criteria considered in making such exceptions?

(e) Are decisionmakers required to obtain approval from their supervisors or human resources to make such exceptions to salary ranges?

(f) Is any corporate oversight provided regarding the setting of employee salaries by decisionmakers?

B. Statistical Analysis of Employer Data

1. Initial Considerations Regarding Pre-Litigation Statistical Analyses

a. Identification of Employment Decisions That May Be The Subject of Litigation and Which Lend Themselves To Statistical Analysis

(i) Hiring

(ii) Promotion

(iii) Compensation

(iv) Termination

(v) Discipline

b. Understanding of Company Policies and Practices Related To The Employment Decisions To Be Analyzed

(i) Before undertaking a promotion analysis, for example, it is critical that the employer fully examine its policies regarding promotion, and understand the practices of its decisionmakers regarding promotions.

(ii) Such an understanding is necessary to develop a statistical model that most accurately reflects the factors considered by decisionmakers in making employment decisions.

(iii) Determine the relevant or potentially relevant factors or criteria for each policy/practice under review.

(a) For example, a company's compensation plan may establish salary ranges for job grades and merit increase will likely be based on a performance rating.

(b) Often, there are a number of other factors not expressly included in policy documents or guidelines that experts and/or courts have determined may impact compensation or other employment decisions and should potentially be included in any data analyses (e.g., age at hire, education). Such factors, to the extent they factor into decision-making processes, must be identified.

(c) With regard to these "other" factors, it is important to note that these are not necessarily factors that are directly taken into account in making employment decisions. Rather, because performance is often not measured very well, certain other factors (for example, age at hire merely as a proxy for experience), may suggest that certain employees are better skilled, have more experience, or possess better education.

c. **Identification of Possible Sources of Data**

(i) Identify types of Human Resources data systems and databases are maintained by the company.

(ii) Identify and gather all available database dictionaries, file layouts, reference tables etc. relating to available data.

(iii) Gather both centralized and local data. There are often sources of data maintained at a local level that are never captured in a central database.

(iv) Identify any other sources of data (internal or external to the company) that are relevant to the decisions to be analyzed (e.g., labor market, EEO-1, compensation surveys or census data).

(v) Identify IT and business personnel within the company who can explain how data is gathered and maintained.

d. Examination of How Data Is Used Within the Company

(i) Consider how data is utilized within the company.

(ii) How data is being used is often a very important factor in how accurate the data is and how well it is maintained.

e. Consult With An Expert Qualified to Conduct Statistical Analyses of Employment Decisions

(i) Utilize an expert as resource on data maintenance and gathering of relevant data.

(ii) Engage an expert in reviewing and understanding policies and practices relevant to employment actions to be analyzed.

(iii) Engage an expert to develop statistical models to study the various employment decisions at issue and to conduct and interpret statistical analyses.

2. Compensation Analysis: A Two-Step Approach To Reviewing Compensation Data

a. Approach is designed to assess the risk of future litigation and, if necessary, assess and, perhaps, correct any significant disparities.

b. Two-step approach to compensation analysis and risk assessment below involves conducting regression analyses without and with protected characteristics included in the model.

(i) Employers will want a robust analysis that analyzes the key factors that influence compensation and that explains differences among employees rather than using an approach that excludes variables and/or presumes the existence of tainted variables based on alleged past discrimination.

(ii) The employer will want to develop a model, similar to one that they would create if in litigation, which includes the major variables impacting compensation and tests the appropriate group of employees.

(iii) The employer should also strongly consider developing a statistical model that mirrors that which a group of plaintiffs may use to analyze compensation during class action litigation challenging compensation practices.

(a) That is, the statistical models utilized should not be limited to those like that which a defendant might present in litigation (for example, a model that includes job grade or performance review ratings, variables that plaintiffs often contend "mask discrimination," or a model that analyzes only highly disaggregated data sets.

(b) A pre-litigation statistical analysis that mirrors a plaintiff's approach will provide the employer with better insight into the nature of the statistical evidence it may be faced with in litigation. This consideration is particularly important given the hesitancy of many courts to consider a defendant's opposing statistical analysis in opposition to plaintiffs' motion for class certification. *See* discussion, *supra*, at Section III.B.2.

c. **Development of Multiple Regression Analysis of Compensation System To Be Analyzed.**

(i) Consideration of Factors Relevant to Compensation Decisions

(a) In making determinations regarding the factors relevant to the multiple regression analysis, it is important that employers consider how their compensation system currently works.

(b) Plaintiffs will often point to the employer's own written materials and policies to justify their method of grouping employees in a multiple regression analysis.

(c) Employers will want to consult written compensation documents and policies, and craft their multiple regression analysis around the *actual* variables considered when compensation decisions are made. Both counsel and a statistical expert should be involved in the decisions regarding the composition of the multiple regression model used.

d. **<u>Step 1</u>: Conducting A Compensation Equity Analysis Without Regard To Any Protected Category**

(i) Before developing a multiple regression model to determine whether there are statistically significant

disparities between males and females or minorities and non-minorities, it may be desirable to develop a multiple regression model that does not account for the protected characteristics of employees.

(ii) Using this model, the employer can determine employees' statistically anticipated compensation and identify individuals who are earning significantly more or less than that amount.

(iii) Such an analysis can be used to test and refine the statistical model before reaching any conclusions, or even performing any analysis, about the existence of gender or race-based disparities in the workplace.

(iv) Perhaps more importantly, however, this analysis can be used as a diagnostic tool to test which factors actually affect compensation and whether factors an employer considers important to compensation (*e.g.*, performance, education) actually impact compensation as intended.

(v) Such a model can also provide a basis for identifying compensation issues which an employer should consider addressing independent of their impact on employees in protected categories.

e. **Analysis of Results of Regression Analysis Conducted Without Regard To Any Protected Category**

(i) **Analysis Should Begin With Determination Of Whether Model Effectively Accounts For Nondiscriminatory Factors.**

(a) Consider whether results indicate that potential errors exist in data. To the extent that errors do exist, those errors must be corrected. Examples of errors may include:

(1) Failure to distinguish between full-time or part-time status;

(2) Improperly coded data;

(3) Missing data;

(4) Mis-classified employees; and

(5) Same employee included in data multiple times.

(b) Consider whether outliers in the data are unduly influencing the overall statistical result.

(1) Outliers are those employees whom the model indicates earn significantly more or significantly less than the model would predict for them based on the variables considered by the model.

- For example, a model that takes into account company tenure may predict a much lower than actual salary for a CEO who was hired from outside the company and has less than a year of tenure with the company at the time the analysis is conducted.

(2) Examining these employees' circumstances may indicate that they should be excluded from any further statistical analyses because of unique circumstances and/or may indicate potential changes that should be made to the statistical model or data being utilized.

(3) Note, however, that to the extent such outliers are heavily weighted toward one group (that is, a protected or non-protected class), the employer will face a heavier burden to justify their exclusion. In such situations, a plaintiff may argue that the explanatory variable is used by the employer to mask discrimination.

(c) Consider whether to undertake compensation adjustments prior to running regression model to examine effect on protected classes.

(1) If it appears that some employees are underpaid relative to similarly situated co-workers, compensation adjustments can then be made on a race/gender neutral basis.

(2) Such adjustments, even though undertaken without regard to a protected characteristic,

may help an employer avoid statistically significant differences in compensation for its minority employees because they may drive any overall disparity between protected group compensation and non-protected group compensation below statistical significance.

(3) This is significant because it may allow employers to avoid reverse discrimination litigation that can arise when employers make broad compensation adjustments based upon statistical disparities in compensation.

(4) Furthermore, by doing these adjustments without regard to protected characteristics, employers avoid the argument that last-minute compensation adjustments to a relatively few number of employees were used by the employer to mask its intentional discrimination.

(5) Many employers already have procedures in place to make equity adjustments to employees who appear underpaid relative to their peers. Using a statistical analysis to identify those individuals adds an additional layer of objectivity, and appearance of fairness, to the process.

f. **Step 2: Assessing Whether Compensation System Has Disparate Impact On Any Protected Group.**

(i) Any review of compensation will ultimately analyze whether disparities exist among groups of employees based upon their protected characteristics, i.e. race, nationality, gender, age, etc.

(ii) Having reviewed the compensation system without regard to protected characteristics, and having made any necessary and appropriate adjustments, employers should then conduct a multiple regression analysis accounting for the protected characteristics of its employees.

(iii) Note that it is critical to ensure that the regression analysis compares employees who are *similarly situated* for purposes of compensation.

(a) Under the Equal Pay Act, employees who perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," should be paid the same compensation. See 29 U.S.C. § 206(d)(1).

(b) Similarly, under Title VII of the Civil Rights Act of 1964, an analysis of compensation should compare employees who perform substantially similar work. *See, e.g., Am. Nurses' Ass'n v. State of Ill.*, 783 F.2d 716, 721 (7th Cir. 1986) (noting in Title VII pattern or practice case that one cannot prove discrimination "based on a comparison of the wage rates of dissimilar jobs") (citation omitted).

(iv) **Consider Also Utilizing A Plaintiffs' Expected Approach.**

(a) As noted above, the employer should consider whether, in addition to utilizing a multiple regression model that accurately reflects legitimate, nondiscriminatory explanatory variables in compensation, employers may also want to undertake analyses similar to those that night be expected from plaintiffs in litigation.

(b) In considering such an analysis, employers should consider:

(1) The cost of such an analysis, which will vary depending upon the uniformity and number of databases maintaining compensation data;

(2) The existence of or imminence of litigation regarding the employer's compensation system; and

(3) The party, if any, challenging the employer's compensation system.

(c) Such an approach may be wise given the tendency of courts, as in the *Wal-Mart* case, to only consider plaintiffs' statistical analysis on the motion for class certification. *See* discussion, *supra*, at Section III.B.2.

g. **Post-Analysis: Dealing With Findings of Statistical Disparities**

(i) **Consideration of Whether To Attempt to Eliminate or Reduce Compensation Disparities Following Statistical Analysis By Broad-Based Adjustments**

(a) Risk of disruption to employer's compensation system.

(b) Risk of potential reverse discrimination claim brought by employees in non-protected classes who did not receive pay adjustment.

(1) Courts that have addressed reverse discrimination challenges to compensation adjustments designed to alleviate disparities between women and/or minority and men and/or non-minorities have held that pay equity adjustments may be undertaken only if:

i) they are justified by the existence of a "manifest imbalance";

ii) they do not "unnecessarily trammel" the rights of non-protected group employees; and

iii) the adjustments are necessary to "attain a balance" rather than "maintain a balance."

(ii) **Alternative Approach: Conducting A More Individualized Review of Compensation Data**

(a) Look at categories of employees, or cohorts, who despite being similarly situated are identified as having significant disparities in compensation.

(b) Counsel can conduct a more detailed review of those groups by reviewing appropriate performance

and personnel files and interviewing relevant managers and human resources personnel.

(c) Using a regression analysis to identify outliers can be very useful in this process.

(d) This detailed review may unearth factors that explain the compensation for those groups, but that were not or could not be accounted for in the statistical model.

(e) This review may also help the employer identify areas where targeted compensation adjustments are warranted.

3. Hiring and Promotions Analyses

a. **Three Typical Analyses of Hiring and Promotions**

(i) **Applicant Flow/Feeder Pool Analyses**

(a) Most widely accepted analysis.

(b) Involves comparison between the "feeder pool" of individuals who would expect to be promoted (or hired) into a particular position under a gender- or race- neutral selection process with the number of females or minorities who actually were selected.

(c) Critical inquiry is determination of appropriate "feeder pools."

(1) Constructing the proper feeder pool is easier said than done. Certain judgment calls that inevitably must be made that can affect the employee constituency of the feeder pool.

(2) If the feeder pool is constructed using the jobs from which employees were historically promoted in the past five years, there is a danger of excluding other jobs from which there simply were no promotions in that time period.

(3) If there are females or minorities in the excluded jobs, then the feeder pool may not be truly representative.

(d) Additional significant issue: whether the feeder pool should include only those individuals who were *qualified* for the job at issue.

(e) An employee's preference for or interest in a particular job or promotion is another factor that may be considered.

(ii) **"From" Or Cohort-Type Analyses**

(a) Where it is not possible to identify an accurate or defensible feeder pool, it may be necessary to compare similarly-situated female and male (or minority and non-minority) employees to assess whether they are equally likely to be promoted "from" their jobs.

(b) By comparing similarly situated employees from a certain point in time (controlling for variables which affect promotions, such as experience, education and job experience), it is possible to ascertain whether female and male (or minority and non-minority) employees are being promoted at the same rate.

(iii) **EEO/Benchmarking Analyses**

(a) Another statistical approach, utilized by plaintiffs in *Wal-Mart*, is to "benchmark" an employer's workforce against that of similar employers through the use of EEO-1 data or other workforce or census-type data.

(b) For example, plaintiffs' expert in *Wal-Mart* compared Wal-Mart against twenty other large general merchandise retailers by comparing workforce data provided by these companies to the EEOC.

(c) This approach is consistent with EEOC guidelines for selecting which companies to target for enforcement activity. *See* EEOC Compliance Manual Section 16.2, entitled "Standards for Selecting Systemic Respondents."

(d) Plaintiffs' counsel in the *Wal-Mart* case has recently indicated that they would continue to rely

on EEO-1 benchmarking statistics to target companies for possible class action litigation.

b. **Assessing Whether A Hiring Or Promotions System Has A Disparate Impact On Any Protected Group**

(i) **Step 1: If There Is Actual Applicant Flow Data, Use It**

(a) As discussed above, the ideal promotions or hiring analysis will utilize actual applicant flow data.

(b) Thus, first step is to ascertain whether there is complete and accurate raw data identifying the actual applicants to the particular jobs at issue. If such data exists, all three analyses discussed above may be conducted.

(ii) **Step 2: Construct Defensible Feeder Pools**

(a) Where, as in *Wal-Mart*, there is incomplete applicant flow data, an employer, with the assistance of counsel and a statistician, should construct appropriate feeder pools based upon the jobs from which employees were historically promoted to the jobs at issue.

(b) It will be important to consider alternative look-back time periods in order to minimize the risk of excluding members of a protected group from the feeder pool.

(c) It also will be important to determine whether the inclusion of solely "qualified" employees and/or employees who had a preference for the particular job, makes a difference in the analysis.

(d) In an analysis of hiring practices, the employer may look to external data, such as census and EEO data, in order compare the employer's work force in a particular job with equivalent work force in the general population.

(iii) **Step 3: Conduct A "From" Or Cohort-Type Analysis**

(a) If it is not possible to construct defensible feeder pools, it may be advisable to conduct a "from" or

cohort-type analysis, as described above, even though such analyses are typically more costly.

(b) Specifically, the employer can compare similarly situated employees from a certain point in time (controlling for variables which affect promotions, such as experience, education and job experience), to ascertain whether female and male (or minority and non-minority) employees are being promoted at the same rate.

(c) Identification of the appropriate groups of similarly situated employees and the correct variables should be based upon the actual decision-making process in the employer's hiring and/or promotions system.

c. **Post-Analysis: Dealing With Findings of Statistical Disparities**

(i) Though it may be possible for employers to consider making broad based adjustments to compensation in the wake of a compensation analysis that reveals disparities (subject to the caveats and considerations discussed above), such adjustments in the promotion or hiring context should be considered very carefully due to the extraordinary risk associated with making selection decisions based, in any part, on protected class status. To the extent that employers wish to remedy any revealed issues relating to the promotion of women or minorities, employers would be better served to attempt to effect change through the legitimate operation of a voluntary affirmative action plan or diversity efforts.

(ii) As in the compensation context, employers attempting to avoid the costs and pitfalls of a broad remedial responses to statistical disparities in promotions can consider using their statistical risk assessments to help them conduct a targeted review of individual employee promotion and compensation decisions.

(a) In these individualized reviews, employers could undertake case studies that look at categories of employees, or cohorts, who despite being similarly

situated are identified as not having received promotions.

(b) Outside counsel can conduct a more detailed review of those individuals by reviewing appropriate performance and personnel files and interviewing relevant managers and Human Resources personnel.

(c) This detailed review may unearth factors that explain the employment decisions made regarding those individuals, but that were not or could not be accounted for in the aggregate statistical models. Alternatively, this detailed review may help the employer identify areas where targeted promotions are warranted.

C. Protecting Internal Analyses From Disclosure

1. Three Privileges Which May Apply (Attorney-Client Privilege, Work Product Doctrine, and Self-Critical Analysis Privilege)

a. Attorney-Client Privilege

(i) Elements

(a) Counsel must act as an attorney giving legal advice (as opposed to business or management advice);

(b) Communication must be between attorney and client; and

(c) Communication must have been made and maintained in confidence.

(ii) Attorney-Client Privilege In Context of Statistical Analysis

(a) Whether the attorney-client privilege applies often turns on the purpose for conducting the analyses.

(b) If an analysis is done for business reasons, *e.g.*, to determine if the compensation system is working properly or if pay is being distributed equitably, the analysis may not be privileged, even if an attorney is involved in the process.

- *See Barfoot v. Boeing Co.*, 184 F.R.D. 642 (N.D. Ala. 1999) (holding that communications regarding a company's investigation of an

internal discrimination complaint were not privileged despite in-house counsel's involvement in those communications because the investigation was not done to provide legal advice regarding the complaint).

(c) If, however, compensation analysis is done to provide legal advice regarding a company's compliance with various EEO laws, or litigation risk, the attorney-client privilege should apply.

- *See Abdallah v. Coca-Cola Co.*, No. Civ. A. 1:98-CV-3679RWS, 2000 WL 33249254 (N.D. Ga. Jan. 25, 2000) (holding that the attorney-client privilege protected from disclosure an internal audit of the company's compliance with affirmative action requirements because the audit was prepared at the behest of counsel so that counsel could advise the employer regarding its response to an OFCCP inquiry).

(d) Consistent with Federal Rule of Civil Procedure 26(b)(4)(B) regarding the discoverability of the work of testifying experts, it is well-settled that analyses performed by an expert, such as a statistician, for the purpose of enabling an attorney to provide legal advice to a client are protected by the attorney-client privilege.

- *See, e.g., U.S. v. Kovel*, 296 F.2d 918, 920 (2d Cir. 1961) (communications to accountant employed by an attorney to interpret defendant's tax information covered by the attorney-client privilege); *Cavallaro v. U.S.*, 284 F.3d 236, 246 (1st Cir. 2002) (attorney-client privilege extends to "third parties employed to assist a lawyer in rendering legal advice")

(e) To preserve the privilege, it also is important to document the reasons for conducting the analysis and only use the analysis for the provision of legal advice, because the failure to do so may lead a court to conclude that the information is discoverable.

- In *Beck v. Boeing Co.*, for example, Boeing argued that its own internal statistical analyses of its compensation practices were privileged

because they were performed at the direction of counsel to help counsel provide legal advice to the company. The court, however, rejected Boeing's claim. After the court reviewed the documents, it found that the analyses were, in fact, used for regular business purposes (that is, they were "used in the normal course of Boeing's business – for purposes of planning and establishing salaries pursuant to the OFCCP agreement"), not just to obtain legal advice, and therefore were not privileged.

b. **Attorney Work Product**

(i) Work product doctrine protects from disclosure confidential information an attorney has obtained or prepared *in anticipation of litigation.* The protection covers two kinds of information: "opinion" and "factual" work product.

(a) Opinion work product

(1) Consists of the attorney's mental impressions, conclusions, opinions or legal theories.

(2) When applicable, opinion work product is afforded almost absolute protection. It can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud.

(b) Factual work product

(1) Any factual, non-opinion material gathered in preparation for a lawsuit.

(2) May be discoverable under limited circumstances – where party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means.

(ii) Work Product Doctrine In Context of Statistical Analysis

(a) If an attorney is involved in designing and implementing the statistical analysis, such an analysis will necessarily reflect the attorney's opinions and mental impressions.

(b) Whether an analysis is protected from disclosure as attorney-work product therefore often will turn on whether the documents were prepared in anticipation of litigation.

(c) Typically, the litigation must be reasonably anticipated on an objective basis before work product protection is afforded.

(1) Thus, a letter from an experienced plaintiffs' attorney making claims of civil rights act violations and warning of the initiation of administrative action with the EEOC was sufficient to invoke the work production protection. *See McPeek v. Ashcroft*, 202 F.R.D. 332 (D.D.C. 2001).

(2) Most courts, however, have held that general concerns that litigation might be instituted, without a specific threat, generally are insufficient to invoke the work product privilege. *See Heavin v. Owens-Corning Fiberglass*, No. 02-2572, 2004 WL 316072 (D. Kan. Feb. 3, 2004).

c. **Self-Critical Analysis Privilege**

(i) Least accepted of the three privileges

(ii) Designed to protect from disclosure certain internal self-critical analyses that meet five criteria (or some variation thereof):

(a) Information sought must be the result of a critical self-analysis undertaken by the party seeking protection;

(b) There must be a strong public interest in preserving the free flow of the type of information sought;

(c) Information sought must be of the type whose flow would be curtailed if discovery were permitted;

(d) Information sought must have been prepared with the expectation that it would be kept confidential; and

(e) Information sought must be subjective analysis designed to have a positive societal effect. *See Johnson v. UPS*, 206 F.R.D. 686 (M.D. Fla. 2002).

(iii) Although some courts recognize the privilege, many do not, particularly in the discrimination context. Even where the privilege is recognized, moreover, it is narrowly applied.

(iv) Because the existence of the privilege is questionable, and the applicability of the privilege is often dependent on the jurisdiction considering the question, employers cannot, at the time an analysis is being created, expect the analysis to be protected from discovery solely because of the self-critical analysis privilege. Therefore, only by involving counsel in the process – and conducting the analyses for the purpose of obtaining legal advice and analyzing litigation risks – can an employer offer the best chance of protecting its analysis from disclosure.

2. General Observations Regarding The Application Of Privilege To Internal Reviews and Analyses

a. Any analysis of compensation or selections must be undertaken with the understanding that it may be discoverable.

b. Nonetheless, there are steps that can be taken before the analysis is conducted to increase the likelihood of protecting it from discovery based on one of the above privileges.

(i) Defining the purpose of the analysis in advance, in writing (e.g. to obtain legal risk assessment);

(ii) Controlling those involved in collecting data for the analysis, preparing the analysis, and reviewing the results of the analysis (e.g. inside counsel and key executives);

(iii) Identifying the information in question as confidential; and

(iv) Ensuring that the results of the analysis are not used for ordinary business purposes or for purposes other than those identified above.

c. The failure to follow these principles can, as reflected in the *Beck v. Boeing Co.* decision discussed previously, contribute to a perception that a privilege is being invoked merely to hide unfavorable information and cause the loss of the privilege.

d. After a statistical analysis is complete, employers (like Boeing) often desire to use those results as, for example, the basis for making adjustments to a compensation system, or the compensation of particular individuals.

(i) Before undertaking this exercise, however, consideration must be given to the fact that these business uses of the information may render a previously privileged analysis discoverable.

(ii) Working with counsel throughout this process – to make clear that the analyses are being conducted to obtain legal advice and/or assess legal risks –can minimize the chance of losing the privilege.

