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THE EMPLOYMENT CLASS ACTION: RECENT DEVELOPMENTS AND IDEAS FOR DISCUSSION

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INTRODUCTION

A right without an effective enforcement procedure is no right at all. Employees who are subjected to systematic discrimination by a corporate employer have the statutory, and occasionally constitutional, right to recover damages and obtain injunctive relief. Corporate employers have the right to make judgments about employees in the interest, if not the obligation, of maximizing profits and return to shareholders. This paper explores aspects of how these rights are currently being enforced in the federal courts of the United States, in the context of the employment class action.

Those looking for tales of jury trial wizardry should flip to the next article. These are stories of class certification proceedings before federal district judges and multi-million dollar settlements.

We make this offering with a direct view to our audience: attendees at The 2001 Sedona Conference on Complex Litigation. We have shamelessly eschewed law-review style and present thoughts based on personal experience, headlines, and anecdotes from other lawyers, as well as the odd actual case. The focus is employment discrimination claims, which are mostly comprised of hot-button allegations of race, sex, and national origin discrimination. ERISA and FSLA claims have not posed the same hard class-action issues as these cases, and they are largely ignored. Our approach is analogous to the brainstorming technique – after largely contextual background material, we present hypotheses for discussion at the Conference, knowing that these thoughts are simply the beginning of the discussion and may not even survive their statement. If they stimulate the creative process among this special group, however, they will have served their purpose well.

THE THEORY OF THE CLASS ACTION

Although perhaps it states the obvious, it bears remembering that a class action is a substantial and exceptional departure from traditional methodology for adjudication of legal rights. At bottom, the litigation is conceived, directed, and in some cases resolved by less than all of the real parties in interest. There is little disagreement on the rationale for such a departure. The goals are the promotion of judicial economy by eliminating repetitive adjudication of the same issues; the provision of a single remedy to a large group of plaintiffs, each one of which individually might be economically precluded from securing justice, and the commensurate spreading of litigation costs among many litigants of a common claim; protection for defendants from inconsistent decisions in multiple trials; and fair consideration of the interests of absentee class members.[1]

1 See generally 5 J. Moore et al., *Moore's Federal Practice* section 23.02, at 23-23 to 23-24 (3d ed. 1999).

NUMBER AND DISPOSITION OF EMPLOYMENT CLASS ACTIONS

The United States District Courts' website[2] compiles statistics for cases pending as of each September 30, as well as the number of cases filed in the twelve-month period ending each September 30. Employment rights class actions are separately listed. The number of employment class actions commenced during the past four years has been relatively stable, while the number of cases pending at the September 30 snapshot has fluctuated significantly:

Year	Cases Pending as of 9/30	Cases Commenced in 12 Months Preceding 9/30
1997	160	70
1998	71	85
1999	43	74
2000	170	79

Changes in the number of cases pending cannot be attributable to jury verdicts. Research suggests that, as of 1999, **not one federal employment class action has gone to verdict since the 1991 amendments to the Civil Rights Act of 1964**.[3] So these actions are being settled, losing their status as a class action or, perhaps occasionally, being dismissed. This begs the question: Are these actions effectively and fairly resolving the legal rights of the parties?

SETTLEMENTS AND THE MEDIA

The price tags for recent settlements of sex and race discrimination class actions against "household name" employers are staggering: Home Depot - $104 million (1998); Publix Supermarkets - $81.5 million (1998); Coca Cola - $192.5 million (2000). Newer cases include sex and race-discrimination claims against Delta Airlines and race-discrimination claims against Microsoft Corporation, both filed as class actions. The news media, presumably driven by the public's interest, has delighted in reporting these cases since learning that a senior human resources executive had surreptitiously taped a meeting among high management officials at Texaco, during which now notorious racist comments were made. This publicity triggered a national boycott led by Reverend Jesse Jackson and resulted in settlement of a pending race discrimination class action brought by African-American managerial employees, at the time reportedly valued at $176 million.[4] Employers argue that the publicity ensuing from these settlements facilitates a tactic which unfairly ups the ante to business - and possibly does more harm than good for diversity - at a time when many academics say that job-related discrimination is declining.[5]

AGENCY INVOLVEMENT

Procedurally, Title VII discrimination claims must first be raised through a charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC). The EEOC has the power to, and frequently does, file class actions against employers as a result of an investigation, exemplified by its high-profile proceedings alleging sexual harassment and retaliation against Mitsubishi filed in April 1996, which settled for a reported value of $34 million in June 1998.[6] The EEOC's gatekeeper role envisioned by the 1964 Civil

2 Http://www.uscourts.gov.
3 Samuel D. Walker and David S. Fortnoy, *Class Claims Arise Under the FLSA*, 2/22/99 Nat'l L.J. C23, 1999 WL 106855 (LRI) and database search for more recent cases (none found).
4 Los Angeles Times, November 16, 1996.
5 National Public Radio, Morning Edition, January 30, 2001, transcript produced by Burrelle's Information Services, Box 7, Livingston, NJ 07039.
6 U.S. Equal Employment Opportunity Commission Press Releases, April 22, 1996 and June 11, 1998, http://www.eeoc.gov.

Rights Act is often avoided through a complainant's request for a "right to sue" letter, ending the agency investigation and enabling private litigants to proceed in court. Determined not to be left out, the proactive EEOC has taken steps to intervene in a number of class cases, most recently a sex-discrimination case (in which a class had yet to be certified) against Rent-a-Center pending since August 2000 in East St. Louis, Illinois. This action was touted in a March 12, 2001 press release: "Vindicating the rights of women who are affected by a nationwide corporate policy of sex discrimination 'serves a compelling public interest,' said EEOC Chairwoman Ida L. Castro. 'Our involvement in this case will ensure that appropriate relief is provided to those affected by the discrimination.'"[7]

COMMENTARY BY COUNSEL

Particularly in the context of a gathering of esteemed representatives of bench, bar, and gown, it is interesting to see what lawyers involved in employment class actions are saying about these cases. Here is a representative comment from the plaintiffs' perspective:

> Cyrus Mehri, lead counsel for plaintiffs in the Coca-Cola litigation**: "These cases are extremely difficult, and the law is stacked and very much in favor of the employer. It's the rare case that succeeds. It's the rare case that succeeds to breathtaking levels like this one."**[8]

The defense perspective is quite the opposite. The prevailing view is that, once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims. Even if individual plaintiffs' odds of prevailing in their specific cases are low, the risk to defendants remains extremely high. In hot-button areas like race and sex discrimination, "name" corporations are as concerned about adverse publicity as the ultimate outcome of the cases. In the face of these risks, companies often perceive that they have little choice but to cut their losses through settlement.

A recent unsuccessful request for Supreme Court review sums up the defense view:

> [O]nce a class is certified, setting up the prospect for huge litigation expenses and creating the risk of a billion-dollar judgment, **cases are likely to settle before the merits of the claims of discrimination are even explored**. In the end, nobody knows whether the employer discriminated or not – only that it paid a lot of money to get out of a no-win situation in which it never should have been placed.[9]

Another defense firm dramatized the forum as a war:

> Class actions have long been a powerful weapon for plaintiffs in employment discrimination litigation. Through the passage of the Civil Rights Act of 1991 . . . Congress gave employment discrimination plaintiffs additional ammunition for their arsenal . . . While the class-action device and the ability to recover compensatory and punitive damages from a jury are each powerful weapons in their own right, the combination of the two can spell swift victory for plaintiffs and their

7 U.S. Equal Employment Opportunity Commission Press Release, March 12, 2001, http://www.eeoc.gov.
8 R. Robin McDonald, *Coke Settlement Deal Far From Sealed*, The Legal Intelligencer, Vol. 223, No. 115 December 15, 2000.
9 Brief of Amicus Curiae Equal Employment Advisory Council at 17, *Home Depot U.S.A. v. U.S. Dist. Ct.*, cert. denied, 520 U.S. 1103 (Mar. 3, 1997), as cited in Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 The Labor Lawyer 415, 416-17 (2000).

> attorneys. **Indeed, the mere certification of an employment discrimination class action, where compensatory and punitive damages could easily climb into the tens of millions of dollars, often leaves the employer with little choice but to raise the white flag and settle.**[10]

This "can't win" attitude displayed on both sides of the caption is extraordinary but consistent with the authors' anecdotal experience in conversations with plaintiff and management lawyers involved in these cases. As explored later, one begins to wonder if both sides doth protest a bit too much.

DASHED HOPES AND UNREALIZED EXPECTATIONS

The lawyers' comments stand in stark contrast to the judiciary's high hopes in the 1960s for the prophylactic effect of the employment discrimination class action. Take, for example, the comments of the Fifth Circuit during the early flurry of interpretation of Title VII. In *Jenkins v. United Gas Corp.*,[11] the court reversed dismissal of a class action filed by an African-American plaintiff alleging systematic racial discrimination in promotions in language reflecting ambitious expectations:

> Considering that in this immediate field of labor relations what is small in principal is often large in principle, [a Title VII violation] has extreme importance with heavy overtones of public interest.
>
> * * *
>
> In dollars Employee's claim for past due wages may be tiny. But . . . it is enough on which to launch a full-scale inquiry into the charged unlawful motivation in employment practices. It is even more so considering the prayer for injunction as a protection against a repetition of such conduct in the future.
>
> * * *
>
> Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee's behalf, the result would be the incongruous one of the Court – A Federal Court, no less – itself being the instrument of racial discrimination . . . .[12]

THE CLASS CERTIFICATION BATTLE

Most employment class actions filed after the 1991 Civil Rights Act seek both compensatory and punitive damages for individual class members, in addition to injunctive relief. This has led to substantial litigation over the question of whether these cases are appropriate for class treatment at all and, even if they are, whether they should be certified under Rule 23(b)(2), with its no notice or opt-out provisions, or whether the more procedurally onerous Rule 23(b)(3) class is the only option.

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10 Samuel Estreicher and Sam Shaulson (O'Melveny & Myers), *New Weapon to Fight Employment Discrimination Class Action Suits*, 7/13/1999 N.Y.L.J. 1, 1999 WL 704967 (LRI).
11 400 F.2d 28 (5th Cir. 1968).
12 400 F.2d at 32-33, 33, 34 (footnotes and citations omitted).

In a pivotal decision, the Fifth Circuit held squarely that disparate-treatment employment claims seeking compensatory damages are simply not appropriate for class treatment. In *Allison v. Citgo Petroleum Corp.*,[13] the court denied certification of a Rule 23(b)(2) class, determining that nonequitable monetary relief may be obtained in a (b)(2) class context only if the predominant relief sought is injunctive or declaratory. Ironically, the court relied on the very provision of the 1991 Act which breathed new life into the employment class – the right to a jury trial for the "new" remedy of compensatory and punitive damages. The court held that the plaintiffs' claims for money damages and the constitutional right of both parties to a jury trial rendered the case unsuitable for class certification. The court observed that since the case presented claims involving both legal (disparate treatment) and equitable (disparate impact) rights, the Seventh Amendment right to a jury trial required that all factual issues common to these claims be submitted to a jury for decision on the legal claims before final court determination of the equitable claims. Since the same employment policies and practices were challenged under both claims, the unavoidable overlap precluded a separate bench trial on the claims for injunctive or equitable relief.

The Seventh Circuit, relying on *Allison*, has determined that every class member seeking monetary damages has, as a matter of due process, the right to notice and an opportunity to opt out of the class. Thus, any certification under (b)(2) that fails to provide these options constitutes an abuse of the court's discretion.[14] The year before *Lemon* was decided, the Seventh Circuit had suggested three options to federal trial courts faced with employment class actions where the damages claim was not incidental to the equitable and declaratory relief sought: (1) certify the class under Rule 23(b)(3); (2) "divided" certification, with a (b)(2) class for the equitable relief and a (b)(3) class for the damages claims; or (3) certify a (b)(2) class but exercise plenary authority to provide notice and opt-out possibilities as if the class were certified under (b)(3).[15]

Not unsurprisingly, federal district judges have not spoken with one voice on these questions. The contrast can be illustrated by two decisions of highly respected jurists: Judge Rakoff of the Southern District of New York and Judge Wright of the Eastern District of Arkansas.

Judge Rakoff was faced with a case brought by African-American employees of the Metro-North railroad commuter line claiming systematic discrimination in promotion and disciplinary practices.[16] Both injunctive relief for the class, as well as compensatory damages for individual class members, appeared in the prayer. Judge Rakoff followed the reasoning of *Allison* in holding the class unsuitable for certification under Rule 23(b)(2). He rejected plaintiffs' request to bifurcate the trials of liability and damages because "liability" meant not only the question of discrimination for unintentional disparate impact but also intentional disparate treatment, with the commensurate inevitability of a predominance of individual questions. Finally, Judge Rakoff refused to certify the class under (b)(3) because the issues of discrimination by individual managers against individual employees would necessarily predominate over any common questions.

Judge Wright was confronted with African-American employees of Sears who alleged race discrimination in almost every aspect of their employment, including hiring, pay, placement, assignments, promotion, and transfer.[17] Class members sought compensatory damages based on their individual situations as well as equitable relief for the

13 151 F.3d 402 (5th Cir. 1998).
14 *Lemon v. Int'l Union of Operating Engs.*, 216 F.3d 577 (7th Cir. 2000).
15 *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999).
16 *Robinson v. Metro-North Commuter Railroad Co.*, 197 F.R.D. 85 (S.D.N.Y. 2000).
17 *Robinson v. Sears, Roebuck and Co.*, 111 F. Supp.2d, 1101 (E.D. Ark. 2000).

class as a whole. Because of the prayer for injunctive relief, Judge Wright found that the class could be certified under Rule 23(b)(2). And, exercising her power under Rules 23(d)(2) and 23(d)(5), she held that all class members would be given personal notice and an opportunity to opt out to pursue individual claims. This ruling, of course, obviated the Rule 23(b)(3) questions of whether common questions predominated and the class-action vehicle was the superior method for resolving the case.

These two cases also exemplify how employer efforts to defeat certification are often based on the unsuitability of the class action due to the unique experiences of the individual members of the proposed class, including such factors as work location, supervisors, specific conditions encountered at the workplace, and psychological impact. Different federal judges have markedly different reaction to the arguments. But, as discussed in the next section, an important underlying question is whether defeating class certification is in the interests of the employer in the first place.

THE DEFENSE DILEMMA

A standard defense strategy upon receipt of a class employment complaint is to direct all efforts toward defeat of class certification. Frequently, the district court will endorse a two-tiered discovery plan, with the first phase focused on appropriateness of a class, holding in abeyance so-called "merits" discovery. This threshold approach is typically a long-term process. Several years often elapse between commencement of the action and a ruling on class certification.

However, this approach may make defense lawyers the architects of their clients' destruction, particularly after the Supreme Court in *Amchem*[18] made clear that a settlement class can be no broader than a trial class, with the same standards of certification applying to both. The pot of gold at the end of a successful campaign to defeat class certification is likely to be scores, if not hundreds, of individual cases to be resolved. If, at the outset, defense counsel knew a case would settle, it is unlikely the mammoth efforts against certification would be mounted. Indeed, from a settlement perspective, the best thing that could happen to a defendant is to have as broad a settlement class certified as possible thus precluding claims of the maximum number of potential plaintiffs.

But the nature of litigation in general, and perhaps especially class-action cases, is such that defense lawyers are loathe to whisper the word "settlement" early in the process lest they be perceived as signaling weakness, fear, or both. Thus the knee-jerk becomes the norm, and the parties lock horns from the outset on the certification question. A "successful" defendant, having convinced a district judge to deny certification, can find itself in front of a court of appeals on the certification question under Rule 23(f) knowing that an affirmance means seemingly endless litigation of individual discrimination cases. Good for the defense lawyers; bad for the client.

THE SAGA OF THE COKE CASE

Employer and employee counsel who recognize their common interests in achieving a class-wide settlement have developed a strategy that is exemplified by the recent settlement proceedings in *Abdallah v. The Coca-Cola Company*. On December 22, 2000, Judge Richard W. Story (1) formally certified the two-year-old race-discrimination suit

18 521 U.S. 519 (1997). *Amchem* is discussed more fully in the "Collusion" section, *infra*.

against Coke as a class action and (2) approved a still incomplete settlement agreement which plaintiffs' counsel had submitted to the court earlier that same day.

The principal elements of the Coke agreement, publicized at a value of $192.5 million,[19] are:

$113 million	cash to be divided by Coke's African-American employees and their lawyers, comprised of:		
	$20.6 million	legal fees	
	1.5 million	costs and expenses	
	23.7 million	back-pay fund	
	10.0 million	Promotional Achievement Award Fund	
	58.7 million	compensatory damages to eligible current/former employees, comprised of:	
		$ .5 million	$3,000 bonus to 150 current and former employees who signed affidavits
		1.2 million	$300,000 each to four lead plaintiffs
		1.5 million	additional plaintiffs' counsel fees
		55.5 million	divided among eligible employees ($374 for every tenth of a year he/she has been employed)
43.5 million	pay equity adjustments (est.)		
36 million	programmatic reforms (est.)		

As of the March 19, 2001 deadline, only about 1% (23 employees) had opted out; Coke had option to declare the agreement void if 200 did so.

CONCERNS OVER COLLUSION

This employer strategy of buying global peace through large settlements certainly has its benefits. Plaintiffs' counsel typically recover substantial fees and the high-profile named plaintiffs generally receive premiums. But what about the faceless multitudes in the class? How are their interests served?

In several asbestos class cases the Supreme Court has indicated its concerns over protecting "consumers" from the dangers of collusive settlements between defendants and plaintiffs' class action lawyers. *Ortiz v. Fibreboard Corp.*[20] In *Amchem Products, Inc. v. Windsor,*[21] Justice Ginsburg writing for the Court affirmed the Third Circuit's decertification of a class and held that no class could be certified solely for the purposes of settlement unless it could be certified as a class for trial. In that case, a settlement was reached **before the case was ever filed.** A group of twenty companies banded together to form the Center for Claims Resolution (CCR). On a single day, two plaintiffs' law firms filed a class-action complaint, CCR's attorneys answered, and the two sides submitted an agreed-upon settlement. Plaintiffs' lawyers would realize substantial fees, and the CCR companies would purchase peace from all persons occupationally exposed to asbestos by one of the CCR companies, whether or not they had yet suffered any asbestos-related diseases. While the settlement made it possible to opt out, many who would be bound did not even know they had been exposed to asbestos and had no way of knowing they were

19 http://www.findjustice.com/mmr/news/coke/set/index1.htm.
20 119 S.Ct. 2339 (1999).
21 117 S.Ct. 2231 (1997).

part of a potential class. The problem was exacerbated in that the settlement precluded claims by present and future spouses and family members of those exposed.

Class actions, like contingency fees, serve the purpose of leveling the playing field by giving ordinary people access to the courts.[22] The high hopes for these cases exemplified by the Fifth Circuit's 1968 opinion in *Jenkins* may still be realized, and there is within the structure of the employment class action the opportunity for much good to be accomplished. But one function the courts must serve is to prevent abuse of the process.

HYPOTHESES FOR DISCUSSION

The authors respectfully offer these thoughts for consideration at the Conference:

The current methodology for dealing with the employment discrimination class action is unfair to both plaintiffs and defendants. The non-merits-based pressures to settle on corporate defendants are real (although often expressed hyperbolically), and recovery of less than $4,000 for each year of discrimination (the recovery for class members in the Coke settlement) is hardly sufficient to compensate for any real discrimination.

The vested interests in the employment-discrimination class action are the lawyers who prosecute and defend these cases. *Amchem* has not eliminated all prospects for collusion to the detriment of class members who have suffered injury.

A more educated, if not specialized, judiciary would significantly improve the current state of affairs. In any event, as soon as a case is filed, the trial court should hold a Rule 16 conference to address issues of class certification and discovery. In general, trial courts must become much more proactive in the management of these cases.

The "defense dilemma" about what position to take on the certification question is leading to needless expense and potentially counterproductive proceedings. To assist in parties in reaching a just result, trial courts should approach employment discrimination class actions under a preliminary injunction model. A hearing should be held as early as practicable to determine the likelihood that individual employees have valid claims, in addition to the usual Rule 23 issues traditionally addressed for purposes of class certification. The court should enter a decision outlining its preliminary view of the case, both in terms of the validity of the claims and initial, non-binding views on certification issues.[23] After this "peek at the merits," the parties should be given some time to pursue resolution of the case short of full-blown discovery and trial, and certainly before the defendant is forced into taking an irrevocable position on certification. If the parties are unable to resolve the case during this post-peek hiatus, the case should track as any other class action, which should include a quick decision on the certification question and entry of the usual scheduling order.

No disparate treatment case in which putative class members seek compensatory damages is appropriate as a class action. There remains the possibility that a disparate impact claim could also contain a request for individual monetary damages and be appropriate for bifurcation, addressing the liability question on a class basis. In no event, however, should any employee be precluded from seeking monetary damages absent fair notice and an opportunity to opt out of the class.

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22 Richard Zitrin and Carol M. Langford, *Action Needed on Class Action*, 157 N.J.L.J. 135 (7/12/99)
23 Query whether there is a role the EEOC – an agency with expertise – could play at this stage.

CONCLUSION

We sincerely hope this serves as a stimulus for discussion and creative work product at the Conference, and we very much look forward to your reaction to these ideas.