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Employment Class and Collective Actions

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Center for Labor and Employment Law at New York University School of Law

The Center for Labor and Employment Law is a program established at New York University School of Law. Samuel Estreicher, Professor of Law at New York University and an internationally recognized expert on labor and employment law, serves as the Center's Director. The objectives of the Center are:

(a) to promote workplace efficiency and productivity, while at the same time recognizing the need for justice and safety in the workplace and respecting the dignity of work and employees;
(b) to promote independent, non-partisan research that would improve understanding of employment issues generally, with particular emphasis on the connections between human resources decisions and organizational performance;
(c) to sponsor a graduate program for the next generation of law teachers and leading practitioners in the fields; and
(d) to provide a forum for bringing together leaders from unions, employees and companies, as well as representatives of plaintiff and defense perspectives, for informal discussion exploring new frameworks for labor-management relations, workplace justice, fair and efficient resolution of employment disputes and representation in the workplace.

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Editor's Preface

Initially intended to be an efficient litigation procedure for dealing by a group of complainants based on the commonality of a discrimination practice, the class action has become a staple of the US litigation system. Reflecting presentations made at the New York University's 56th Annual Conference on Labor, on May 8–9, 2003, as well as some additional contributions, this volume brings to bear considerable expertise and analysis of the status, prospects, and particularly the controversy surrounding class actions.

One criticism of class actions concerns the potential damage that might be done to a corporate defendant. However, in 'The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects,' Professor Michael Selmi offers evidence that class actions neither affect losing companies' share prices nor, for that matter, typically result in meaningful corporate change.

Any discussion of litigation must also take into account on of its principal alternatives, arbitration. As a starting point for that discussion, in 'Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment' Professor Samuel Estreicher and Jones Day's Kristina Yost evaluate the oft-stated view that class actions make possible relief for small-size claims that would go unredressed individual arbitration or lawsuits. The authors report that settlements of employment class actions suggest a monetary value to average and median claims that, as prima facie matter, could support individual actions either in arbitration or court.

In a detailed analysis, 'Class and Representative Actions,' noted lawyers Richard T. Seymour and John F. Aslin detail the reasons behind the observed decline in Federal Rule of Civil Procedure (Rule 23) class actions, in part because of the expense and complexity of such cases.

The decline in class actions may mean difficulties in resolving discrimination cases, in the view of Professor Suzette M. Malveaux. In 'Fighting to Keep Employment Discrimination Class Actions Alive: How *Allison v. Citgo's* Predomination Requirement Threatens to Undermine Title VII Enforcement,' she suggests that the conflicting holdings of federal courts of appeals regarding class actions might best be resolved with an ad hoc balancing test, favored by a few, rather than the bright line holding used in several controversial decisions.

As detailed by Daniel F. Piar in 'The Uncertain Future of Title VII Class Actions after the Civil Rights Act of 1991,' revisions to federal statutes designed to provide additional remedies to individuals ironically served to increase the obstacles to class litigation.

The poster child for the contemporary challenges and complexities of class actions is the Ninth Circuit panel decision in *Dukes v. Wal-Mart Stores*. In 'A Classless Act: The Ninth Circuit's Erroneous Class Certification in *Dukes v. Wal-Mart, Inc.*,' Aaron B. Lauchheimer analyzes this California class action and argues that certifying a wide-ranging, nationwide class is usually not appropriate.

Rachel Tallon Pickens offers a different perspective on *Dukes* in 'Too Many Riches?: *Dukes v. Wal-Mart* and the Efficacy of Monolithic Class Actions.' She argues that manageability concerns in a wide-ranging, though monolithic, class should not necessarily inhibit certification of the class.

One lesson of the *Dukes* is that compliance and internal enforcement present important challenges for large employers, concludes Professor Melissa Hart in 'The Possibility of Avoiding Discrimination: Considering Compliance and Liability.' She adds, however, that these very points must be considered central elements for limiting discrimination of the workplace.

Often left out of the discussion of class actions is the preclusive effect of a judgment on absent class members. Professor Tobias Barrington Wolff addresses this omission in 'Preclusion in Class Action Litigation.' Unfortunately, courts have given short shrift to this issue.

Increasing collective actions are being brought under the Fair Labor Standards Act, Age Discrimination in Employment Act, and Equal Pay Act. As detailed by Mark S. Dichter in 'Opt-In Class Actions: Collective Litigation Under the FLSA, ADEA and EPA,' these are opt-in actions rather than the class Rule 23 opt-out action where members of the class are bound unless they affirmatively exclude themselves from the action.

Steven Arenson and Craig J. Ackermann advocate an alternative to the expense and complexity of class actions in 'Not without Class: Test Cases In Lieu of Class Certification as a Paradigm for Litigating Multi-Plaintiff Harassment Cases.' They assess the use of a different approach, namely, using test cases as patterns, combined with multi-party joinder.

Also looking at the possibility of test cases, in '"Pattern or Practice" Discrimination Litigation,' Michael Delikat explains that pattern or practice test cases that apply to discriminatory harassment have so far not been accepted by appellate courts, although they have been heard in federal trial courts.

The difficulties of disabled people have been multiplied, write Professors Michael Ashley Stein and Michael E. Waterstone in 'Disability, Disparate Impact, and Class Actions.' They point out that the increasing difficulty in predicating collective employment actions on a unifying group-based identity when dealing with disadvantaged persons with disabilities, in part because disability law has heretofore not been litigated on the basis of group identity.

Proposals have been floated relating to the shifting of the burden of proof in actions under the Fair Labor Standards Act and state wage payment laws. In 'Collective and Class Action Issues under the Fair Labor Standards Act and State-Based Wages Statutes,' Adam T. Klein concludes that these proposals are unfair to workers.

In a related discussion, 'Working with the Equal Employment Opportunity Commission,' Wayne N. Outten suggests that, in principle, joining forces with the US Equal Employment Opportunity Commission in a litigation confers advantages, but it also involves challenges and pitfalls.

When the topic of arbitration is broached, the case of *Green Tree v. Bazzle* is not far behind. In '*Green Tree v. Bazzle* in the Supreme Court: "How to Succeed in Blocking Class Actions in Arbitration Without Really Saying So,"' Daniel B. Edelman addresses whether agreements that provide for arbitration of disputes can be read to authorize class-wide arbitration if the agreement is silent on that particular point.

Henry D. Lederman looks at the *Green Tree* case in the context of California case law. In 'Arbitration Agreements, Unconscionability, and Bans on Class Actions: Dueling Magic Wands? The California Experience,' he writes that the California Supreme Court's answer to the conundrum posed by *Green Tree v. Bazzle* is, yes. That is, when an

agreement that sends disputes to arbitration is silent on class actions, arbitrators have authority to proceed on a classwide basis.

Another issue surrounding arbitration is its fairness to employees, especially when the employee is employed under an agreement that both requires arbitration and requires the employee to bear some of the cost. In 'When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration,' Professors Michael H. LeRoy and Peter Feuille explain that courts have begun to scrutinize this type of employment arrangement.

The fairness to employees issue also arises in connection with the matter of individuation, writes Professor W. Mark. C. Weidenmaier. In 'Arbitration and the Individuation Critique,' he suggests that aggregating claims in arbitration may blunt the critique that individuals are not likely to fare well in arbitration because of the advantage that accrues to so-called 'repeat players.'

At root, the best defense against any litigation is to make sure that there is no cause in the first place. G. Roger King, Jeffrey D. Winchester, Lori A. Clary, and Kimberly J. Potter explain the value of an internal human services audit in 'Building An Internal Defense Against Class Action Lawsuits: HR Practices Audits.' Such an audit can be an important step in forestalling class litigation-in part, by identifying and ending inappropriate practices.

Mark Twain's negative comment about statistics notwithstanding, it is possible to 'prove' diametrically opposed positions with similar-sounding statistics, as detailed in '"Statistical Dueling" with Unconventional Weapons: What Courts Should Know about Experts in Employment Discrimination Class Actions.' Expert witnesses William T. Bielby and Pamela Coukos offer this primer, which explains the need to analyze the power of a statistical claim.

One issue underlying the tangled matters of class actions is the tension between state and federal interests. In 'Symposium: Emerging Issues in Class Action Law: Backdoor Federalization,' Professors Samuel Issacharoff and Catherine M. Sharkey suggest that the Supreme Court has supported federal efforts to preempt areas that have been matters of concern for the individual states, particularly in matters relating to commerce.

Looking ahead, Allan Erbsen seeks resolution. Writing in 'From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions,' he points out that the core of class actions contains a

contradiction, to wit, the tension between commonality and individuation. Rather than a predominance balancing test, he suggests that a better approach might be a resolvability test that reconciles the practical and theoretical constraints of class litigation.

D.S.
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