CLASS ACTION EMPLOYMENT LITIGATION:
NEW RULES, NEW OBSTACLES, NEW STRATEGIES

26th Annual
University of Texas School of Law
Labor and Employment Law Conference
Austin, Texas

John V. Jansonius
Judy Bennett Garner
Jackson Walker LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6000
jjansonius@jw.com
jgarner@jw.com

May 9, 2019

TABLE OF CONTENTS

I. Five Non-Exclusive Categories Of Class Actions In Employment Cases. 1

A. Class Actions Under Rule 23 of the Federal Rules of Civil Procedure. 1

1. Rule 23(b)(1)—Limited Fund/Third Party Impact Cases. 1

2. Rule 23(b)(2)—Injunction Cases. 2

3. Rule 23(b)(3)—Damages. 2

B. Wage and Hour Collective and Class Actions. 2

1. Section 16 Collective Actions. 2

2. Hybrid Actions. 3

II. Amendments To Federal Rule Of Civil Procedure 23 Effective December 1, 2019. 3

A. Notice To Class Members—Rule 23(c)(2). 4

B. The Settlement Process—Rule 23(e). 4

C. Curbing Bad Faith/Opportunistic Objectors To Settlement—Rule 23(e)(5). 5

D. Appeals For Grant Or Denial Of Class Certification—Rule 23(f). 5

E. Summary. 6

III. *Epic Systems*: A Green Light To Massive Adoption Of Class Action Waivers Or An Impetus To A Backlash Against Binding Arbitration Agreements In The Workplace? 6

A. Impact Of *Epic Systems* On Employer Practices. 6

B. Significant Post-*Epic* Decisions Concerning Mandatory Arbitration Agreements Between Employers And Employees. 8

1. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686 (5th Cir., June 2018). 8

2. *Weckesser v. Knight Enterprises*, 735 Fed App’x 816 (4th Cir., June 12, 2018). 9

3. *Gaffers v. Kelly Services, Inc.*, 900 F.3d 293 (6th Cir., August 15, 2018). 9

4. *Dish Network, L.L.C. v. Ray*, 900 F.3d 1240 (August 21, 2018). 10

5. *Herrington v. Waterstone Mortgage Ass’n.* 907 F.3d 502 (7th Cir., October 22, 2018). 10

6. *In re JPMorgan Chase*, No. 18-20825 (5th Cir., February 21, 2019). 10

7. *New Prime v. Oliveira*, 139 S.Ct. 532 (2019). 11

IV. Class And Collective Action Cases Presently Before The SCOTUS. 12

V. Significant Class Certification Cases Post-*Dukes* 13

A. Discretionary Decision-making—Cases Distinguishing *Dukes*. 13

B. Discretionary Decision-making—Class Certification Defeated By *Dukes* 15

VI. Conclusion. 16

As plaintiffs lawyers and defense lawyers, we all want big class action cases from time to time. There is money in numbers. The odds for identifying a viable class claim and pressing it through to certification have not been favorable in employment litigation for a very long time, however, and nowhere has that been more true than in Texas and the Fifth Circuit.

Low odds do not negate the purpose served by class actions, however, and employment lawyers continue to use Rule 23 to contest policies and practices that adversely affect a large number of applicants or employees in a common manner. This paper discusses developments in employment class action litigation over the past few years. We start with an overview of the various forms of class actions and the December 2018 amendments to the Federal Rules of Civil Procedure concerning class action litigation.

I. Five Non-Exclusive Categories Of Class Actions In Employment Cases.

Class or collective actions in the employment context are governed by Rule 23 of the Federal Rules of Civil Procedure or state counterparts to Rule 23 and in the wage-hour context by Section 16 of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b). Combining Rule 16(b) class requests with Rule 23 state law class certification requests has become relatively common even the past 15 years.

A. Class Actions Under Rule 23 of the Federal Rules of Civil Procedure.

Rule 23(a) sets out the prerequisites to bringing a class action lawsuit in federal court. First is numerosity. The class must be so numerous that joinder of all members to the class is impractical. Classes have been certified with as few as 35-40 members, but generally there are hundreds or thousands of persons in a proposed class.

Second is commonality. The named plaintiff(s) and the putative class members' claims must share common questions of law or fact, which would yield common answers for all class members.

Third, the interests and injuries must be sufficiently similar among the class members.

Finally, there may be no conflicts among the proposed class. The named plaintiff(s) must have common interests with the putative members of the class and the named plaintiff(s) must diligently prosecute the interests of the class through qualified counsel.

The four requirements are frequently referred to as numerosity, commonality, typicality, and adequacy of representation, respectively. If the Rule 23(a) requirements are met, then the plaintiffs must show that the putative class action meets one of the prongs of Rule 23(b):

1. Rule 23(b)(1)—Limited Fund/Third Party Impact Cases.

Class actions filed pursuant to Rule 23(b)(1) are permissible if: (a) separate lawsuits would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (b) if tried

separately, the outcome of the lawsuits would be dispositive of the interests of the other putative class members who are not parties to the individual adjudications or would substantially impair or impede other putative class members' ability to protect their interests. Fed. R. Civ. P. 23(b)(1)(A)-(B). An example of a Rule 23(b)(1)(A) class action could be a riparian rights case in which the parties adjudicate a particular group's rights to a body of water. Class action lawsuits under Rule 23(b)(1)(B) have generally been limited to cases in which the defendant's available assets for payment of damages are severely limited to ensure that recovery by some plaintiffs does not prevent other plaintiffs from recovering at a later date. *See generally Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). Rule 23(b)(1) suits are uncommon in the employment context.

2. **Rule 23(b)(2)—Injunction Cases.**

Class action lawsuits are permissible under Rule 23(b)(2) if the party opposing the class has acted or refused to act on grounds generally applicable to the class, making final injunctive relief or declaratory relief appropriate for the class as a whole. Relief under this rule is limited to injunctive or equitable relief. Monetary relief may only be awarded if incidental to the requested injunctive or equitable relief.

Generally, plaintiffs file class action lawsuits pursuant to this rule to challenge an employer's policy or decision that affects all class members in a fairly similar manner. There is no "opt-out" requirement, as opposed to other Rule 23 class action litigation that allows plaintiffs who are not satisfied with the litigation to withdraw from the class. In Rule 23(b)(2) cases, all of the class members are bound by the determination and may not opt-out.

3. **Rule 23(b)(3)—Damages.**

Under Rule 23(b)(3), a party may bring an action if common questions of law or fact predominate, taking into account matters such as individual interests of the class members, any litigation concerning the controversy that is already pending by or against class members, the desirability or undesirability of concentrating litigation of the claims in the particular forum, and the likely difficulties in managing a class action. The class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. Class actions under this rule account for most of the employment class action lawsuits.

B. **Wage and Hour Collective and Class Actions.**

1. **Section 16 Collective Actions.**

The FLSA permits collective actions for "similarly situated" employees. A collective action is similar to a class action, but there are notable differences. As an initial matter, instead of applying the Rule 23(a) requirements, the court must determine whether claims and circumstances of the putative class members are "similar" or not. "Similarly situated" is the guiding standard under Section 16(B), not numerosity, commonality, or typicality, as under Rule 23.

Further, a collective action is an "opt-in" process (as opposed to an "opt-out" process), so members of a collective action class must affirmatively opt into the litigation. Section 16 requires

that notice be provided to putative class members to inform them of the "opt-in" requirement. Though Rule 23 does not apply to FLSA collective actions, courts often look to Rule 23 to guide the certification analysis.

2. **Hybrid Actions.**

A hybrid action refers to a lawsuit initiated on behalf of a group of employees asserting collective/class federal and state wage and hour laws. Plaintiffs frequently rely on similar factual allegations to support federal and state wage and hour claims, so it is common for them to assert both types of claims in a single action. In this context, the FLSA's collective action rules govern the FLSA claims and Rule 23 governs the state wage and hour claims. The challenging procedural issues that arise in hybrid actions are that the FLSA uses an opt-in procedure and Rule 23 uses an opt-out procedure. Hybrid actions tend to be larger in size than FLSA collective actions. Plaintiffs who initiate hybrid actions must satisfy the requirements under both frameworks to successfully assert their claims on a representative basis.

There has been considerable litigation over the propriety of combined 16(b) and Rule 23 classes. Employers have frequently argued that federal courts should not exercise supplemental jurisdiction over state law claims. However, the trend is toward permitting hybrid claims to proceed through litigation. *See e.g., Lindsay v. Gov. Employees Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006) (finding that the court could exercise supplemental jurisdiction over the state wage and hour claim of class members who opted out of the class with respect to the FLSA claim); *De Asencio v. Tysons Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003) (finding that the district court did not abuse its discretion by finding that FLSA and state wage and hour claims arose from the same controversy and shared common nucleus of operative facts); *Jackson v. City of San Antonio*, 20 F.R.D. 55 (W.D. 2003) (finding that the court could not exercise jurisdiction over plaintiffs who did not opt out of the state claim and failed to opt-in to the FLSA claim).

II. **Amendments To Federal Rule Of Civil Procedure 23 Effective December 1, 2019.**

Class action lawsuits are particularly prone to complications and uncertainty in communicating with people who may be impacted by the lawsuit. Class actions also invite opportunism by individuals (or entities) who may try to obstruct class resolution for personal gain and by attorneys who seek generous fee awards disproportionate to the relief to class members. Approximately five years ago, the Advisory Committee on Civil Rules (of the federal judiciary) appointed a sub-committee to investigate and assess possible revisions to the class action rules.

Following an initial report in 2015 with several far-reaching ideas for reform, and a few years of road shows, public input and debate, and deliberations by the FRAC, the process concluded in April 2018. On April 28, Chief Justice Roberts released the proposed Amendments to the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2074, Pub. L. No. 115-223 (April 26, 2018). The amendments advanced from proposals to rules effective on December 1, 2018.

The amendments to FRCP 23 are significant, but far less ambitious than the initial sub-committee considerations in 2015. For the most part the amendments codify practices that

had become common in class action litigation and they tackle the problem of "professional objectors." The amendments focus on (i) notice procedure, (ii) settlement process, (iii) settlement factors, (iv) objections to class settlements, and (v) appeals from orders denying class certification.

A. Notice To Class Members—Rule 23(c)(2).

Historically, the preferred means of notice to identifiable class members has been by U.S. mail. That is consistent with the Supreme Court's dictate that "individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Notice by publication has been an acceptable alternative to the extent potential class members cannot be specifically identified.

New Rule 23(c)(2) recognizes technological advances as enhancing ability to assure that class members are apprised about litigation that may affect their interests. Under amended Rule 23(c)(2), notice by electronic communication is expressly permitted. Specifically, notice may be "by one or more of the following: United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B).

How courts will use electronic communications to reach class members remains to be seen and for the time being it is likely that U.S. mail will remain the default. In cases where the universe of class members is known to be reachable electronically, however, e-notice will likely be readily embraced. Another likelihood is that electronic communication to class members will be used as a supplementary means for providing notices. New Rule 23(c)(2)(B) is written very broadly, and as electronic communication technology advances courts will have considerable flexibility to take advantage of the Rule to direct "the best notice that is practicable under the circumstances."

B. The Settlement Process—Rule 23(e).

Settlement practices evolved in an uncertain and inconsistent manner across the circuits and the states over the decades in which old Rule 23(3) and case law served as our guide. Lack of uniformity in settlement procedure and factors for approval was of concern to the FRAC sub-committee. Rule 23(e) as amended on December 1, 2018 is a large step forward toward uniformity, though experience suggests that actual uniformity in practice will always be aspirational.

New Rule 23(e)(2) requires that parties wanting approval for a class action settlement first seek preliminary approval from the court. Preliminary approval requires demonstration that settlement will be approved as proposed and when necessary that the court will certify the class for entry of a judgment on the settlement proposal. This preliminary approval step is designed to avoid wasted time and money serving notice to a class of individuals of a settlement that is unlikely to be approved.

Rule 23(e) as amended outlines factors to be considered for ultimate approval or disapproval of a proposed class action settlement. There are four:

- Adequacy of representation;
- Fair and arms' length negotiation;
- Adequacy of relief to the class (considering (i) costs and risks of trial and appeal, (ii) effectiveness of proposed means for distributing relief to class members, (iii) attorneys' fees, and (iv) any agreement that must be disclosed per Rule 23(3)(3)); and
- Equity in treatment among class members.

In short, new Rule 23(e) is intended to shine a light on settlement terms and place within the Rule a level of scrutiny that some courts have been attentive to and other courts have not.

C. Curbing Bad Faith/Opportunistic Objectors To Settlement—Rule 23(e)(5).

Any class member may object to a proposed settlement. That right has been taken advantage of for good and bad many times. Amended Rule 23(e)(5) adds measures to rein in abusive objection practices.

The approach taken to discouraging bad faith objections is transparency. Now, objectors must specify whether the objection "applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." Perhaps more significant as a matter of transparency, amended Rule 23(e)(5) requires disclosure of payments to objectors.

An unseemly practice in class action litigation has been payment of money by class counsel to objectors in exchange for withdrawal of the objections. That practice has not been banned by the amendments, but must now be disclosed. The court must be notified and must approve any "payment in connection with an objection." Approval of payment to an objector may be done only after conducting a hearing, and the requirement of court approval for payments to an objector applies both in the trial court and on appeal. Fed. R. Civ. P. 23(e)(5)(i) and (ii).

D. Appeals For Grant Or Denial Of Class Certification—Rule 23(f).

A notable change in appeals from appellate relief under Rule 23 involves notice of settlement. Courts may no longer certify appeal from an order directing notice to class members of a proposed settlement. As to appeal from award or denial of class certification, a "party must file a petition to appeal with the circuit clerk within 14 days after the order is entered…." That period is enlarged to 45 days if "any party" to the action is the federal government or an employee of the federal government sued in connection with performance of her/his duties as a government employee.

E. Summary.

The new rules on class action practice are modest, but welcome. Particularly as to settlement and objection practices, amended Rule 23(e) provides new safeguards and protections to limit gamesmanship at the expense of class members and the public. Otherwise, the amendments are largely adaptations to accommodate new technology since the rules were last updated.

III. *Epic Systems*: A Green Light To Massive Adoption Of Class Action Waivers Or An Impetus To A Backlash Against Binding Arbitration Agreements In The Workplace?

People tend to overstate implications of outcomes they disapprove of, and lawyers have a canny ability to sidestep the consequences of policy impacting precedent they disapprove of. Although too early to tell, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) may be an example of both tendencies.

Last May, the Supreme Court held in *Epic Systems* that employers may require applicants and employees to sign agreements to resolve all disputes one-on-one in final and binding arbitration. The Court rejected the National Labor Relations Board's argument (and Board decisions beginning in 2012) holding that class litigation over terms and conditions of employment is inherently concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157. Justice Gorsuch for a 5-4 majority emphasized (i) that the Federal Arbitration Act requires that arbitration agreements be enforced as written, (ii) that the NLRA was passed into law after the FAA without making reference to exclusion of class actions from reach of the FAA, and (iii) that the NLRB itself never took the position that class action waivers violate Section 7 until 2012, over seven decades after passage of the NLRA.

A. Impact Of *Epic Systems* On Employer Practices.

At the time of writing this paper, about ten months have passed since *Epic Systems* was decided. Some employers have undoubtedly taken *Epic Systems* as a cue to implement employment arbitration agreements with class action waivers, but there is no indication that this has been widespread. No empirical data demonstrates widespread post-*Epic Systems* adoption of employment arbitration agreements with class action waivers. Anecdotal evidence is inconclusive at best.

There is some pre-*Epic System* data about the scope of mandatory arbitration agreements in place among America's largest employers. One source for that is a study by the Employee Rights Advocacy Institute For Law & Policy. In a report entitled "The Widespread Use of Workplace Arbitration Among America's Top 100 Companies," Professor Imre S. Szalai of the Loyola University New Orleans College of Law reported that most Fortune 100 U.S. companies

have employment arbitration agreements ranging from broad to narrow in coverage.[1] Among the largest companies with employment arbitration agreements including class action waivers, the report listed:

Berkshire Hathaway	Aetna
Exxon Mobil	Sysco
CVS Health	Hewlett Packard Enterprise
General Motors	HP
AT&T	Coca-Cola
Ford Motor	New York Life Insurance
Amazon.com	Cigna
General Electric	Best Buy
Verizon	Morgan Stanley
Kroger	Goldman Sachs Group
Chevron	American Express
Fannie Mae	TJX
JPMorgan Chase	General Dynamics
Home Depot	Charter Communications
Alphabet	Travelers Cos.
Citigroup	Capital One Financial
Comcast	UnitedHealth Group
IBM	Pfizer
Johnson & Johnson	AIG
Lowe's	

Professor Szalai's report was published on September 27, 2017, approximately eight months before *Epic Systems* was decided by the Supreme Court.

Counteracting *Epic Systems*, considerable socio-political pressure on employers not to require class action waivers, or even arbitration agreements, has emerged. This pressure has been most intense in connection with sexual assault and harassment claims. In our own industry, women law student associations at Harvard and some other prominent law schools have pressured major law firms to end mandatory arbitration to resolve disputes between attorneys and the firm. Some firms that have rescinded their mandatory arbitration agreement include Kirkland & Ellis, with DLA Piper a current focus of law student pressure at the time of writing. *See* "Women's Law Associations Condemn Controversial Agreements, Praise Harvard's Pipeline Parity Project", *The Harvard Crimson* (December 5, 2018); "Backlash Has Some Employers Rethinking Forced Arbitration", *Law360* (March 1, 2019). As to be expected among law students, the views asserted

[1] "The Widespread Use of Workplace Arbitration Agreements Among America's Top 100 Companies," Prof. Imre S. Szalai (Employee Rights Advocacy Institute, Sept. 27, 2017).

by the Harvard Women's Law Association and counterparts at other law schools are not universally shared. Online debate about this subject among law students is robust.

In the tech industry, bowing to pressure from the Me Too Movement, Facebook and Apple have abandoned arbitration as the sole means to resolve sexual harassment claims. Google went a step further and has jettisoned mandatory arbitration altogether for employment disputes. There likely are more companies that have or will do the same, but there is little indication at this time that an *Epic Systems* backlash has impacted industries other than big-law and big-tech. *See e.g.,* Shannon Bond, *#MeToo in Silicon Valley*, FINANCIAL TIMES, Jan. 21, 2019, https://www.ft.com/content/af5f42a8-1501-11e9-a168-d45595ad076d; Sara Randazzo and Nicole Hong, *At Law Firms, Rainmakers Accused of Harassment Can Switch Jobs with Ease*, THE WALL STREET JOURNAL, Jul. 30, 2018, https://www.wsj.com/articles/at-law-firms-rainmakers-accused-of-harassment-can-switch-jobs-with-ease-1532965126; Vivia Chen, *The #MeToo Backlash Is Building*, THE AMERICAN LAWYER, Oct. 26, 2018, https://www.law.com/americanlawyer/2018/10/26/the-metoo-backlash-is-building/; Sheelah Kolhatkar, *The Tech Industry's Gender-Discrimination Problem*, THE NEW YORKER, Nov. 13, 2017, https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem.

In terms of practices among employers, the most that can be safely concluded about *Epic Systems*' impact is that it reinforced mandatory arbitration agreements with class action waivers at many companies that already had them. There undoubtedly have been employers that have implemented arbitration agreements as a result of *Epic Systems*, but there is no reliable evidence that this has been widespread. Finally, partly as a consequence of the Me Too Movement and a highly public backlash to *Epic Systems* by opponents of mandatory arbitration to resolve disputes between employee and employer, by contrast, the trend toward adoption of employment arbitration agreements over the past two decades appears to be waning rather than accelerating.

B. Significant Post-*Epic* Decisions Concerning Mandatory Arbitration Agreements Between Employers And Employees.

In the eleven months since May 21, 2018, there have been a few significant federal circuit court opinions applying or addressing *Epic Systems*. These cases have not uniformly gone in management's favor, but when they have not there has been a failure to satisfy basics of contract formation. The cases discussed below are in order of date of release.

1. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686 (5th Cir., June 2018).

This case was an appeal from the Western District enforcing an arbitration agreement between Kimberly Huckaba, a former employee of Ref-Chem, L.P. As a condition of employment, Ms. Huckaba signed an agreement to arbitrate all disputes that may arise between her and Ref-Chem. That employment agreement expressly required that both parties sign the agreement. Ironically, Ref-Chem itself neglected to sign the agreement.

Ref-Chem's argument for enforceability, which the district court credited, was that Ref-Chem's continued employment of Huckaba and placement of the agreement in her personnel file manifested assent by Ref-Chem to the agreement. Applying Texas law of contract formation, the Fifth Circuit disagreed. To form a contract in Texas, "execution and delivery of the contract with intent that it be mutual and binding" is a necessary element. *Id.* at 689, *citing In re Capco Energy, Inc.*, 669 F.3d 274, 279-280, (5th Cir. 2010). Since the putative contract expressly required Ref-Chem's signature, manifestation of intent to be bound to the agreement could not be inferred: "[w]e give meaning to the words Ref-Chem used in its agreement."

2. ***Weckesser v. Knight Enterprises*, 735 Fed App'x 816 (4th Cir., June 12, 2018).**

This is an FLSA § 16(b) case in which plaintiff Weckesser sought to represent a class of service technicians he maintained were improperly classified as independent contractors. Knight Enterprises was the ostensible employer and as defendant it moved to stay Section 16(b) proceedings in federal court and to arbitrate one-on-one, not as a class or collective action representative. Weckesser was party to an arbitration agreement that contained a class action waiver. Unfortunately for Knight Enterprises and fatal to its motion, however, the arbitration agreement was under the name and signature of Knight Enterprises' parent corporation—not the alleged employer. Applying South Carolina law of contract formation, the Fourth Circuit declined to treat this discrepancy as a clerical error or immaterial misnomer. The Fourth Circuit cited several contextual facts supporting its conclusion that the parent corporation was intended to be the contracting party. One such factor was the venue clause, which specified Tampa, Florida (the parent's "backyard") as the site for venue, even though Weckesser lived and worked in South Carolina.

3. ***Gaffers v. Kelly Services, Inc.*, 900 F.3d 293 (6th Cir., August 15, 2018).**

This case was brought by a former Kelly Services employee who provided "virtual call center" support from home. For himself and on behalf of other similarly situated employees, Plaintiff Gaffers filed an FLSA § 16(b) case claiming that they were not compensated for time logging in, logging out, and getting technical support when working from home. Sixteen hundred (1,600) employees opted in.

As an alternative to the NLRA § 7 concerted activity argument rejected by *Epic Systems*, Gaffers argued that the FLSA's statutory right to sue on behalf of other employees overrides the Federal Arbitration Act's directive that arbitration agreements be enforced as written, at least to the extent that the FAA compromises a right written into the FLSA. Starting with the comment that "this argument" faces a steep uphill climb, "the Sixth Circuit explained that the FLSA gives an employee the option to seek collective relief, but does not require them to do so. *Id.* at 296 (quoting *Epic Systems*, 138 S.Ct. at 1624). In other words, employees can waive their right to bring collective actions under the FLSA.

4. *Dish Network, L.L.C. v. Ray*, 900 F.3d 1240 (August 21, 2018).

Dish Network is another FLSA § 16(b) collective and state law class action case brought by a former employee who had signed an arbitration agreement. Plaintiff Matthew Ray, when confronted with Dish Network's motion to dismiss and to enforce the arbitration agreement, yielded. Ray voluntarily dismissed his lawsuit and re-asserted his claim with the American Arbitration Association (AAA)—still purporting to represent a class of similarly situated present and former employees.

The question before the District of Colorado and the Tenth Circuit was who decides whether Ray could arbitrate on behalf of a class or only pursue his personal claims: the arbitrator or the court? The Supreme Court in *Epic Systems* characterized this arbitrability question as a matter of civil procedure rather than a substantive right. 138 S. Ct at 1624-1625. The arbitrator concluded that even if the claimant's right to seek class relief is a gateway issue typically for the courts, in this case Dish Network's arbitration agreement "clearly and unmistakably" expressed the parties' intent that the scope of arbitrable disputes be assigned to the arbitrator. The Tenth Circuit agreed. Rejecting contrary decisions by the Third, Sixth, and Eighth Circuits, the Tenth Circuit held that parties by clear and unmistakable language may delegate a determination about arbitrability on a collective or class action basis to the arbitrator. 900 F.3d at 1248. Significantly, the Tenth Circuit stressed Dish Network's incorporation of AAA Rules into the arbitration agreement as evidence of intent to delegate the permissible scope of a case to the arbitrator. *Id.*

5. *Herrington v. Waterstone Mortgage Ass'n.* 907 F.3d 502 (7th Cir., October 22, 2018).

Two months after the Tenth Circuit's decision in *Dish Network*, adoption of AAA Rules as a clear expression of intent to allow arbitration of class claims was addressed by the Seventh Circuit.

The lower court previously treated arbitrability of class claims as an issue for the arbitrator following the slim majority of circuits that have treated ability on a class or collective basis as a gateway issue for courts to decide. 907 F.3d at 511. The circuit court remanded the case to the district court to decide whether the parties' arbitration agreement provides for class action claims.

6. *In re JPMorgan Chase*, No. 18-20825 (5th Cir., February 21, 2019).

On petition for writ of mandamus, the Fifth Circuit addressed an issue of first impression in the federal circuit courts. That issue is whether district courts may order that notice in a FLSA § 16(b) case be served to employees and former employees who signed arbitration agreements waiving the right to participate in a class or collective action? In this case, JPMorgan Chase & Company objected to an order directing that notice be sent to approximately 42,000 employees—85% of whom JPMorgan Chase asserted are signatory to arbitration agreements with class action waivers.

Expressing disapproval with the district court's certification and order for notice, the Fifth Circuit held that "district courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action." *Id.* at 8. The Fifth Circuit added:

> [A]n employer that seeks to avoid a collective action, as to a particular employee, has the burden to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for that employee. The court should permit submission of additional evidence, carefully limited to the disputed facts, at the conditional certification stage.

Id. at 10. The court rejected the respondent-plaintiff's contention that all putative collective members have a right to be given notice of FLSA claims they might have even if they may be ineligible to participate in the pending collective action. *Id.* at 11.

To be true to the purpose of mandamus, the Fifth Circuit did not issue a blanket order precluding the district court from certifying a class. Rather, the district court was instructed to allow JPMorgan Chase to present additional evidence establishing who among the putative class are bound by arbitration agreements with class action waivers. Proceedings toward that end are ongoing in *River Camp v. JPMorgan Chase & Company*, Case No. 4:17-cv-03786 in the Southern District of Texas.

7. ***New Prime v. Oliveira*, 139 S.Ct. 532 (2019).**

This year, the Supreme Court issued a decision in *New Prime v. Oliveira*, a case concerning exemption of arbitration agreements from coverage under the FAA for transportation workers. Section 1 of the FAA excludes from its enforcement purview contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1. In *Circuit City Stores v. Adams*, the Supreme Court clarified that the term "any other class of workers engaged in foreign or interstate commerce" only applies to contracts of employment of transportation workers engaged in foreign or interstate commerce. *See Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001). The Court reasoned that the FAA is based on the 1925 definition of interstate commerce, not the expansive definition of the term that developed over the 20th Century.

Dominic Oliveira worked as an independent contractor truck driver for New Prime trucking company. The independent contractor agreement between Oliveira and New Prime stated that disputes arising out of the parties' relationship would be resolved by arbitration, including disputes concerning the scope of an arbitrator's authority. Oliveira filed a wage and hour class action lawsuit against New Prime alleging that he was actually an employee, instead of an independent contractor. New Prime sought to enforce the arbitration clause of the independent contractor agreement pursuant to the FAA. The District of Massachusetts denied the motion to compel. New Prime appealed the decision to the First Circuit, which affirmed the district court's

ruling. The First Circuit held that the interstate transportation exception to the FAA (Section 1) deprived the district court of power to compel Oliveira to arbitrate his claims.

The Supreme Court considered two questions: (1) whether a court must leave disputes regarding the application of the Section 1 exclusion to an arbitrator when a contract delegates questions of arbitrability to an arbitrator; and (2) does the term "contracts of employment" in Section 1 of the FAA refer only to contracts between employers and employees, or does it extend to contracts with independent contractors? The Supreme Court unanimously answered no to both questions. On the question of who determines arbitrability, the Court determined that the enforcement provisions of the FAA can only be applied to arbitration agreements that are subject to the FAA, and not excluded by Section 1 of the FAA. Accordingly, it was up to the court to decide whether the Section 1 exclusion applied to Oliveira's claims.

On the second question, the Court determined that the text of Section 1 of the FAA is broad enough to reach all contracts of employment with transportation workers, including independent contractors. When the FAA was enacted, the phrase contracts of employment was broadly meant to cover all master-servant relationships without a distinction between contract labor and employees. 139 S.Ct. at 541. The Court's decision in *New Prime* only extends to arbitration agreements governed by the FAA. However, many states have an arbitration act that could be relied upon to enforce arbitration agreements with transportation workers.

IV. <u>Class And Collective Action Cases Presently Before The SCOTUS.</u>

Currently before the Supreme Court is another case exploring the intersection between arbitration agreements and class actions. In *Lamps Plus*, the Supreme Court will consider whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based on general language commonly used in arbitration agreements. *Lamps Plus Inc. v. Varela*, No. 17-988, 2018 WL 398496 (U.S. Apr. 30, 2018). This lawsuit arose as the result of a data breach of employee W-2 forms.

Frank Varela (a data breach victim) filed a class action in the Central District of California seeking relief due to the data breach. Lamps Plus sought to compel individual arbitration under Varela's arbitration agreement, which did not explicitly permit class or collective arbitrations. The district court found that the arbitration agreement authorized class arbitration based on state law contract interpretation principles. The Ninth Circuit affirmed the district court's decision. The Supreme Court's decision in this case will have a direct impact on the level of specificity employers must use in arbitration agreements to demonstrate consent to class or collective action arbitrations.

The Supreme Court is also considering a procedural class action issue in *Home Depot U.S.A. v. Jackson*, No. 17-1471. The issue is whether an original defendant to a class-action claim that was brought as a counterclaim against a co-defendant can remove the class action to federal court if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act? This case started out as a routine collection suit by Citibank. The procedural complexity began when

the defendant being sued for payment of a debt filed a consumer protection counter-claim against Citibank, naming Home Depot as a co-defendant.

V. Significant Class Certification Cases Post-*Dukes*.

The most recent Supreme Court decision addressing the requirements of Rule 23(a) is *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). *Dukes* was a massive challenge to Wal-Mart's pay and promotion practices nationwide on behalf of 1.5 million present and former female employees. Relying at least in part on the plaintiffs' social framework analysis and statistical evidence, the Ninth Circuit affirmed certification of a nationwide class on the premise that gender stereotyping among local decision-makers could have deprived women employees of opportunities and income equal to their male counterparts.

The Supreme Court reversed. Writing for the five justice majority, Justice Scalia rejected the notion that commonality for a nationwide class can be satisfied when the employment practices being challenged are delegated to the discretion of local management. As Justice Scalia explained:

> What matters to class certification … is not the raising of common questions … but rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.

Id. at 2551. In a system of decentralized and discretionary, decision-making, there could be no common answer to why members of the class were (or were not) disfavored.

In the eight years since *Dukes*, the courts have had to address issues concerning scope to which managerial discretion forecloses class certification. A key issue in disparate impact cases has been whether existence of a facially neutral policy applied by managers exercising independent discretion provides the glue necessary to argue that prospective class members have been discriminated against based on a policy that has a common impact on the class. In disparate treatment cases, courts have had to examine whether a corporate culture or shared environment establish commonality sufficient to overcome decentralized and discretionary decision-making.

A. Discretionary Decision-making—Cases Distinguishing *Dukes*.

In the disparate treatment context, it is especially difficult to show a circumstance in which commonality can be established to support a class of plaintiffs claiming that they have been victimized by discretionary decisions made by different decision-makers. Something more than an appearance of widespread discrimination, even if borne out by statistics, is generally necessary to prove that a common answer explains the adverse employment actions the putative class is complaining about. That something else must be a facially neutral policy with an alleged adverse impact. In this context, the question is how much discretion must reside in the various decision-makers to undermine commonality.

One early case involving delegated discretion to local management yet still resulted in certification of a large nationwide class is *McReynolds v. Merrill Lynch*, 572 F.3d 489 (7th Cir. 2012). There, the plaintiffs sought to represent a nationwide class of African-American financial advisors employed by Merrill Lynch in hundreds of separately managed offices. Relying on *Dukes* and the fact that the business opportunity decisions affecting financial advisors were a matter of local discretion and decision-making, the district court denied certification. The Seventh Circuit reversed.

Citing two policies at the corporate level, the Seventh Circuit invoked the "issue class" procedure in Rule 23(c)(4) to certify an injunction class under Rule 23(b)(2). *Id.* at 491. The two policies unifying the class, according to the Seventh Circuit, were: (i) a policy conferring on financial advisors themselves discretion as to "team" formation in offices subject to local management approval; and (ii) established criteria, subject to local management discretion for reallocation of accounts of departing financial advisors. *Id.* The Supreme Court denied Merrill Lynch's petition for writ of certiorari, and the case subsequently settled.

Brown v. Nucor Corp., 785 F.3d 915 (4th Cir. 2015) involved a claim of racially discriminatory promotion practices and hostile work environment. The plaintiffs were workers in a steel mill. Nucor policy required supervisor approval for employees to bid on job opportunities in other departments. At the plant in question, there were six separate departments.

The district court originally certified a class of about 100 workers, but decertified the class following the *Dukes* decision. The Fourth Circuit held that decertification of the class was in error and remanded the case to recertify the promotion practices class. Boiling down a lengthy opinion with detailed analysis of Rule 23 and *Dukes*, the Fourth Circuit concluded:

> In contrast to *Wal-Mart*, this litigation concerns approximately 100 class members in a single steel plant in Huger, South Carolina. The class members shared common spaces, were in regular physical contact with other departments, could apply for promotions in other departments, and were subject to hostile plant-wide policies and practices. [Cite omitted.] Such differences were not merely superficial. <u>Instead, a more centralized circumscribed environment generally increases the uniformity of shared injuries, the consistency within which managerial discretion is exercised, and the likelihood that one manager's promotion decisions will impact employees in other departments.</u>

Id. at 910 (emphasis added).

The clear lesson of *Nucor* is that limiting the geographical range and number of employment locations will increase the possibility of demonstrating that discretionary decision-making by local or departmental managers is commonly impacted by company policy or culture. The lesson of *McReynolds* is that proponents of class certification in a disparate impact

case must demonstrate that local management discretion is influenced by a facially neutral company policy to a degree that a common adverse effect on the proposed class is a consequence of the policy. Thus, while *Dukes* has dramatically limited the availability of Rule 23 class actions to challenge allegedly discriminatory employment practices, the door has not been completely shut.

B. Discretionary Decision-making—Class Certification Defeated By *Dukes*.

Not long after the Seventh Circuit decided *McReynolds*, which distinguished *Dukes* creating a seemingly expansive opening for class proponents, the same circuit denied class certification in another case of delegated decision-making. *Bolden v. Walsh Construction Company*, 688 F.3d 405 (7th Cir. 2012). *Bolden* was a race discrimination case claiming that a construction company discriminated in overtime and working conditions for black laborers. There were 282 job sites. Overtime work and general working conditions were under control of the job site managers.

Finding a lack of commonality, the Seventh Circuit overturned the district court's grant of class certification. The district court had relied on *McReynolds*. The missing link as explained by the Seventh Circuit was a common policy linking individual discretion to discriminatory outcomes.

> [I]n *McReynolds* we held that a national class could be certified to contest the policy allowing brokers to form and distribute commissions within teams and who would be on a team—this single national policy was the missing ingredient in Wal-Mart.

Id. at 898.

The *Bolden* plaintiffs tried to link job site supervisor discretion to administration of common company policies, to which the Seventh Circuit responded that the job site working conditions and overtime assignments all are products of local discretion: "Wal-Mart tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity." *Id.* If there is a reconciliation to be made between award of class certification in *McReynolds* and denial of class certification in *Bolden*, it may be that the Seventh Circuit considered a practice built on group dynamics (*i.e.*, team formation) as facilitating a common form of discriminatory treatment even when discretion in forming the teams is decentralized.

Certification of a class claiming discriminatory promotion practices reached the Tenth Circuit in *Tabor v. Hill, Inc.*, 703 F.3d 1206 (10th Cir. 2013). Plaintiffs were inside sales representatives who sought to represent a class of women employees challenging Hill, Inc.'s practices with regard to promotion to Account Manager (outside sales). The district court denied certification for lack of numerosity (244) and failure to satisfy the requirements of Rule 23(b).

On appeal, the Tenth Circuit focused on the element of commonality. Plaintiffs/Appellants maintained that Hill, Inc.'s "Global Develop and Coach Process" (GDCP) as applied had a discriminatory impact on female account representatives that was reinforced by the exercise of discretion among Hill, Inc.'s managers. The Tenth Circuit disagreed.

> Plaintiffs challenge a highly discretionary policy for granting promotions. They have not shown that Hill maintained "a common mode of exercising discretion that pervaded the entire company." [Cite omitted]. To the contrary, the record suggests that Hill failed to maintain the GDCP system in any uniform manner."

Id. at 1229. Thus, one irony resulting from *Dukes* is that inconsistency by management, which is damaging to defense of individual discrimination claims, is compelling evidence to defeat class certification.

VI. <u>Conclusion.</u>

Since the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and during the early history of Title VII, class actions have been a powerful tool for shaping compliance with federal civil rights laws. Rule 23 class actions remain important vehicles for remedying discriminatory employment practices and promoting equal employment opportunity. As application of Rule 23 in employment litigation has evolved, however, obtaining class certification has become complicated and difficult and employer avoidance of vulnerability to class actions has become more obtainable. Rule 23 is and will remain vital in correcting discriminatory employment practices, but as events over the last ten years have shown, social activism and rapidly changing public attitudes are far more effective means for changing employment policies and practices than class action or individual litigation of claims.