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ALERT
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2011'S TOP 10 U.S. COURT AWARDS AND SETTLEMENTS

Each January we publish a list of the past year's top 10 court awards and settlements in the U.S. in the areas of D&O, E&O, EPL and Fiduciary Liability, which we believe will impact these exposures in the coming year and beyond. This year a standout trend has been decisions that significantly re-write the rule books when it comes to class action litigation, starting with the first item in our list. Other notable cases speak to evolving law in the employment practices and cyber areas that counter some of the pro-defendant trends. We look forward to discussing these and other matters with you during the coming year.

1. WAL-MART

With roughly 1.5 million plaintiffs, this was the largest potential employment class action that the U.S. had ever seen. The issue of whether it should be permitted to be brought as a class had itself been litigated for roughly 10 years. The U.S. Supreme Court's refusal to grant the plaintiffs the right to bring their gender discrimination suit as a class action (or "certify" the class) will have a huge impact (and we don't use that term lightly) on other potential, federal class actions – whether they relate to employment or not.[1] **[Impact: EPL, D&O, E&O/ Cyber, Fiduciary]**

2. AT&T MOBILITY

Consumers accepted a contract that had a binding arbitration provision with a no-law suits provision; they later brought suit in California where local contract law generally deems litigation waivers in arbitration agreements unenforceable (as contracts of "adhesion"). The U.S. Supreme Court found that state law was preempted or trumped by the Federal Arbitration Act and upheld the class-action waiver, allowing organizations to eliminate exposure to class action lawsuits via contract in certain situations.[2] **[Impact: E&O/Cyber, EPL]**

3. CONSOLIDATED LEGAL CHALLENGES TO HEALTH CARE ACT

Three federal appeals courts have found the new U.S. universal health care law, or the Patient Protection and Affordable Care Act (PPACA) which would arguably extend health coverage to about 30 million Americans, to be constitutional, while another has said it is not. This series of appeals have been accepted for review by the U.S. Supreme Court. At issue is whether the "individual mandate" section – requiring nearly all Americans to buy health insurance by 2014 or face financial penalties – is an improper exercise of federal authority.[3] **[Impact: Fiduciary]**

4. HALLIBURTON CO.

The firm was accused of making a series of false statements about its business dealings that artificially inflated its stock price. The Supreme Court unanimously decided that at the class certification stage, investors did **not** need to prove a direct relationship between the company's alleged fraudulent statements and the investors' financial losses (also known as loss causation), noting that in order to prevail in a securities fraud action, investors

must prove that the company's "deceptive conduct caused their claimed economic loss". This win for the plaintiffs' bar makes it easier to pursue Federal securities class actions, at least in the early stages.[4] **[Impact: D&O]**

5. ROCKYOU

The company's site was hacked and the data breach exposed the personal information of several million users of the site, who brought suit. The case was based on a theory that the release of their personal information decreased its value. The court found the plaintiff's allegations of harm sufficient at the early stage to allege a generalized injury; however, if it becomes evident that no basis exists upon which plaintiff could legally demonstrate tangible harm, the court may dismiss the plaintiff's claims.[5] **[Impact: Cyber]**

6. THOMPSON VS. NORTH AMERICAN STAINLESS

After an employee's fiancée (also an employee) filed a gender discrimination charge with the Equal Employment Opportunity Commission (EEOC) against their mutual employer, he was fired. He then filed his own charge and a subsequent suit, claiming that he was fired to retaliate against his fiancée for filing **her** charge. The U.S. Supreme Court ultimately held that assuming that the fired employee's facts are true, his firing constituted unlawful retaliation, in what may signal a willingness by the Court to read U.S. anti-discrimination laws more broadly. **[Impact: EPL]**

7. EXELON CORPORATION, ET AL.

The company sponsored a 401(k) defined contribution pension plan for its employees that offered 32 investment options, including 24 no-load mutual funds also available to the public at large. The plaintiffs alleged that the plan administrators violated their fiduciary duties under ERISA by offering mutual funds at "retail" rates for management fees instead of negotiating for a volume discount on mutual fund expenses, and that the plan should have offered participants access to "wholesale" or institutional investment vehicles, which some mutual funds offer. This decision, in an important line of cases, was a resounding defeat for plaintiffs alleging that retirement plans paid excessive fees to investment advisers and otherwise failed to uphold the fiduciary duties imposed under the Employee Retirement Income Security Act of 1974 (ERISA).[7] **[Impact: Fiduciary]**

8. PROCTOR HOSPITAL

The employee was a member of the U.S. Army Reserve, which required monthly and annual drills resulting in time out of work. His immediate supervisors were allegedly hostile to his military obligations and (according to the employee) fabricated a work rule violation to justify a "corrective action" which led to the employee being fired. The U.S. Supreme Court made it clear that an employer may be liable for unlawful discrimination, in this case under the Uniformed Services Employment and Reemployment Rights Act, when it unwittingly terminates an employee based on a supervisor's biased recommendation or false allegations, known as the Cat's Paw theory of liability.[8] **[Impact: EPL]**

9. MATRIXX INITIATIVES, INC.

The issue was whether the plaintiffs had adequately alleged material omissions in their securities fraud class action. A unanimous U.S. Supreme Court held that even if the complaint does not allege that the company knew of a **statistically significant** number of adverse events, a securities fraud claim based on a pharmaceutical company's alleged failure to disclose reports of adverse events associated with a product, may state a claim. In doing so, the Court rejected a bright-line test on materiality that would require an allegation of statistical significance in order to satisfy the materiality and scienter requirements, thus potentially making it easier for similar suits to be brought. **[Impact: D&O]**

10. BOEING AND INTERNATIONAL PAPER

In these two ERISA 401(k) fee cases, the Seventh Circuit focused on class certification and found serious problems with the proposed classes arising from the nature of the defined contribution plans. The court held that the proposed classes failed to satisfy the "typicality" requirement. While not holding that a class *couldn't* be established, appropriate classes would need to be more narrowly drawn and isolated to identifiable participants, in a line of cases that has vexed a number of large employers and the financial institutions that provide services to the plans.[10] **[Impact: Fiduciary]**

CONTACTS

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1 *Wal-Mart Stores v. Dukes*, 603 F. 3d 571, reversed (No. 10-277) June 20, 2011. This is the unprecedented 4th time that this matter has made our Top 10 list, signaling just how important it may prove to be. As of the time that we went to press, it has already begun to be sited in a few cases (where the plaintiffs' lost the battle over class certification). But this case must also be considered along with *Smith et al. v. Bayer Corp.*, No. 09–1205, decided by the Supreme Court just prior to Wal-Mart, on June 16, 2011, in which the Court held that dismissal of a class action in federal court did not preclude a state-based class action, potentially relitigating the same matter.

2 *AT&T Mobility, LLC v. Concepcion*, 563 U.S., 131 S. Ct. 1740, April 27, 2011.

3 *Dept. of Health and Human Services v. Florida* (11-398) and *NFIB v. Sebelius* (11-393); and *Florida v. Department of Health and Human Services* (11-400). Joining Florida in the challenge are Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin and Wyoming. Virginia and Oklahoma have filed separate challenges, along with other groups and individuals opposed to the law. Note that the Court has set aside 5.5 hours to hear oral arguments in late March (when the norm is 1 hour).

4 *Erica P. John Fund Inc. v. Halliburton Co.,* No. 09-1403 (June 6, 2011). Prior to this decision, other courts in the Second and Seventh Circuits had repeatedly seen cases where defendant's raised loss causation arguments in fighting class certification. Now, these arguments should become a thing of the past. (**http://blog.issgovernance.com/slw/2011/06/halliburton-decided-supreme-court-decision-favors-shareholders.html**).

5 *Claridge v. RockYou*, This follows after last year's *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010). Also see the excellent article, Is Cyber Liability The Next Asbestos? Guard Your Company With Cyber Risk Insurance at: **http://www.calfee.com/ArticleView.aspx?ArticleID=1018**.

6 *Thompson v. North American Stainless, LP*, No. 09-291(January 24, 2011), 567 F. 3d 804, reversed and remanded.

7 *Loomis, et al. v. Exelon Corporation, et al.*, Nos. 09-4081 & 10-1755 (7th Cir. Sep. 6, 2011).

8 *Staub v. Proctor Hospital,* No. 09-400, 562 U.S. (March 1, 2011). The term *"cat's paw" theory* gets its name from the 17th century fable by a French poet about a monkey who persuaded a cat to pull chestnuts out of the fire, so the cat gets burned and the monkey makes off with the chestnuts. (**http://www.scotusblog.com/2011/03/opinion-recap-cats-paw-theory-upheld/**)

9 *Matrixx Initiatives, Inc. v Siracusano*, No. 09-1156 (Mar. 22, 2011).

10 *Spano, et al. v. The Boeing Company, et al.*, No. 09-3001, and *Beesley, et al. v. International Paper Company, et al.*, No. 09-3018 (both issued January 21, 2011, in a consolidated opinion), U. S. Court of Appeals for the Seventh Circuit.