

# US Class Action Settlements and Developments in Certification

Lionel Z. Glancy, Founding Partner  
**GLANCY BINKOW & GOLDBERG LLP**  
1925 Century Park East, Suite 2100  
Los Angeles, CA 90067  
Tel: (310) 201-9150  
[lglancy@glancylaw.com](mailto:lglancy@glancylaw.com)

# Top Shareholder Class Action Settlements



1. \$7.2 billion- 2008

2. \$6.2 billion- 2005



3. \$3.1 billion- 2000

4. \$3.2 billion- 2007



5. \$2.5 billion- 2005

6. \$1.143 billion- (I), 2006



7. \$1.1 billion- 2006

8. \$1.074 billion- (II), 2006



9. \$1.043 billion- 2008

10. \$ 925 million- 2008



UnitedHealth Group®

# Top Antitrust Class Action Settlements

- \$2.75 billion- (\$1.8875 B  & \$862.5 M , 2008
- \$1.027 billion- NASDAQ Market-Makers, 1998
- \$700 million- The Brand Name Prescription Drugs Antitrust Litigation (11 of 17 manufacturing defendants), 1999
- \$585 million- LCD Litigation (LG, Sharp, Hitachi and Chunghwa) (\*\*Ongoing)
- \$504 million- Air Cargo Litigation (Air France-KLM, Cathay Pacific, SAS & Martinair) (\*\*Ongoing)
- \$458 million- *In re Domestic Air Transportation Antitrust Litigation*, 1991
- \$377 million- Sempra Energy, 2006
-  \$335 million- Vitamin Makers- Hoffman- La Roche, et al., 2005
- \$303 million- BP Propane, 2007
- \$295 million- De Beers (\*\*\*)Pending Appeal 
- \$202.5 million- *In re Linerboard Antitrust Litigation*, 2005

# Notable Labor & Employment Settlements

- \$192.5 million- Coca Cola, 2000 
- \$176.1 million- Texaco, 1997 
- \$175 million- Novartis, 2010
- \$135 million- State Farm Mutual Automobile Insurance, 2005
- \$120 million- All-State Insurance, 2005
- \$86 million- Wal-Mart, 2009 
- \$85 million- Tenet Healthcare, 2009
- \$65 million- IBM, 2006 
- \$65 million- Home Depot, 1997 
- \$57 million- Washington Department of Social And Health Services, 2010

## Notable Consumer, Mass Tort and Environmental Settlements

- \$206 billion over 25 years- Master Tobacco Settlement (Antitrust and Consumer claims), 1998
- \$3.75 billion- “Fen-Phen” Litigation, 2000
- \$3.4 billion- Breast Implant Litigation, 1994
- Over \$1 billion- In 2007, Eli Lilly settled claims related to Zyprexa.
- \$950 million- Vioxx Litigation, Merck, 2007
- \$500 million- Exxon, 2001 
- \$410 million- Bank of America, 2011



## Notable Class Action Settlements with Israeli Companies

- \$225 million-  COMVERSE Technology, 2010
- \$22 million- ECI Telecom, 2002   
Your Partner for Growth
- \$20 million- Lumenis, 2008   
Enhancing Life. Advancing Technology.
- \$20 million- Gilat Satellite Networks, 2007 
- \$17 million- ESC Medical Systems, 2002

# Opt- Out and Opt- In Classes

- **OPT-OUT CLASSES:**

- There is no automatic right to opt-out of “**limited fund**” classes
- Rule 23(b)(3) applies to “opt-out” classes that receive notice; **members have the right to opt-out of settlements or judgments and pursue their own claims**
  - E.g., large investors opted out of \$624 million Countrywide settlement



- **OPT-IN CLASSES:** Under the Fair Labor Standards Act (“FLSA”), litigants must opt in and classes are conditionally certified if the court finds the named plaintiffs have made a modest showing they are similarly situated and were victims of a common plan or policy. It is unclear how, or if, *Wal-Mart* will affect FLSA actions, but in several recent FLSA actions, courts applied *Wal-Mart’s* Rule 23(b)(3) methodology.

# Recent Developments - WAL★MART Wal-Mart Stores, Inc. v. Duke

- Need common questions AND common answers
- Merits may be considered to the extent they overlap with issues related to certification
- Individualized money damages are no longer available under Rule 23(b)(2)
- Sampling or “Trial by Formula” cannot be used to circumvent the problem of individualized affirmative defenses
- Shift to preponderance of the evidence-plaintiffs must be “prepared to prove” Rule 23’s requirements and certification requires a “rigorous examination” of such requirements



# Recent Developments - Arbitration and Class Actions

- In *Rent- a -Center v. Jackson*, 130 S. Ct. 2772 (2010), the Supreme Court held that where an agreement to arbitrate includes a provision that the arbitrator will decide the enforceability of the agreement, under the Federal Arbitration Act (“FAA”), a party who challenges the enforceability of that special agreement is entitled to have the district court resolve the issue. Challenges of the agreement as a whole are for the arbitrator.
- In *Stolt-Neilsen, S.A. v. Animal-Feeds Int’l Corp.* 130 S. Ct. 1758 (2010), the Supreme Court considered whether an arbitration panel could order class-wide arbitration absent a provision authorizing it - Justice Alito concluded specific consent was necessary.
- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), state law rules are preempted when they stand as an obstacle to the FAA’s objectives (namely, to ensure that arbitration agreements are enforced to their terms)
  - **After *Concepcion*, it seems that class-wide arbitration is only available if the parties expressly contract for it. Mandatory arbitration and class action waiver provisions are common in many retail contracts.**

## The Class Action Landscape

- The number of class actions filed is declining, but the number of securities, ERISA and labor class actions filed has been steadily increasing
- Securities class actions total **47%** of all class actions filed in the US, more than any other category
  - New types of securities class actions have emerged (i.e., those involving reverse mergers by Chinese companies)
- Geographically, **40%** of all class actions were filed within the 2<sup>nd</sup> or 9<sup>th</sup> Circuits (includes NY and CA)

## Class Actions Under Rule 23 of the Federal Rules of Civil Procedure

- Under Rule 23(a):
  - **NUMEROSITY**: A class must be so numerous that joinder of all members is impracticable
  - **COMMONALITY**: There must be questions of law or fact common to the class
  - **TYPICALITY**: Claims or defenses must be typical of the class
  - **ADEQUACY**: class representatives must adequately represent the interests of the class

## Rule 23(a)(1) Numerosity

- **20-40** members usually sufficient, but proposed classes of **120** members have been defeated
  - A proposed 145 million citizen class was unmanageable
- Within the 20-40 range, the Second Circuit (and other jurisdictions) consider:
  - Judicial economy
  - Geographic disbursement
  - Financial resources of putative members
  - Ability to bring individual suits
  - Requests for prospective relief that might affect other members
- Regardless of the number of proposed class members, there must be an ascertainable standard for identifying class members
  - If the number is unknown, but can be established, discovery may be permitted
- Many **subclasses** and subclasses with insufficient members can prevent certification

## Rule 23(a)(2)- Commonality

- The historically permissive standard is more stringent in the wake of *Wal-Mart*:
  - *Wal-Mart* states that class members must have the same injury
  - Common questions AND common answers
- After *Wal-Mart*, commonality is particularly difficult to establish in labor cases, but there are hurdles in various types of cases
  - E.g., individual misrepresentations in a fraud case were not common
  - E.g., determining “wrongfulness” of denying benefits was not common across a class

## Rule 23(a)(3)- Typicality

- The claims or defenses of representative parties must be typical of those of the class (e.g., same types of employees, residing within a certain state, reliance on the same representation)
- Typicality may merge with commonality and adequacy, and be helpful in showing predominance
- Typicality can be defeated where there are special defenses (e.g., an investor receiving different or special information)

## Rule 23(a)(4)- Adequacy of Representation

- No substantial conflicts and the representative must adequately prosecute the action
- Under the Private Securities Litigation Reform Act ("PSLRA"), notice of the action is published, the court appoints a presumptive lead plaintiff (usually with the largest financial interest) and the court decides if any member of the class can rebut the presumption
  - However, the plaintiffs with the largest financial stake are not automatically the best representatives
  - Heightened pleading requirement
- Difficult to adequately represent future claimants (e.g., a nearly 20 year old litigation was re-opened where plaintiffs discovered their injuries after the settlement fund was exhausted)
- Incentive fees must be reasonable and class counsel must be adequate

# Rule 23(b)(3) – Commonality

- **Major hurdles include:**
  - variations in state law
  - showing reliance
  - proximate causation
  - difficulty in measuring damages/individualized damages
- **Presumption of reliance:**
  - To overcome the hurdle of reliance, many plaintiffs in securities, fraud and RICO actions argue they are entitled to a **rebuttable presumption of reliance**
  - Proof of reliance is not required when the “**fraud on the market**” doctrine applies
    - The Second Circuit recently held this doctrine extends to statements made by securities analysts
- **Class action must also be superior to all other methods and manageable**
  - Duplicative litigation may pose a problem for the superiority prong
  - Class action may not be superior where plaintiffs’ actual harm is disproportionate to statutory damages
  - **Negative value** suit is generally a good reason for a class action, but may not be where some plaintiffs have positive value suits



# Additional Rule 23 Issues

- **Partial Certification**

- Plaintiffs may adapt to rigorous predominance requirements by seeking partial certification under Rule 23(c)(4) and then pursuing individual adjudication
- Generally appropriate where resolving the issue materially advances the litigation (e.g., smoking related injuries, large scale environmental harm)

- **Ascertainability**

- Generally, a threshold issue
- Class must be defined by **objective criteria**
  - Class membership cannot be contingent on determining liability in the underlying litigation
- This allows for members to receive notice, protects defendants from undue settlement pressure and conserves judicial resources

- **Standing**

- Courts are split as to how rigorously to apply the requirement that the class be defined in such a way that each member has standing
  - The Second Circuit recently stated a class must be defined in such a way that each member has standing, while the Seventh Circuit stated that as long as one member of the certified class has a plausible claim to have suffered damages, the standing requirement is met
  - If the representative suffered a different type of damage, this may pose a standing problem in addition to, or opposed to, an adequacy problem

# Special Litigation Contexts

- Antitrust

- The Third Circuit has a “presumption of impact” applicable to horizontal price fixing cases which allows plaintiffs to use evidence of a common antitrust injury to satisfy the requirements of Rule 23(b)(3)

- Securities Fraud

- Courts are tightening their criteria for when a market is efficient
- Debt securities do not qualify for the “**fraud on the market**” presumption
- However, in *Halliburton*, the Supreme Court held that **plaintiffs are not required to prove loss causation at the class certification stage** because it is not relevant to the fraud on the market presumption (*Erica P. John Fund v. Halliburton*, 131 S. Ct. 2179 (2011))
- Only a “maker” of a statement (i.e., someone who possesses control over the publishing entity) can be sued under Rule 10b-5 (*Janus Capital Group Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2001))
- The Securities Litigation Uniform Standards Act (“SLUSA”) also creates hurdles in that it preempts state law claims brought in federal or state court when raised in an actual or constructive class action

# Additional Class Action Issues

- **CERTIFICATION ORDERS-** must properly define class claims, issues or defenses as required by Rule 23(c)(1)(B)
- **RULE 68-** Defendants may try to disqualify or “pick off” representatives under Rule 68 by making the representatives whole, however, some recent decisions suggest that Rule 68 is only satisfied where the class obtains relief.
- **RULE 23(F)-** Circuits are split on the standards applicable to Rule 23(f)’s interlocutory appeal- the Ninth Circuit has noted three general categories:
  - Where denial of certification is the “death knell” of the litigation
  - Where it would facilitate the development of an unsettled area of law
  - Where certification was clearly erroneous

## Looking Forward- Uncertainty in the Class Action Landscape

- Recent cases have generally curtailed class actions
- Across the board, predominance is the largest hurdle
- Shift from “some showing” of evidence to plaintiffs bearing the burden of proof shows a procedural shift- at least three Circuits have adopted a preponderance standard
- Issue certification may be the best way to counter these obstacles, particularly with “negative value” cases
- The full extent of *Wal-Mart*'s ramifications are unclear

# APPENDIX- Top 100 Securities Settlements from 1996-2010



Top 100 Settlements Quarterly Report

Rank	Case Name	Court	Settlement Year	Total Settlement Amount
1	Enron Corp.	S.D. Tex.	2010	\$7,242,000,000
2	WorldCom, Inc.	S.D.N.Y.	2005	\$6,156,100,670
3	Cendant Corp.	D. N.J.	2000	\$3,318,250,000
4	Tyco International, Ltd	D. N.H.	2007	\$3,200,000,000
5	AOL Time Warner, Inc.	S.D.N.Y.	2006	\$2,500,000,000
6	Nortel Networks Corp. I	S.D.N.Y.	2006	\$1,142,775,308
7	Royal Ahold, N.V.	D. Md.	2006	\$1,100,000,000
8	Nortel Networks Corp. II	S.D.N.Y.	2006	\$1,074,265,298
9	McKesson HBOC Inc.	N.D. Cal.	2008	\$1,042,500,000
10	UnitedHealth Group, Inc.	D. Minn.	2009	\$925,500,000
11	Xerox Corp.	D. Conn.	2009	\$750,000,000
12	Lucent Technologies, Inc.	D. N.J.	2003	\$667,000,000
13	Cardinal Health, Inc.	S.D. Ohio	2007	\$600,000,000
14	IPO Securities Litigation	S.D.N.Y.	2009	\$586,000,000
15	HealthSouth Corp.	N.D. Ala.	2009	\$554,000,000
16	BankAmerica Corp.	E.D. Mo.	2004	\$490,000,000
17	Merrill Lynch & Co., Inc.	S.D.N.Y.	2009	\$475,000,000
18	Dynegy, Inc.	S.D. Tex.	2005	\$474,050,000
19	Adelphia Communications Corp.	S.D.N.Y.	2006	\$460,000,000
19	Raytheon Company	D. Mass.	2004	\$460,000,000
21	Waste Management Inc. II	S.D. Tex.	2003	\$457,000,000
22	Global Crossing, Ltd.	S.D.N.Y.	2007	\$447,800,000
23	Qwest Communications International, Inc.	D. Colo.	2009	\$445,000,000
24	Federal Home Loan Mortgage Corp. (Freddie Mac)	S.D.N.Y.	2006	\$410,000,000
25	Marsh & McLennan Companies, Inc.	S.D.N.Y.	2009	\$400,000,000
26	Cendant Corp. (PRIDES)	D. N.J.	2006	\$374,000,000
27	Delphi Corp.	E.D. Mich.	2008	\$322,350,000
28	Rite Aid Corp.	E.D. Pa.	2003	\$319,580,000
29	Williams Companies, Inc.	N.D. Okla.	2007	\$311,000,000
30	General Motors Corp.	E.D. Mich.	2009	\$303,000,000
31	Bristol-Myers Squibb Co.	S.D.N.Y.	2004	\$300,000,000
31	DaimlerChrysler AG	D. Del.	2003	\$300,000,000
31	Oxford Health Plans Inc.	S.D.N.Y.	2003	\$300,000,000
34	El Paso Corp.	S.D. Tex.	2007	\$285,000,000

Rank	Case Name	Court	Settlement Year	Total Settlement Amount
35	Tenet Healthcare Corp.	C.D. Cal.	2008	\$281,500,000
36	3Com Corp.	N.D. Cal.	2001	\$259,000,000
37	Comverse Technology, Inc.	E.D.N.Y.	2010	\$225,000,000
38	Waste Management Inc.	N.D. Ill.	1999	\$220,000,000
39	Sears, Roebuck & Co.	N.D. Ill.	2006	\$215,000,000
40	The Mills Corp.	E.D. Va.	2009	\$202,750,000
41	CMS Energy Corp.	E.D. Mich.	2007	\$200,000,000
42	Safety-Kleen Corp. (Bondholders)	D. S.C.	2006	\$197,622,944
43	MicroStrategy, Inc.	E.D. Va.	2001	\$192,500,000
44	Motorola, Inc.	N.D. Ill.	2007	\$190,000,000
45	Bristol-Myers Squibb Co.	D. N.J.	2006	\$185,000,000
46	Schering-Plough Corp.	D. N.J.	2009	\$165,000,000
47	Dollar General Corp.	M.D. Tenn.	2002	\$162,000,000
48	Brocade Communications Systems, Inc.	N.D. Cal.	2009	\$160,098,500
49	Bennett Funding Group, Inc. Merrill Lynch & Co., Inc. (Bonds or Preferred Shares Offerings)	S.D.N.Y.	2003	\$152,635,000
50	AT&T Wireless Tracking Stock	S.D.N.Y.	2009	\$150,000,000
50	Broadcom Corp.	S.D.N.Y.	2006	\$150,000,000
50	Broadcom Corp.	C.D. Cal.	2005	\$150,000,000
53	TXU Corp.	N.D. Tex.	2005	\$149,750,000
54	Sumitomo (Copper Trading) Corp.	S.D.N.Y.	2001	\$149,250,000
55	Charter Communications, Inc.	E.D. Mo.	2005	\$146,250,000
56	Sunbeam Corp.	S.D. Fla.	2002	\$140,995,187
57	Refco, Inc.	S.D.N.Y.	2007	\$140,000,000
58	Biovail Corp.	S.D.N.Y.	2008	\$138,000,000
59	The Coca-Cola Company	N.D. Ga.	2008	\$137,500,000
59	Electronic Data Systems Corp.	E.D. Tex.	2006	\$137,500,000
61	Informix Corp.	N.D. Cal.	1999	\$136,500,000
62	Computer Associates International, Inc.	E.D.N.Y.	2003	\$133,551,000
63	Doral Financial Corp.	S.D.N.Y.	2007	\$130,000,000
64	Edward D. Jones & Co., L.P.	E.D. Mo. / Missouri Circuit Court	2007	\$127,500,000
65	Bristol-Myers Squibb Co.	S.D.N.Y.	2009	\$125,000,000
66	Mattel, Inc.	C.D. Cal.	2003	\$122,000,000
67	Lernout & Hauspie Speech Products N.V.	D. Mass.	2005	\$120,520,000
68	Bank One Corp. (First Chicago NBD)	N.D. Ill.	2005	\$120,000,000
68	Deutsche Telekom AG	S.D.N.Y.	2005	\$120,000,000



Securities Class Action Services

Rank	Case Name	Court	Settlement Year	Total Settlement Amount
68	Conseco, Inc.	S.D. Ind.	2002	\$120,000,000
71	Peregrine Systems, Inc.	S.D. Cal.	2009	\$117,567,922
72	Mercury Interactive Corp.	N.D. Cal.	2008	\$ 117,500,000
73	The Interpublic Group of Companies, Inc.	S.D.N.Y.	2004	\$115,000,000
74	Ilkon Office Solutions, Inc.	E.D. Pa.	2000	\$111,380,000
75	CVS Corp.	D. Mass.	2005	\$110,000,000
75	DPL Inc. (Federal Class Settlement)	S.D. Ohio	2003	\$110,000,000
77	Homestore.com, Inc.	C.D. Cal.	2009	\$107,421,216
78	Prison Realty Trust Inc.	M.D. Tenn.	2001	\$104,129,480
79	Symbol Technologies, Inc.	E.D.N.Y.	2004	\$102,000,000
80	American Express Financial Advisors	S.D.N.Y.	2007	\$100,000,000
80	AT&T Corp.	D. N.J.	2005	\$100,000,000
80	Honeywell International, Inc.	D. N.J.	2004	\$100,000,000
83	Cisco Systems, Inc.	N.D. Cal.	2006	\$99,250,000
84	Fleming Companies, Inc.	E.D. Tex.	2005	\$93,950,000
85	CIGNA Corp.	E.D. Pa.	2007	\$93,000,000
86	Gemstar-TV Guide International, Inc.	C.D. Cal.	2005	\$92,500,000
86	Boeing Co.	W.D. Wash.	2002	\$92,500,000
88	OM Group, Inc.	N.D. Ohio	2005	\$92,400,000
89	Parmalat Finanziaria, S.p.A.	S.D.N.Y.	2010	\$91,400,000
90	International Rectifier Corp.	C.D. Cal.	2010	\$90,000,000
90	New York Life Insurance Co.	S.D. Fla.	1996	\$90,000,000
92	Royal Dutch Petroleum Company/The Shell Transport and Trading Company PLC	D. N.J.	2008	\$89,508,000
93	iZ Technologies, Inc.	N.D. Tex.	2005	\$87,750,000
94	Legato Systems Inc.	N.D. Cal.	2002	\$85,000,000
95	FirstEnergy Corp.	N.D. Ohio	2004	\$84,900,000
96	Converium Holding AG	S.D.N.Y.	2008	\$84,600,000
97	Real Estate Associates Limited Partnership	C.D. Cal.	2003	\$83,000,000
98	Aetna Inc.	E.D. Pa.	2000	\$82,500,000
99	Hanover Compressor Co.	S.D. Tex.	2007	\$82,000,000
100	MoneyGram International, Inc.	D. Minn.	2010	\$80,000,000
100	Priceline.com, Inc.	D. Conn.	2007	\$80,000,000
100	Xcel Energy, Inc.	D. Minn.	2005	\$80,000,000

\*\*\* "Settlement Year" for cases that include multiple settlements reflects the most recent settlement.

\*\*\* Settlements that have the same amount are given the same ranking

\*\*\* To be eligible for the Top 100 Settlements, cases must have been filed after January 1, 1996 and the settlement must have been approved by the Court.