Employee Benefits Broadcast

The Benefits News You Need in 60 Minutes or Less

For audio participation, dial 866.837.9782 and follow the prompt.

FOLEY
FOLEY & LARDNER LLP

1

09.6021

Employee Benefits Broadcast

“The Benefits News You Need in 60 Minutes or Less”

Tuesday, July 26, 2011

12:00 p.m. – 1:00 p.m. CST

FOLEY
FOLEY & LARDNER LLP

2

08.5055

Employee Benefits Broadcast

Housekeeping Issues

- Call 866.493.2825 for technology assistance
- Dial *0 (star/zero) for audio assistance
- To ask questions, use the pull down Q&A menu
- We encourage you to Maximize the PowerPoint to Full Screen Usage:
  - Hit F5 on your keyboard
- To print a copy of this presentation:
  - Click on the printer icon in the lower right hand corner. Convert the presentation to PDF and print as usual.

FOLEY
FOLEY & LARDNER LLP

3

08.5055

Employee Benefits Broadcast

Today's Topics

- **Vexing Verdicts**: *Cigna v. Amara:* New Remedies To Address ERISA Disclosure Failures And More
- **Risky Business**: Some Forgotten Lessons of Section 409A
- **Headline News**: *Wal-Mart v. Dukes*: Impact on Class Action Litigation

FOLEY
FOLEY & LARDNER LLP

4

08.5055

Vexing Verdicts

Cigna v. Amara
New Remedies To Address ERISA Disclosure Failures And More

Michael H. Woolever

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Everyone agrees *Amara* is a very significant ERISA case, but not as to why.
  - Initial reactions to the ruling varied widely-
    - "Supreme Court **Rules** SPD Does Not Trump Plan Document…"
    - "Supreme Court **Suggests** Equitable Remedies Are Available For Misleading SPDs.
    - "Supreme Court **Rules** that Participants Must Show Actual Harm, but not Detrimental Reliance To Recover Based Upon Misleading Notices…"
    - "Supreme Court **Recognizes** A New ERISA Remedy For Aggrieved Participants"
    - "Majority **Suggests, In Dicta,** That Reformation (or Worse) May Be Appropriate Under ERISA § 502(a)(3)

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- The basic holdings in *Amara* are fairly straight forward
  - Participants may not sue for benefits under 502(a)(1)(B) based on the language in the SPD or other notices that are not part of the plan document; **BUT**
  - "Appropriate equitable relief" **may** be available under 502(a)(3) to remedy a fiduciary's material misrepresentations regarding plan benefits.
  - The standard of prejudice (i.e., level of harm) that justifies equitable relief depends on the nature of the equitable remedy sought.
- The real implications of *Amara* for plan sponsors are less clear. That is what we will explore today.

FOLEY
FOLEY & LARDNER LLP

7

08.5055

Vexing Verdicts

CIGNA v. Amara

- Basic Facts
  - 1997 decision to convert existing DB plan to a "greater of A or B" cash balance ("CB") plan effective 1/1/98.
  - November 1997 "newsletter" announced conversion.
  - Further periodic communications about new plan during 1998, including SPD.
  - 2001 class action law suit challenging CB plan on multiple grounds and seeking declaration that CB plan was invalid and restoration of the DB plan benefits.

FOLEY
FOLEY & LARDNER LLP

8

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court –Liability Opinion (73 pages) issued in February 2008.
  - Cash balance plan design was lawful
    - No age discrimination
    - No impermissible back loading based on "wear away"
    - No impermissible forfeiture/cut back
  - CIGNA failed to:
    - provide notice of significant reduction in benefits required under 204(h);
    - disclose material modifications required under 102 and 104;
    - disclose extent to which optional benefit forms were subsidized

FOLEY
FOLEY & LARDNER LLP

9

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Liability Opinion
  - Court found that CIGNA knowingly and materially misrepresented the terms of the plan in various communication made to participants that were inconsistent with the plan document.
  - "CIGNA sought to negate the risk of backlash by producing affirmatively and materially misleading notices…."
  - ERISA does not permit "material misrepresentations suggesting a benefit increase where there is an actual reduction."

FOLEY
FOLEY & LARDNER LLP

10

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Liability Provision (204(h))
  - CIGNA "deemed" November 1997 newsletter as the 204(h) notice.
    - "CIGNA will significantly enhance its retirement program"
    - CB plan "builds benefits faster than the old plan"
    - "Each dollar of credit is a dollar of retirement benefits"
  - CIGNA knew benefit accrual rates lower under cash balance than DB and that "greater of A or B" formula would cause "wear away".
  - Instructed Mercer not to include any comparisons of old and new benefits
  - Ignored comments from test participants on draft notices that what they really wanted was a comparison of the two plans.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Liability Opinion (SPD)
  - SPD also deficient
    - failed to discuss "wear away" that was highly likely to occur. Regs. require inclusion of a:
      - "description of exceptions, limitations, reductions, and other restrictions on plan benefits shall not be minimized, rendered obscure or otherwise made to feel unimportant."
    - failed to discuss exclusion of early retirement subsidy from opening account balance
    - failed to disclose early retirement subsidy not included in lump sum value

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v Amara

- District Court – Liability Opinion
  - Court rejected CIGNA's argument that plaintiffs failed to show actual injury/detrimental reliance required to justify relief.
  - Court adopted the 2nd Circuit's "likely harm" standard as more consistent with ERISA's objectives to protect employees.
  - Employer may rebut by showing "harmless error".

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Remedy Opinion (32 pages) issued in June 2008.
  - Court ordered separate briefing on "what remedies are available and appropriate in light of the Court's liability findings…"
  - "The remedy decisions addressed in this decision are complex, difficult, and enormously important to employers and employees alike. Unfortunately, the relevant statutory provisions and existing case law do not provide clear guidance. Moreover, the remedy choices available to the Court are not ideal, for either CIGNA or Plaintiffs."

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Remedy Opinion
  - First hurdle –class certified under Rule 23(b)(2)
    - Certification proper only if "final injunctive relief or corresponding declaratory relief is appropriate", and
    - monetary relief does not predominate.
  - Court found damages in the form of increased benefits was "incidental" to the injunctive and declaratory relief sought (i.e., a declaration that Part B was invalid and an injunction requiring the plan administrator to reform plan records and provide benefits under Part A).

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Remedy Opinion
  - Second hurdle – fit relief under 502(a)(1)(B) or (a)(3).
    - Could not just leave participants in the DB plan, as it had been properly frozen and freeze not challenged.
    - Cash Balance Plan itself not unlawful or invalid
    - Violation limited to CIGNA's notices regarding the plan.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGMA v. Amara

- District Court – Remedy Opinion
  - Prior 2nd Circuit opinions allowing 502(a)(1)(B) claims based on court ordered reformation of the plan in light of misleading disclosure or notices.
  - No reason to consider (a)(3) relief as (i) (a)(3) not available if (a)(1)(B) is and (ii) Supreme Court, starting with *Mertens,* has severely curtailed the scope of relief available under (a)(3) and claims for benefits are like money damages.
  - Court decided to construct an appropriate remedy under 502(a)(1)(B).

FOLEY
FOLEY & LARDNER LLP

17

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Remedy Opinion
  - Can not restore DB based on 204(h) violation with respect to the cash balance plan.
    - Only relief is to order new 204(h) notice after the fact.
  - But, broader relief available based on misleading SMM and SPD.
    - Failure to discuss wear away and impact on benefit accruals, fact that early retirement subsidy not in opening balance, and relative accrual rates by age.
    - Basic contract claim – participants may rely on benefits promised in SPD, even if in conflict with plan.

FOLEY
FOLEY & LARDNER LLP

18

08.5055

Vexing Verdicts

CIGNA v. Amara

- District Court – Remedy Opinion
  - Best way to address the misrepresentations – order "A+B" benefits, not "greater of A or B" as drafted.
    - Eliminates wear away
    - Eliminates need for opening balance
    - Eliminates issue with lump sum and early retirement subsidy
  - Rejected plaintiffs proposed remedy of restoring the DB plan as A+B produces a "meaningful, substantial, and appropriate remedy."

Vexing Verdicts

CIGNA v. Amara

- 2nd Circuit Court of Appeals
  - Issued summary opinion: "Looks good to us?"
  - Both sides petitioned for certiorari.
    - Plaintiffs petitioned based on denial of 204(h) remedy – seeking restoration of DB plan.
    - CIGNA petitioned based on use of "likely harm" standard for relief and conflict within the circuits.
- Supreme Court granted CIGNA petition – held Plaintiffs petition in abeyance.

Vexing Verdicts

CIGNA v. Amara

- Supreme Court
  - 8-0 majority vacated the lower court's judgment and remanded on a totally different basis.
  - Court found that the 502(a)(1)(B) did not authorize the court to reform CIGNA's plan as written.
  - Court rejected Solicitor General's alternative argument that the plan document includes the SPD and court could award benefits based on the SPD.
    - SPD is just that a description of the plan, but not the plan.
    - Inconsistent with the purpose –summarize and communicate simply – to make an SPD a binding legal document.
    - SPDs do not constitute the terms of their plans for purposes of 502(a)(1)(B).

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Supreme Court
  - 6-2 majority went on to discuss the potential for relief under 502(a)(3)
    - Likely District Court would consider 502(a)(3) alternative on remand.
  - Majority stated that the concern of the District Court about the narrow scope of (a)(3) were unfounded
    - "[e]quity suffers not a right to be without a remedy".
  - Majority discussion of *Mertens* and *Great-West* effectively limits their future importance.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Supreme Court
  - Suits by beneficiaries against a plan fiduciary are the kinds of lawsuits that could have been brought in a court of equity (based on ERISA analogy of the plan as a trust and the fiduciary as a trustee).
  - District Courts affirmative and negative injunctions obviously are equitable remedies.
  - Equity courts had great flexibility to formulate distinctive remedies based on the nature of the right they were intended to protect.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Supreme Court
  - Court then identified three traditional equitable remedies that might fit the District Court's A+B relief
    - Reformation of the terms of the plan to remedy the false and misleading information;
    - Estoppel – i.e., holding CIGNA to what it had promised; and
    - Surcharge – monetary compensation for a trustee's breach of duty or prevent the trustee's unjust enrichment.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Supreme Court
  - The Court then turned to the issue that was the basis for granting certiorari – the level of harm that must be shown to be entitled to the equitable remedy
  - As the requirement for harm comes from the law of equity, not ERISA, the level of harm that must be shown is tied to the relief requested.
  - Detrimental reliance is standard for estoppel;
  - Reformation appropriate to reflect mutual understanding of the parties where substance effected by fraudulent insertions or omissions;
  - Surcharge requires fiduciary breach and actual harm (e.g. loss of an ERISA protected right).

Vexing Verdicts

CIGNA v. Amara

- Supreme Court
  - Did not suggest what remedy would be appropriate, if any.
  - Remanded to the District Court to
    - "revisit its determination of an appropriate remedy for the violations of ERISA it identified"; and
    - revisit whether a remedy for the 204(h) violation existed under 502(a)(3).

Vexing Verdicts

CIGNA v. Amara

- Supreme Court (con't)
  - Scalia and Thomas did not join the 502(a)(3) portion of the opinion
    - In concurring opinion, Scalia agreed that lower court grant of relief under 502(a)(1)(B) was wrong, but argued that the Court should stop there.
      - "The Court's discussion of the relief available under 502(a)(3) and *Mertens* is purely dicta, binding on neither us nor the District Court
    - Scalia's *dicta* in *Mertens,* a 5-4 decision, that no monetary relief was available under 502(a)(3) led to numerous lower court decisions in which participants were denied remedies despite clear fiduciary breaches.
    - The dissent in *Mertens* argued that "other equitable relief" in (a)(3) should be read broadly as giving courts the power to not leave plans and participants from having a remedy.

Vexing Verdicts

CIGNA v. Amara

- Key Take-Aways — 502(a)(3) Ruling
  - Citing *Mertens* a number of courts had denied participants (as opposed to plans) remedies despite clear fiduciary violations.
  - *Mertens dicta* about the limits on compensatory remedies available in equity is now effectively overturned in favor of the view of the *Mertens* dissenters.
    - Still must construct remedies within the historical powers of an equity court (the remaining *Mertens* legacy);
    - Still must show a fiduciary breach;
    - Will help employers in reimbursement suits as well as participants in suits seeking remedies for fiduciary breaches.

Vexing Verdicts

CIGNA v. Amara

- Key Take-Aways — 502(a)(3) Ruling
- Not clear just how far court can go in making participant's whole through surcharge and the level of harm required.
  - Court's reference to a loss of a right protected by ERISA suggests standard very low.
  - May be that the greater the fiduciary breach, the lower the standard of harm, consistent with the nature of equitable remedies.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v Amara

- Key – Take-Aways – 502(a)(3) Ruling
- Not clear what the proper result is when the breach is unintentional or does not involve knowing, material misrepresentations.
  - DOL has argued in *amicus* briefs filed since *Amara* that a lack of clarity may be sufficient or a failure to explain rights
    - Not making it clear that a "call center" pre-authorization is not binding on the plan or a failure to explain how to get a binding pre-authorization.
  - Not clear if failure to list an exception in the SPD is fatal to future reliance on the exception.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Key Take-Aways – 502(a)(3) Ruling
- Arguments that 502(a)(3) discussion is only *dicta* and can be ignored is overblown.
  - DOL *amicus* briefs are directly challenging that argument.
  - Lower courts tend to follow Supreme Court *dicta*
    - Especially when the *dicta* is clearly intended to guide the lower court on remand;
    - *Dicta* in *Mertens* regarding in ability to get monetary damages under 502(a)(3) followed to a fault.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Key Take-Aways – 502(a)(3) Ruling
- The Court's blessing of the remedy of surcharge could have significant impact on the cost of, and coverage provided by, fiduciary insurance and the willingness of individual to serve as fiduciaries.
  - Risk of personal liability significantly increased.
  - Insurers may well try and limit scope of coverage to avoid surcharge exposures.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- Key Take-Aways — Standard of Harm

  Replaces old detrimental reliance standard used in many circuits (except estoppel claims), lowering bar for participant claims.

  – Plaintiffs lawyers will need to get creative in making their claims fall under alternative theories to estoppel with lower harm requirements.
    – Unclear how courts will deal with less egregious violations (e.g., unintentional misrepresentation)
    – District Court in Amara focus on loss of right to complain

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- KeyTake-Aways — Standard of Harm
  – Many commentators have implied that “actual harm” is required in all cases, but that is not what the court said.
    - Only said actual harm was required for surcharge.
  – Abandoning the “likely harm” standard followed by some courts may make class certification harder, particularly if the standard is “real” actual harm and not just a violation of ERISA.
    - May make determinations individualized.

FOLEY
FOLEY & LARDNER LLP

08.5055

Vexing Verdicts

CIGNA v. Amara

- KeyTake-Aways — 502(a)(1)(B) Ruling
  - Not clear how important the loss of the right to bring SPD claims under 502(a)(1)(B) will be.
  - Many courts have treated the SPD as a contract and claims for SPD benefits as a contract claim.
    - Those cases are effectively overruled
    - Now must show fiduciary breach and some harm.
  - Participants still have rights when SPD misleading.
    - Should have an (a)(3) claim when ever there is a material violation.
    - Weitzenkamp v. Unum (7th Cir. July 11, 2011)(enforced SPD without citing *Amara* based on estoppel)

FOLEY
FOLEY & LARDNER LLP

35

08.5055

Risky Business

CIGNA v. Amara

- Key Take – Away – Other Thoughts
  - Need to exercise great care in all plan related communications (not just SPD) to avoid creating conflicts with the plan.
  - Need to clearly identify which documents are part of the plan document and which are not.
    - If you use a ERISA wrap document over a policy or benefit statement, need to make it clear that the SPD and plan are the same.

FOLEY
FOLEY & LARDNER LLP

36

08.5055

Risky Business

Some Forgotten Lessons of Section 409A

Gregg H. Dooge

FOLEY
FOLEY & LARDNER LLP

37

08.5055

Risky Business

Some Forgotten Lessons of Section 409A

- Internal Revenue Code Section 409A
  - Initially effective January 1, 2005
  - Regulations effective January 1, 2009
  - Existing plans amended for compliance by December 31,2008
- Section 409A:
  - Requires advance elections (or non-discretionary plan provisions) as to compensation to be deferred, and form and time of payment
    - 20% additional income tax (and other taxes) for violations
  - Basic idea is that subsequent changes in deferred compensation (or how the compensation will be paid) are extremely limited.

FOLEY
FOLEY & LARDNER LLP

38

08.5055

Risky Business

Some Forgotten Lessons of Section 409A

- What has been forgotten?
  - Many within the organization "touch" the comp and benefits function at some level.
  - The HR/Benefits staff must be alert to individualized changes proposed by those who are not familiar with the detailed requirements of Section 409A.
- Example #1 -- Terminating executive severance agreement.
  - Section 409A provides considerable latitude for mid-year negotiation of new benefits (not previously subject to Section 409A).
  - But, where the agreement seeks to change the payment terms of existing Section 409A benefits, or to substitute a new benefit for an existing Section 409A benefit, Section 409A might be violated.

FOLEY
FOLEY & LARDNER LLP

39

08.5055

Risky Business

Some Forgotten Lessons of Section 409A

- Example #2 -- Modification to provide for payment in the same year, but at an earlier or later date within that year than required under plan terms.
  - Belief is that Section 409A is not implicated if change does not cause amounts to be paid in a different tax year, e.g., if we only tinker a little bit, it must be okay.
  - This is only partially true.
    - Payment at a later date, but within the same tax year, does not violate Section 409A.
    - Payment at an earlier date, even if within the same tax year, violates Section 409A if payment is accelerated by more than 30 days.

FOLEY
FOLEY & LARDNER LLP

40

08.5055

Risky Business

Some Forgotten Lessons of Section 409A

- Example #3 -- Linked Qualified and Nonqualified Plans
  - Nonqualified plan provides benefits that cannot be provided through qualified plan due to government limits.
    - Qualified plan permits payment election (lump sum or annuity) at retirement.
    - Nonqualified plan provides for automatic lump sum.
  - This is not a drafting mistake (in the nonqualified plan).
    - Nonqualified plan may not offer choice at retirement between lump sum or annuity benefit.

FOLEY
FOLEY & LARDNER LLP

08.5055

Headline News

Wal-Mart v. Dukes: Impact on Class Action Litigation

John G. Yslas

FOLEY
FOLEY & LARDNER LLP

08.5055

Headline News

Rule 23(a) and 23(b)

- Class certification requires satisfying Federal Rule of Civil Procedure 23(a). Rule 23(a) requires:
  - (1) numerosity (essentially sufficient number)
  - (2) commonality (essentially sufficient common issue of law or fact)
  - (3) typicality (essentially named plaintiffs claims are typical of the class)
  - (4) adequacy of representation. Wal-Mart focuses on commonality, whether issue common to class members.
- Class certification also requires meeting at least one of the three requirements under Rule 23(b). These are not focus of presentation, but one aspect includes essentially (b)(2) which may not require notice and opt out opportunity (court discussed predominance, and declaratory relief and failed argument regarding incidental monetary damages), which (b)(3) does.

FOLEY
FOLEY & LARDNER LLP

43

08.5055

Headline News

Factual Background

- 1.5 million- current and former female Wal-Mart employees in 41 regions (with each 80-85 stores for total of 3,400 stores, and each store 40-53 separate departments and 80-500 staff positions with 1 million employees) alleging promotion and pay discrimination, theorizing disparate impact and pattern or practice claims with "common" policy in which local managers discretion to set pay within range based on subjective factors (no allegation of an express policy) favor men and “corporate culture” permitting bias.
- Proposed class is Wal-Mart retail store employees “who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.”

FOLEY
FOLEY & LARDNER LLP

44

08.5055

Headline News

Factual Background

- Evidence is:
  - (1) statistical evidence of pay and promotion disparity
  - (2) anecdotal reports of 120 female employees declarations
  - (3) sociologist testimony of “culture” that is “vulnerable” to gender discrimination. 9th Circuit certified and permitted a random sampling of claims subject to discrimination
- General holding:
  - (1) Rule 23(a)
  - (2) commonality of law or fact requirement is not met by posing "generalized questions" (instead, must meaningfully advance the litigation –merely showing discretion is exercised not enough, in fact unlikely exercised in the same way & class must suffer the "same injury"
  - (3) proving commonality via either a common biased testing procedure (not applicable here) or “significant proof” of general policy of discrimination (and no evidence regarding percentage of discriminatory decisions, and not even “common mode of exercising discretion” without some “common direction” is death knell)
  - (5) expert proof higher standard
  - (6) must also meet one of Rule 23(b) requirements, and individualized monetary damages," including back pay, could not be certified under Rule 23(b)(2).

Headline News

Some More Specific Takeaways

- Court must consider merits.
  - (1) merits of plaintiffs' claims must be considered when connected to certification.
  - (2) expert opinions need to be carefully looked at and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (the *Daubert* standard) likely applies to experts.
- Meeting “Commonality” threshold more difficult and essentially must be specific, not merely whether a basic generalized issue (e.g., whether Title VII violated). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Mere violation of same provision of law not enough. No damages (or perhaps differing damages) will be an argument.

Headline News

Some More Specific Takeaways

- Proof to establish commonality showing “glue” between individual discrimination allegation and company policy in two ways:
  - (1) a uniform biased testing procedure that impacted all test takers in the same way (this is easiest and cleanest way)
  - (2) "significant proof" that company "operated under a general policy of discrimination -- but here just delegated (and decentralized) discretion fails “kaleidoscope of supervisors” subject to “regional policies that all differed.”

    Commonality not established by:
    - (1) social science expert opining company culture somehow lends itself to overall discrimination policy (need more scientific Daubert standard)
    - (2) aggregate statistical analyses and gender disparities in pay not enough, and a “specific employment practice” essentially causing the disparity
    - (3) 120 declarations (which works out to about 1 in 12,500 class members and 235 of 3400 stores), isn’t "significant proof" of general discrimination

FOLEY
FOLEY & LARDNER LLP

47

08.5055

Headline News

Some More Specific Takeaways

- In short, must show “convincing proof of a companywide discriminatory pay and promotion policy,” which the above fails to do
- Extremely difficult monetary damages under Rule 23(b)(2). Clarifies money damages cannot be certified under Rule 23(b)(2) and only under Rule 23(b)(3) (class notice and opt out opportunity required). Ninth Circuit’s "predominance test" rejected where monetary damages as long as claims for injunctive relief "predominated" over the claims for monetary damages. It cited favorably to the "incidental damages" test (but implies monetary damages really hardly ever be incidental to injunctive and declaratory relief). Rule 23(b)(3) requires proof common questions predominate over individual and class action is superior.
- Sampling and “Trial by Formula” rejected. Ninth Circuit's approach to sample and give back pay by multiplying average backpay award over class size without considering individual employment decisions not acceptable (further proceedings with burden on defendant generally required) with “individualized determinations of each employee's eligibility for backpay." No money damages under Rule 23(b)(2), and difficult for monetary damages under Rule 23(b)(3).

FOLEY
FOLEY & LARDNER LLP

48

08.5055

Headline News

Some Defense Arguments

- No common questions, generalized not enough
- De-centralized decisions at local levels really are not common questions, they vary
- Examples of helpful language – “glue” for “reasons” must be held together, “same injury”, “significant proof” of “generalized policy”
- No common damages (how far with this?)
- Expert evidence must be scientific (specifically, e.g., based upon sufficient facts or data, reliable principles and methods, and applied the principles and methods reliably to the facts of the case), cannot be over-generalized and must answer the specific question at issue, and statistical evidence based on small sample insufficient and must go to reason for decision

FOLEY
FOLEY & LARDNER LLP

08.5055

Headline News

Some Defense Arguments

- No Trial By Formula, right to show that it took the adverse employment actions in question for reasons other than unlawful discrimination
- Impact on wage and hour litigation. While cases we litigate certainly involve varying theories lacking merit and not suitable for certification, plaintiffs may try to focus on specific uniform practice. Regarding FLSA, arguing Rule 23 applies and even if it does not technically, the principles and analysis apply in determining:
  - a) the disparate factual and employment settings of the individual plaintiffs;
  - b) the various defenses available to the defendants with respect to the individual plaintiffs; and
  - c) fairness and procedural considerations

FOLEY
FOLEY & LARDNER LLP

08.5055

Questions & Answers

Contact Information

- **Michael H. Woolever**
  312.832.4594
  mwoolever@foley.com
- **John G. Yslas**
  213.972.4659
  jyslas@foley.com
- **Gregg H. Dooge**
  414.297.5805
  gdooge@foley.com
- **Leigh C. Riley**
  414.297.5846
  lriley@foley.com

Employee Benefits Broadcast

Mark Your Calendar

- The final session of the 2011 Employee Benefits Broadcast Series will take place on the following date:
  - October 25, 2011

FOLEY
FOLEY & LARDNER LLP

08.5055

Employee Benefits Broadcast

Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley's website within 24 to 48 hours:

  http://www.foley.com/news/event_detail.aspx?eventid=3803

- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:

  http://www.zoomerang.com/Survey/WEB22CS7UBVHQ9/

FOLEY
FOLEY & LARDNER LLP

08.5055