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## Supreme Court Reverses Class Certification in *Wal-Mart*

In *Wal-Mart Stores, Inc. v. Dukes, Inc.*, No. 10-277, slip op. (U.S. June 20, 2011), the Supreme Court significantly restricted the use of class actions in a case involving claims of employment discrimination on behalf of a class of 1.5 million women, but its impact is likely to be felt in many other areas of the law. Because class action decisions can be altered or amended at any time prior to final judgment, the potential impact of this decision on both pending and future cases is enormous. In particular, the Court:

- Clarified that trial courts are free to consider the underlying merits of plaintiffs' claims in determining whether plaintiffs have satisfied the requirements for class certification.
- Substantially tightened the "commonality" requirement in Rule 23(a)(2) by requiring proof that the class claims are based on a "common contention" whose resolution "will resolve an issue that is central to the validity of *each one* of the claims *in one stroke*." (Emphasis added.) It will no longer be sufficient for plaintiffs to meet this requirement by merely listing a series of questions allegedly common to many or all class members' claims. Moreover, statistical evidence offered to support class certification will face greater scrutiny under this ruling.
- Ruled that considerable scrutiny of expert testimony at the class certification stage is appropriate, which continues the trend adopted by many Circuits in recent years to subject expert testimony on class certification motions to rigorous analysis.
- Held that certification of claims seeking individualized monetary relief is inappropriate under Rule 23(b)(2) and must satisfy the more stringent requirements of Rule 23(b)(3). The Court reversed a general practice of treating claims for back pay in employment discrimination cases as a form of equitable relief appropriate for certification under Rule 23(b)(2).
- Rejected the use of sampling or averaging techniques when this approach effectively prevents a defendant from offering affirmative defenses to individual class member's claims.

The case involved three named plaintiffs who sought certification of a proposed class consisting of all female employees of any Wal-Mart store since 1998. The complaint sought, among other things, injunctive and declaratory relief and back pay. The district court certified the class under Rule 23(b)(2). A divided *en banc* panel of the United States Court of Appeals for the Ninth Circuit affirmed.

In an opinion by Justice Scalia, the Supreme Court reversed. The Court began by reaffirming that a class certification decision requires a "'rigorous analysis' [that] will entail some overlap with the merits of the plaintiff's underlying claim." In so holding, the Court put to rest any notion that courts may not delve into the merits in deciding whether to certify a class.

Addressing the commonality requirement of Rule 23(a)(2), the Court held that "[r]eciting common questions is not sufficient to obtain class certification." As the Court explained:

"What matters to class certification ... is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."

The Court rejected plaintiffs' attempt to satisfy their burden under Rule 23(a)(2) with expert testimony concerning the corporate culture at Wal-Mart, and with statistical and anecdotal evidence of gender bias. As for plaintiffs' expert testimony, the Court stated that it "doubt[ed]" the district court's conclusion that *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), "did not apply to expert testimony at the certification stage of class-action proceedings." However, the Court did not decide that question because even assuming the testimony was

admissible, the expert could not “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart,” which “is the essential question on which respondents’ theory of commonality depends.”

The Court also rejected plaintiffs’ statistical evidence because statistics at the national or regional level concerning disparities in hiring or promotion could not establish disparities at any of the company’s 3,400 stores. More fundamentally, the Court held that “merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice” to demonstrate that commonality exists absent some evidence of a “specific employment practice” that produced the disparity. In this way, the Court narrowed the previously recognized exception of allowing broad class actions where employment decisions are based on subjective decisionmaking processes. The Court also rejected plaintiffs’ anecdotal evidence as “too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory” because it consisted of reports from a limited number of class members involving a limited number of stores in a limited number of States.

Turning to Rule 23(b)(2), the Court held that claims for monetary relief may not be certified under Rule 23(b)(2) “at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.” In such circumstances, a class cannot be certified absent the “greater procedural protections” afforded by Rule 23(b)(3).

Finally, the Court held that it “need not decide in this case whether there are any forms of ‘incidental’ monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.” In particular, the Court held that plaintiffs could not demonstrate that the monetary relief that they sought was incidental to the injunctive and declaratory relief that they sought because “Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay.” The Court rejected the Ninth Circuit’s belief “that it was possible to replace such [individualized determinations] with Trial by Formula” by which back pay would be determined for a sample set of employees and then extrapolated to the class.

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, concurred in part and dissented in part. Those Justices agreed that the class “should not have been certified under Federal Rule of Civil Procedure 23(b)(2).” However, in their view, the Court conflated “Rule 23(a)(2)’s threshold criterion [on commonality] with the more demanding criteria of Rule 23(b)(3), and thereby elevate[d] the (a)(2) inquiry so that it is no longer ‘easily satisfied.’” Those Justices would have remanded the case for consideration of whether plaintiffs could satisfy the requirements for certification under Rule 23(b)(3).

Although *Wal-Mart* involved claims of sex discrimination in employment, it will have widespread application to all types of class action claims from antitrust to personal injury to consumer fraud, and counsel are advised to read the decision carefully for its application to their particular cases.

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