CLASS ACTIONS AFTER *WAL-MART*

The Supreme Court's *Wal-Mart* decision has received an enormous amount of media attention. This Advisory accordingly does not belabor the basic facts or the procedural background of the case, and does not focus on the already well-reported employment law aspects of the decision. Rather, it strives to provide readers with a fresh perspective and analysis in the context of the decision's implications for class action law in general. We hope you find it helpful.

Introduction

Class action lawsuits that make it past the class certification stage are almost always settled—regardless of the merits of the case. Companies facing such lawsuits will usually choose to settle for a fraction of the claimed damages rather than take the risk of losing a huge verdict at trial. In this way, lawsuits that have been certified as class actions often create "unwarranted pressure to settle nonmeritorious claims"[1]—an outcome that corporate defendants, quite understandably, see as unjust.

In the past decade, the federal courts of appeals have, to a degree, ameliorated this situation by imposing more rigorous standards on plaintiffs seeking to certify class actions. But this development, while welcome, could not be seen as any type of permanent fix because the Supreme Court had not weighed in on the issue.

Until now, that is. *Wal-Mart* v. *Dukes*,[2] issued on June 20, 2011, is the Supreme Court's first significant class action decision since its 1997 decision in *Amchem*.[3,4] It provides a capstone—and an exclamation point—to the trend initiated in the lower courts towards more rigorous certification standards. Although the case arose in the employment discrimination context, and will likely have its greatest impact in that context, a great deal of what the Court said will apply to class actions generally. That includes the following:

- Federal Rule of Civil Procedure 23—which sets forth the requirements for class certification—obligates the trial court to undertake a "rigorous analysis"[5] to determine

1 *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001).

2 564 U.S. ___, No. 10-277 (June 20, 2011).

3 *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997).

4 On behalf of the Retail Litigation Center, Arnold & Porter filed an amicus brief in the case in support of Wal-Mart.

5 *Wal-Mart*, Slip Op. at 10.

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if plaintiffs have satisfied the Rule 23 requirements, and such an analysis will often require at least a preliminary inquiry into the merits of the case. In so holding, the Court laid to rest famous language from one of its earlier opinions that had led many lower courts to refuse to examine the merits at the certification stage and to instead accept at face value plaintiffs' allegations about the propriety of a class action.

- Commonality—the Rule 23 requirement for all types of class actions that a plaintiff must show that there are "questions of law or fact common to the class"—requires not merely the *recital* of *any* common question relating to the case, but rather a *showing* that class members have "suffered the same injury" and that their claims all "depend upon a common contention."[6] The Court's holding puts real teeth into a requirement that had heretofore usually been easily satisfied and had in fact often been conceded by defendants.
- Trial courts should consider whether expert testimony in support of certification satisfies the standards for admission of expert testimony set forth in the Court's *Daubert*[7] case. This will impose another hurdle for plaintiffs at the certification stage.
- A class cannot be certified if the only way the case can be manageably tried is to resolve the claims of a sample set of plaintiffs and then apply to the entire remaining class the percentage of claims determined to be valid. Such "Trial by Formula" improperly abrogates the right of defendants to litigate their defenses to individual claims.[8]
- Claims for monetary relief "when each class member would be entitled to an individualized award of monetary damages" must satisfy the more stringent requirements of Rule 23(b)(3), and may not be certified under the more permissive requirements of Rule 23(b)(2).[9]

6 *Id.* at 9.

7 *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

8 *Wal-Mart*, Slip Op. at 27.

9 *Id.* at 20-21.

Background

This case came to the Supreme Court after the Ninth Circuit, in a 6-5 *en banc* decision, largely affirmed the certification by the Northern District of California of the largest employment discrimination class in history—1.5 million female employees of Wal-Mart Stores, seeking injunctive and declaratory relief, backpay, and punitive damages. Although most class actions in which monetary relief is sought proceed under Rule 23(b)(3), plaintiffs sought certification under Rule 23(b)(2), which expressly applies to claims for injunctive or declaratory relief. Rule 23(b)(2) is easier to satisfy and provides fewer procedural protections than 23(b)(3). Thus, although both (b)(2) and (b)(3) classes must satisfy all of the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation), a (b)(3) class must *also* show *predominance* (i.e., that common questions of fact or law predominate over questions affecting only individual members), and *superiority* (i.e., that a class action is superior to other methods of adjudicating the controversy in terms of fairness and efficiency). Moreover, unlike a (b)(2) class, a (b)(3) class requires notice to all class members and provides each member the opportunity to withdraw from the class at his or her option.

The Ninth Circuit certified the class on the basis of its determination that, among other things, (1) plaintiffs' evidence of commonality was sufficient under Rule 23(a) to raise a common question of whether Wal-Mart's corporate policies worked to subject women to unlawful discrimination, (2) plaintiffs' backpay claims were appropriate in a Rule 23(b)(2) class because they did not "predominate" over the requests for declaratory and injunctive relief, and (3) the action was manageable as a class using a bellwether trial of randomly selected sample cases to determine the "approximate percentage of class members" with valid claims.

The Supreme Court's Holding

The Supreme Court reversed. In a 5-4 opinion by Justice Scalia, the Court held that the case could not proceed as a class action under any circumstances because plaintiffs

could not satisfy Rule 23(a)'s threshold requirement of commonality. Justice Ginsburg wrote the dissent to this part of the opinion. And, all nine of the Justices agreed that certification under Rule 23(b)(2) was improper because "individualized monetary claims belong in Rule 23(b)(3)" with its stricter standards and greater procedural protections.[10]

The key take-aways from the opinion are:

- **Tighter Certification Standards In General.** The Court held that, contrary to the views of some lower courts, "Rule 23 does not set forth a mere pleading standard."[11] A party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or facts, etc."[12] Thus, plaintiffs cannot obtain certification simply by relying on the allegations of their complaint or by making a perfunctory evidentiary showing. Instead, courts must examine *all* the evidence bearing on certification, including expert testimony, and must resolve factual disputes bearing on the Rule 23 requirements.[13]

  The "rigorous analysis" courts must undertake is exemplified by the Court's own review of the evidence in this case. The Court carefully examined the statistical, sociological, and anecdotal evidence offered by plaintiffs to try to prove that Wal-Mart "operated under a general policy of discrimination," which the Court held was necessary to show commonality.[14] It found particularly revealing the deposition testimony of plaintiff's sociological expert, where he conceded that he could not calculate "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[15]

  The Court held that "frequently . . . [the analysis] will entail some overlap with the merits of the plaintiff's underlying claim."[16] It noted that a statement in one of its prior cases—the 1974 *Eisen*[17] opinion—had led some lower courts to "mistakenly" conclude that they could not inquire into the merits in order to decide the certification question.[18] Indeed, this language—"We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"—routinely had been invoked by federal judges as a justification for their decisions either to ignore the evidence or refuse to weigh the evidence and grant certification.[19]

  The Supreme Court's disapproval of the way lower courts had construed the *Eisen* language mirrors the Supreme Court's 2007 decision in *Twombly* to "retire" the language from its 1957 decision in *Gibson* v. *Conley* that had led a generation of federal judges to employ a lenient pleading standard.[20] Thus, just as *Twombly* implemented more rigorous pleading requirements by laying to rest language from an earlier decision that had been widely relied upon, *Wal-Mart* endorses tougher class certification requirements by doing the same thing. Taken together, these developments impose finer filters at two critical stages of litigation, and accordingly should limit the number of class actions that are certified.

  The Court's holding regarding strict certification standards, it should be noted, does not break any ground not already broken by the federal courts of appeals. In recent years, most of those courts have issued similar holdings, and had independently arrived at the conclusion that the *Eisen* language should not be followed.[21] The Court's decision in this regard is

10 *Wal-Mart*, Slip Op. at 22.
11 *Id.* at 10.
12 *Id.*
13 *Id.*
14 *Id.* at 13-19.
15 *Id.* at 13.
16 *Id.* at 10.
17 *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).
18 *Wal-Mart*, Slip Op. at 10, n.6.
19 *Id.*
20 *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 563 (2007) (retiring the "no set of facts" language from *Conley* v. *Gibson*, 355 U.S. 41 (1957), "as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.").
21 *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3rd Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2nd Cir.

noteworthy because it emphatically cements this view of Rule 23's requirements as the law of the land.

- **A Greater Emphasis On Commonality In Particular.** The Court did appear to break new ground in its analysis of commonality—the rule requiring plaintiffs to show that "there are questions of law or fact common to the class." The Court noted that this language "is easy to misread, since 'any competently crafted class complaint literally raises common' questions," such as "Do any managers have discretion over pay? Is that an unlawful employment practice?"[22] Such questions, the Court held, do not satisfy the commonality requirement. Rather, to show commonality, plaintiffs must show that all class members "have suffered the same injury" and that their claims "depend upon a common contention" such that "determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[23] Applying this standard, the Court held that plaintiffs had "not established the existence of any common question," because they provided "no convincing proof of a companywide discriminatory pay and promotion policy."[24]

  The Court's discussion appears to create a commonality requirement that is more muscular, both in nature and scope, than what most lower courts had assumed was the case. The dissent certainly thought so. It stated that the requirement has historically been "easily satisfied" because all it requires is a single "dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims."[25] Here, the dissent believed, the requirement was satisfied by the question of "whether Wal-Mart's discretionary pay and promotion policies are discriminatory."[26] The dissent accused the Court of conflating the "threshold" commonality requirement of Rule 23(a) with the "more demanding" criteria of 23(b)(3) (which requires that common questions predominate over individual issues, and need not be proven for certification of a 23(b)(2) class).[27]

- ***Daubert* At The Certification Stage.** Under *Daubert*, a district court must determine "whether a given expert is qualified to testify in the case in question and whether his testimony is scientifically reliable."[28] Whether a *Daubert* analysis is required at the certification stage (in instances where certification depends on expert testimony) is an issue on which the circuits are split.[29] Although the Court did not hold that *Daubert* applies at the certification stage, it strongly suggested that it does: it stated "we doubt" the district court's conclusion that *Daubert* "did not apply to expert testimony at the certification stage."[30] Assuming the lower courts follow this suggestion, *Daubert* hearings will give defendants another important tool for defending class actions.
- **No "Trial by Formula."** The Ninth Circuit concluded that, despite the massive size of the class, the action—including resolution of the backpay claims—could manageably be tried by determining the liability and backpay claims of a sample set of class members and then extrapolating those results to the entire class. The Court, derisively referring to this "novel project" as "Trial by Formula," unanimously disapproved it.[31] It held that this manner of proceeding would abrogate Wal-Mart's right to litigate its defenses to individual claims, and would thereby run afoul of the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right."[32]

2006), *reh'g denied*, 483 F.3d 70 (2nd Cir. 2007); *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *Gariety* v. *Grant Thorton, LLP*, 368 F.3d 356 (4th Cir. 2004); *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

22 *Wal-Mart*, Slip Op. at 8-9.

23 *Id.* at 9.

24 *Id.* at 19.

25 *Wal-Mart*, Dissent Op. at 2-3, 8.

26 *Id.* at 8.

27 *Id.* at 8-10.

28 *Gayton* v. *McCoy*, 593 F.3d 610, 616 (7th Cir. 2010), citing *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

29 *Compare American Honda Motor Co.* v. *Allen*, 600 F.3d 813 (7th Cir. 2010) *with Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

30 *Wal-Mart*, Slip Op. at 14.

31 *Id.* at 27.

32 *Id.*

- **Individualized Claims For Monetary Relief Cannot Be Certified Under Rule 23(b)(2).** The Court also unanimously held that the presence of backpay claims rendered the case unfit for certification as a 23(b)(2) class action. It rejected the Ninth Circuit's conclusion that certification under 23(b)(2) was appropriate because the claims for monetary relief did not "predominate" over the requests for injunctive and monetary relief, finding no support in the Rule for that reading. It held instead that "individualized monetary claims belong in Rule 23(b)(3)" because of the "procedural protections attending a (b)(3) class—predominance, superiority, mandatory notice and the right to opt out."[33] Plaintiffs cannot circumvent these protections—which benefit both absent class members and defendants—by folding in claims for monetary relief into a (b)(2) class.

Looking Forward: Implications for Future and Pending Class Actions

Wal-Mart most directly impacts 23(b)(2) class actions. This is because the Court's more muscular commonality analysis under Rule 23(a) appears to engraft on (b)(2) class actions aspects of the predominance analysis already required by the 23(b)(3) requirement that common questions of law or fact predominate over questions affecting individual members. However, the Court's more stringent standards for defining what are "common questions" for purposes of 23(a) also should be significant in certification proceedings for cases brought under 23(b)(3).

After *Wal-Mart*, unless plaintiffs can show that all class members "have suffered the same injury" and that their claims "depend upon a common contention" the resolution of which will decide an issue "that is central to the validity of each one of the claims in one stroke," the class will be "disqualifie[d] at the starting gate"[34] of 23(a), without even the need to undertake the 23(b)(3) predominance analysis. And even if a case clears the newly-raised 23(a) bar, the same definition of "common questions" used in satisfying the 23(a) requirement should apply to define and limit the "common questions" for purposes of the (b)(3) predominance analysis. The perfunctory, *pro forma* recitation of common questions previously seen in so many class action complaints—such as whether defendant's conduct violates the law, or whether class members have been damaged thereby—may no longer be sufficient for either purpose.

Moreover, even though *Wal-Mart's* rule that district courts must undertake a rigorous analysis that can include a merits inquiry was already the law in nearly all circuits, the Supreme Court's clear endorsement of the rule should be helpful. In circuits—such as the Ninth—that have approved "Trial by Formula," or have not adopted *Daubert* proceedings at the certification stage, *Wal-Mart's* impact should be even more significant.

Since district courts retain the discretion to revisit their certification decisions at any time, companies currently litigating certified class actions should carefully consider whether to move for reconsideration on the basis of *Wal-Mart*. Certainly a reconsideration motion is warranted if the class in question is a 23(b)(2) class that includes individualized monetary claims.

33 *Id.* at 22.

34 *Wal-Mart*, Dissent Op. at 1.

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