



UPDATE
Class Actions and
Complex Litigation

JUNE 2011

Supreme Court Heightens the Standard for Class Certification in *Wal-Mart Stores, Inc. v. Dukes*

On June 20, 2011, the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 564 U.S. ____ (2011), handed down a landmark ruling on the scope of class action lawsuits. The decision substantially raises the bar for plaintiffs to obtain class certification in all types of class actions, and it solidifies the law in several areas where lower courts were not consistent.

BACKGROUND

This case was the most important class action case to come before the high court in more than a decade. The lawsuit was the largest civil rights class action in American history, with the class comprising as many as 1.5 million women currently or formerly employed by Wal-Mart. The plaintiffs alleged systemic pay and promotion discrimination against women. They claimed that the individual discretion afforded to local managers in making pay and promotion decisions resulted in an unlawful disparate impact on women. The district court had certified the class, and the Ninth Circuit affirmed in a 6-5 *en banc* decision.

THE COURT'S RATIONALE

The Supreme Court ruled that class certification was improper on two grounds: first, the plaintiffs did not satisfy the commonality requirement of Rule 23(a); and second, the plaintiffs' claims for individualized monetary relief (back pay) could not be certified under Rule 23(b)(2).

Commonality Under Rule 23(a)

Rule 23(a)(2) requires "questions of law or fact common to the class" in order for a class to be certified. Prior to this decision, some courts had treated the commonality requirement as relatively easy to satisfy, as long as the plaintiffs could identify some common question of law or fact. The Supreme Court, in a portion of its *Wal-Mart* opinion, which was 5-4, redefined the commonality requirement, holding that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." (Slip op. at 9 (citation omitted).) In addition, the Court held that the "common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will

resolve an issue that is central to the validity of each one of the claims in one stroke." (*Id.*)

In analyzing whether the plaintiffs in fact suffered the same injury, the Court held that the plaintiffs needed to provide "significant proof that Wal-Mart operated under a general policy of discrimination." (Slip op. at 13.) The statistical analysis offered by the plaintiffs' sociology expert to show a corporate culture vulnerable to gender bias failed to meet this burden. In dismissing the expert's analysis, Justice Scalia's opinion focused on the expert's inability to ascertain whether 0.5 percent or 95 percent of employment decisions at Wal-Mart were determined by stereotyped thinking.

The Court concluded that, where Wal-Mart's policies allowed local supervisors substantial discretion over pay and promotion matters, the plaintiffs failed to identify "a common mode of exercising discretion that pervades the entire company." (Slip op. at 15.) Because of the wide discretion that each manager possessed, the Court concluded that the plaintiffs could not provide "a common answer to the crucial question why was I disfavored." (Slip op. at 15.) The Court therefore found class certification improper under Rule 23(a).

Monetary Relief under Rule 23(b)(2)

The Court also unanimously rejected the plaintiffs' attempt at certification under Rule 23(b)(2), which governs class actions seeking injunctive or declaratory relief. Prior to *Wal-Mart*, in analyzing whether Rule 23(b)(2) was a proper avenue for certification of class actions that sought both monetary and injunctive/declaratory relief, lower courts had generally held that certification under Rule 23(b)(2) was available only where the monetary relief was "incidental," not where it was "predominant." The Court held that if claims for monetary damages require individualized determinations, they cannot be brought under 23(b)(2). Because the plaintiffs' claims for back pay required individualized determinations, certification was improper under Rule 23(b)(2). The Court explained that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class," and "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." (Slip op. at 20-21.) The Court declined to address whether or not, in some circumstances, "incidental" monetary relief may be available under Rule 23(b)(2).

THE IMPACT OF WAL-MART

Wal-Mart is likely to have a substantial impact on class action law beyond the employment realm. After *Wal-Mart*, lower courts are likely to scrutinize more closely the commonality factor, which until the Court's ruling had little teeth. The Court's decision also made clear that lower courts can and should consider the merits of cases where merits issues overlap with class certification issues. The Court clearly weighed the merits of the plaintiffs' claims in analyzing the opinions of their experts and their statistical models. The Court also suggested (without expressly deciding) that *Daubert* motions are appropriate at the class certification stage, and the Court itself critically analyzed the expert testimony proffered by the plaintiffs in *Wal-Mart*. All of this substantially reshapes the landscape of class action litigation and potentially offers defendants considerable advantage in defending against all types of class actions.

For more analysis of the potential impact of *Wal-Mart*, see the [blog post by Wytan M. Ackerman](#), chair of Robinson & Cole LLP's [Class Action Team](#) on his blog at www.insuranceclassactions.com.

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