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LEGAL ALERT

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Wal-Mart v. Dukes: Supreme Court to Review Certification of "Gargantuan" Class

This morning the Supreme Court of the United States agreed to address two questions raised by the Ninth Circuit's decision affirming certification of a nationwide class of more than a million current and former Wal-Mart employees, *Dukes v. Wal-Mart*, 603 F.3d 571 (9th Cir. 2010).

The Court agreed to review the first of two questions presented in Wal-Mart's petition for certiorari: "Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) – which by its terms is limited to injunctive or corresponding declaratory relief – and, if so, under what circumstances." The Court did not grant Wal-Mart's petition as to the second question presented – "Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23" – but directed the parties to brief and argue a more narrow question: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."

The first question presented in the Wal-Mart petition, concerning the availability of monetary relief in class actions certified under Rule 23(b)(2) rather than under Rule 23(b)(3) (which requires that common issues predominate), invites the Court to address a three-way Circuit split, the third way having its genesis in the Ninth Circuit's *Dukes* opinion. The Fifth, Sixth, Seventh and Eleventh Circuits allow Rule 23(b)(2) certification of claims seeking monetary relief only when the monetary relief sought is "incidental" to the requested injunctive or declaratory relief, such that the monetary relief "flow[s] directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649-50 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Jefferson v. Ingersoll Intern. Inc.*, 195 F.3d 894, 899 (7th Cir. 1999). The Second Circuit has rejected the *Allison* standard, applying instead an "ad hoc" approach focusing on the plaintiff's subjective intent with respect to the relative importance of monetary relief. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). In *Dukes* the Ninth Circuit announced a new standard, allowing Rule 23(b)(2) certification if a class seeks "only monetary damages that are not 'superior [in] strength, influence, or authority' to injunctive and declaratory relief." *Dukes*, 603 F.3d at 616 (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). As pointed out in Wal-Mart's petition for certiorari, Rule 23(b)(2) itself says nothing at all about monetary relief, and Rule 23(b)(2) does not require that class members be afforded an opportunity to opt out of the class (though the *Dukes* order included such a provision).

The second question the Court will consider – whether the class certification ordered in *Dukes* was consistent with Rule 23(a) – may have been prompted by the debate between the parties (and between the Ninth Circuit majority and the dissenters) about the existence of commonality and typicality among a "gargantuan" class of more than a million Wal-Mart employees in different jobs in different stores. 603 F.3d at 652 (Ikuta, J., dissenting) ("Never before has such a low bar been set for certifying such a gargantuan class.") The plaintiffs argued, essentially, that Wal-Mart has a centralized "policy" that allows subjective decision-making, which could in turn produce sex-based discrimination. 603 F.3d at 611-12. In support of that contention the plaintiffs submitted evidence about centralized Wal-Mart policies (none of which was claimed to be inherently discriminatory), 603 F.3d at 601; statistics purporting to suggest sex discrimination at the regional level (but not the store level, at which subjectivity was claimed to operate), 603 F.3d at 604; and 120 anecdotal reports, 603 F.3d 610. The Ninth Circuit majority found plaintiffs'

evidence sufficient *"to raise the common question* whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." 603 F.3d at 612. The problems with that conclusion are highlighted in Judge Ikuta's dissent:

> [T]he Supreme Court [has] explained that plaintiffs who seek to bridge the gap between their claims and those of the class members by alleging a general company-wide policy of discrimination must adduce "significant proof" that such a policy exists. [*Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)]. . . .When plaintiffs' evidence is subjected to the rigorous inquiry required by [*Gen. Tel. Co. v.*] *Falcon*, [457 U.S. 147 (1982),] it is inadequate to bridge the gap between the six plaintiffs' claims of individual discrimination and a class-wide claim of company-wide discrimination. . . . Like the proverbial shell game, the plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted." 603 F.3d at 633, 640-41 (Ikuta, J., dissenting).

The Court may use the case as a vehicle to rein in expansive use of Rule 23(b)(2) classes, much as it used *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) to discourage "adventurous" application of Rule 23(b)(1). *Ortiz*, 527 U.S. at 845. The Court's determination of the two questions presented – the availability of monetary relief in classes certified under Rule 23(b)(2) and the propriety of the Ninth Circuit's finding commonality and typicality based on the plaintiffs' allegation of a centralized "policy" of decentralized subjectivity – could affect class action practice in virtually every area of substantive law.

The Court is likely to hear the case in March or April.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Authors

Thomas M. Byrne	404.853.8026	tom.byrne@sutherland.com
Valerie Strong Sanders	404.853.8168	valerie.sanders@sutherland.com

Related Attorneys

Phillip E. Stano	202.383.0261	phillip.stano@sutherland.com
Steuart H. Thomsen	202.383.0166	steuart.thomsen@sutherland.com
Lewis S. Wiener	202.383.0140	lewis.wiener@sutherland.com
Wilson G. Barmeyer	202.383.0824	wilson.barmeyer@sutherland.com