

## [U.S. Supreme Court to Hear \*Dukes v. Wal-Mart\* Petition on Scope of Class Actions](#)

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On December 6, 2010, the [United States Supreme Court](#) granted *certiorari* in *Wal-Mart Stores, Inc., v. Dukes*, no. 10-277, agreeing to hear [Wal-Mart's](#) appeal of a California district court's order certifying a class alleging sex discrimination in the workplace.

Although the claims in *Dukes* specifically relate to Wal-Mart's alleged unfair employment practices concerning paying and promoting women, the Supreme Court's decision, expected in summer of 2011, could dramatically affect the class action landscape for all large companies, including insurers.

Class action litigators following *Dukes* have been particularly interested in whether a class can be "too big" to certify.

In *Dukes*, six named plaintiffs allege that Wal-Mart -- the nation's largest employer -- discriminates against women in violation of [Title VII of the Civil Rights Act of 1964](#). They seek to certify a nationwide class encompassing thousands of women employed by Wal-Mart at any time since December 26, 1998, in a range of positions, from part-time, entry-level hourly employees to salaried managers. The proposed class involves 3,400 Wal-Mart stores in 41 regions. Wal-Mart's counsel estimates the class size could exceed 1.5 million women. Given the size of this class, billions of dollars are potentially at stake.

The district court certified for class treatment all of plaintiffs' claims for injunctive relief, declaratory relief and back pay, and included a separate opt-out class for employees seeking punitive damages.

On appeal, the Ninth Circuit affirmed the district court's certification, under [Federal Rule of Civil Procedure \("FRCP"\) 23\(b\)\(2\)](#), of a class of current employees with respect to the claims for injunctive relief, declaratory relief, and back pay and, as to the punitive damages claims, it remanded the case to the district court to make further rulings under FRCP 23(b)(2) and (b)(3).

As to former Wal-Mart employees, the Ninth Circuit remanded the action to the district court to consider whether to certify an additional class or classes under FRCP 23(b)(3). See [Dukes v. Wal-Mart Stores](#), 605 F.3d 571 (9th Cir. 2010).

In addition to the arguments that class action counsel routinely make to defeat class certification, such as whether the issues are sufficiently common and the claims of named class members are typical of others in the class, Wal-Mart's counsel argued that a class action this size would be *inherently* unmanageable and coercive. The allegations cover diverse job positions held by thousands of employees with different supervisors in numerous geographic locations. There is no way that all of the evidence relating to these plaintiffs can be presented. Further, it is unlikely

that evidence relating to a "representative sample" of plaintiffs can prove the case as to the more than a million class members.

For these reasons, if classes of this size are going to be certified, independent of the manageability issue, there is also a significant Due Process concern. Moreover, if such huge classes are certified, there is a far greater likelihood that defendants will feel compelled to settle, regardless of the merits of the action, to avoid potential billion-dollar litigation.

Although the "too big to certify" argument is of great importance to class action lawyers and their clients, it is unclear whether or to what degree the Supreme Court will resolve that issue.

The Court granted *certiorari* on only one, narrow issue raised in Wal-Mart's petition:

Whether claims for monetary relief can be certified under FRCP 23(b)(2) — which by its terms is limited to injunctive or corresponding declaratory relief — and, if so, under what circumstances."

The Court denied *certiorari* as to the broader issues of "whether the class certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and FRCP 23."

Nevertheless, the Court instructed the parties to brief the issue of "whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." Although this vaguely worded request leaves open the door to discussion of the broader issues, it appears unlikely that the Court will focus its decision on the bigger issues.

If the Supreme Court affirms the order granting class certification, *Dukes* will be the largest class action in United States history. Given the size of the class, the case potentially affects all large companies that may find themselves embroiled in class action litigation. Therefore, regardless of which way the Supreme Court decides *Dukes*, the case is likely to have a significant impact on future class action practice.