Class Action Alert

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The Future of Class Action Suits After *Wal-Mart v. Dukes*

BY KEVIN M. MCGINTY, DANIEL T. PASCUCCI, ARI N. STERN, AND NATHAN R. HAMLER

In a historic decision, the Supreme Court decertified a plaintiff class in *Wal-Mart Stores, Inc. v. Dukes*,[1] which asserted claims on behalf of 1.5 million female Wal-Mart employees alleging that Wal-Mart discriminated against women on matters of pay and promotion.[2] The Court's decision definitively resolves three important issues of class action law:

1. The Court held that plaintiffs now bear a heightened burden under Rule 23(a)(2) to show that there are questions of fact and law common to the class as a whole, particularly where the class claims concern the independent conduct of numerous individuals in multiple locations throughout the country.
2. The Court reaffirmed that it is permissible to address merits questions at the class certification stage to the extent necessary to determine whether the requirements of Rule 23 have been met.
3. The Court ruled that claims for back pay are not proper under Rule 23(b)(2), which governs classes seeking injunctive relief, and cast substantial doubt on whether Rule 23(b)(2) ever permits certification of classes that seek money damages.

The Supreme Court's decision has far-reaching implications for class action practice that extend well beyond employment discrimination cases.

Plaintiffs' Claims

The three named plaintiffs in *Wal-Mart* claim to have been the victims of adverse decisions on pay, promotions or demotions solely or primarily because they are women. The plaintiffs filed suit in the Northern District of California under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, *et seq*, which prohibits employers from engaging in gender-based discrimination. Their complaint asserted claims on behalf of a putative class of current and former female Wal-Mart employees who worked in hourly and salaried positions at the conglomerate's retail stores throughout the country.[3] The plaintiffs alleged that women employed at Wal-Mart: (a) received lower pay than men in comparable positions, even when those women had longer tenure with the company and received better performance evaluations; and (b) obtained "fewer—and wait[ed] longer for—promotions to in-store management positions that men."[4]

The Proceedings Below

In 2004, the trial court granted plaintiffs' motion to certify a class under Rule 23(b)(2), which permits

certification of a class to pursue injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole…." The proposed class, however, sought back pay and punitive damages in addition to injunctive relief. Wal-Mart appealed the certification order. After a divided panel affirmed the lower court ruling, Wal-Mart secured *en banc* review of the decision by the entire Ninth Circuit.

On appeal, Wal-Mart argued that the plaintiffs had failed to meet the Rule 23(a)(2) requirement to establish "questions of law or fact common to" the sprawling class certified by the district court, because the class claims arose from decisions made by thousands of Wal-Mart managers respecting the pay, performance and advancement of 1.5 million class members. Wal-Mart also argued that it was improper to use Rule 23(b)(2) to certify the class claims for back pay and other monetary damages.

The Ninth Circuit rejected Wal-Mart's arguments in a 6-5 decision that upheld most of the district court's class certification decision.[5] The Ninth Circuit found that the plaintiffs satisfied the commonality requirement under Rule 23(a)(2) by providing "factual evidence, expert opinions, statistical evidence, and anecdotal evidence" that raised a common question as to the existence of a pattern or practice of discrimination by Wal-Mart.[6] The court also held that back pay is recoverable under Fed. R. Civ. P. 23(b)(2) because such monetary relief did not "predominate" over the injunctive relief that the class also was seeking.[7]

Wal-Mart petitioned the Supreme Court to review the Ninth Circuit decision, and the Court agreed to hear the appeal.

The Supreme Court's Decision

In a decision authored by Justice Scalia that was partially divided and partially unanimous, the Supreme Court reversed the Ninth Circuit and decertified the class. The Court split 5-4 on the question of whether the requested class satisfied the commonality requirement under Rule 23(a)(2), with the majority deciding that it did not. In so ruling, the Court endorsed evaluation of merits-related issues at the class certification stage. All nine justices concurred that a so-called "mandatory" (i.e., non-opt-out) class could not be certified under Rule 23(b)(2) to pursue claims for back pay and other monetary relief sought by the *Wal-Mart* plaintiffs. The impact of the Court's ruling, which is not limited to employment cases, will be to impose additional burdens on plaintiffs at the class certification stage.

The sprawling class did not satisfy Rule 23(a)(2)'s commonality requirement

Possibly the most revolutionary aspect of the Court's decision was its finding that the proposed class did not satisfy Rule 23(a)(2)'s commonality requirement. Rule 23(a)(2) has ordinarily been construed to require only that there be "a single question of law or fact common to the members of the class…."[8] The Supreme Court, however, had previously held that Rule 23(a)(2) obligates a plaintiff to establish that the proposed class consists of members who "have suffered the same injury."[9] This burden, Justice Scalia reasons, requires more than simply framing questions that are common to the class, but instead requires proof of "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[10]

The Court concluded that the class that had been certified in *Wal-Mart* was too riven by dissimilarities to permit the generation of common answers. The fundamental question to be addressed as to each class member—was she a victim of gender-based discrimination—could not be tied to a single course of conduct common to all class members. Wal-Mart gave its store managers significant discretion to make decisions as to pay and promotions based on their firsthand assessments of their employees, but had a strict corporate anti-discrimination policy. Because discrimination by managers would be contrary to corporate policy, plaintiffs lacked a common thread binding the class as a whole. In the

absence of a single companywide policy discriminating against women, plaintiffs offered an expert statistical analysis that purported to show that store managers' "excessive discretion" had fostered an allegedly pervasive culture of corporate bias that had manifested itself in the form of lower pay and decreased promotions for women.[11] The Court, however, rejected the contention that this statistical analysis would generate common answers to the question of whether individual class members had been the victims of gender discrimination.[12] Instead, the answer to that question inevitably would require individualized assessments both of the store managers' conduct and the class members' own job performance and qualifications. Thus, the Court ruled, the anecdotal and statistical evidence proffered by the Plaintiffs did not suffice to establish commonality under Rule 23(a)(2).[13]

Courts may address merits issues to the extent required to establish that the proposed class meets all of the requirements of Rule 23

The Court approved the examination of merits issues at the class certification stage, placing a burden on plaintiffs to move beyond the allegations in their complaints and support requests for class certification with factual evidence. In so doing, the Court relied on its own holding almost thirty years ago in *General Telephone Co. of Southwest v. Falcon*[14] that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[15] In the years since *Falcon* was decided, some lower courts had relied on dicta in an earlier Supreme Court decision, *Eisen v. Carlisle & Jacquelin*,[16] to forbid merits inquiries at the class certification stage. In *Wal-Mart*, however, the Court rejected the notion that *Eisen* even addresses this issue,[17] and instead cities with approval Judge Easterbrook's groundbreaking 2001 opinion in *Szabo v. Bridgeport Machines, Inc.*,[18] which revived *Falcon's* directive that "a rigorous analysis" that sometimes overlaps with the merits is required before a court may certify a plaintiff class.[19]

Back pay claims were not proper under Rule 23(b)(2)

In contrast to its split over the commonality issue, the Court unanimously held that plaintiffs' claims for back pay could not be certified under Rule 23(b)(2), which applies to classes seeking injunctive relief. Rule 23(b)(2), the Court states, applies where "the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."[20] Because injunctive relief is indivisible as to members of a class, Rule 23(b)(2) classes are not subject to the predominance, notice and opt-out provisions that apply to money damages classes under Rule 23(b)(3). Thus, the Court concludes, allowing plaintiffs to append money damages claims to a Rule 23(b)(2) class improperly circumvents provisions that are intended to protect class members' individualized interests in pursuing their own independent claims for money damages.[21]

Relying on the Advisory Committee Notes to Rule 23, the plaintiffs in *Wal-Mart* argued that it is proper to certify a Rule 23(b)(2) class for mixed injunctive and monetary relief so long as the relief sought does not relate "*exclusively or predominantly* to money damages."[22] The Court rejected this argument as unsupported by the text of Rule 23(b)(2), further noting that permitting certification of such classes would encourage plaintiffs to impose artificial limits on class member recoveries to fit within the confines of Rule 23(b)(2), thus potentially prejudicing the rights and interests of absent class members who would be powerless to opt out and pursue claims on their own.[23]

Ultimately, the Court concluded that the back pay claims that were asserted on behalf of the class did not present the type of undifferentiated relief that would warrant certification of a mandatory class under Rule 23(b)(2). Awarding and quantifying back pay would depend on class-member-specific proof as to positions, qualifications, conduct and work history that would devolve into hundreds of thousands of mini-trials, each resulting in highly-differentiated damages awards. Accordingly, the

Court unanimously held that Rule 23(b)(2) did not permit certification of a class to seek recovery of back pay.[24]

The Impact of the *Wal-Mart* Decision

Each of the bases on which the Court decided the *Wal-Mart* case promises to have a significant impact on certification of class actions.

The election to stiffen the commonality requirement under Rule 23(a)(2) is certainly the most groundbreaking aspect of the case. Few courts had previously treated Rule 23(a)(2) as anything more than a preliminary hurdle to certification. Justice Ginsburg's dissent argues that the Court's decision now imbues Rule 23(a)(2) with many of the characteristics of the predominance requirement under Rule 23(b)(3).[25] To the extent that is true, the impact of the *Wal-Mart* decision will be most pronounced in cases seeking class certification under Rules 23(b)(1) and (b)(2), neither of which requires a showing that individualized issues of fact and law predominate for the class. For all types of class actions, commonality will no longer be satisfied where a class, like the one in *Wal-Mart*, artificially groups together factually unrelated disputes that are framed only by a common legal theory.

The Court's endorsement of merits inquiries at the class certification stage signals agreement with decisions of the Ninth Circuit—which, ironically, had itself so held in the *Dukes* decision below[26]—and of seven other circuits that had adopted such a rule.[27] Plaintiffs will continue to have the burden to adduce facts beyond the four corners of the complaints to support their motions for class certification.

The Court's unanimous rejection of the use of Rule 23(b)(2) to certify plaintiffs' back pay claims resolves a prior circuit split on when money damages may be sought under a Rule 23(b)(2) class[28] by casting doubt on whether such a class may ever be certified. This ruling substantially closes a notorious loophole that permitted plaintiffs to evade the rigors of the Rule 23(b)(3) predominance inquiry by linking claims for money damages to a demand for injunctive relief. By refusing to address the question of whether even claims for "incidental" money damages are permitted under Rule 23(b)(2), the Supreme Court has left it to the lower courts to explore whether any types of monetary relief might plausibly be pursued under Rule 23(b)(2) in the wake of the *Wal-Mart* ruling. The Court's unanimous and unequivocal rejection of such a class in the *Wal-Mart* case strongly suggests that the number of future cases that seek certification of claims for mixed relief under Rule 23(b)(2) will be significantly reduced.

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Endnotes

1 564 U. S. ____, slip op. at 19-20 (June 20, 2011).

2 *See generally id.*

3 *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 578 (9th Cir. 2010) (recognizing that "[t]he proposed class consists of women employed in a range of Wal-Mart positions, from part-time entry-level hourly employees to salaried managers").

4 *See id.* at 577.

5 *See id.*, 603 F.3d at 615.

6 *See id.* at 612 (stating that such evidence "provide[s] sufficient support *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 …").

7 *See generally id.* at 615-23 (remanding, however, the case for a decision on punitive damages).

8 *Wal-Mart*, dissenting op. at 2 (Ginsburg, J.) (quoting Nagareda, *The Preexistence Principle and the Structure of the Class Action,* 103 COLUM. L. REV. 149, 176, n.110 (2003) (hereinafter, "Nagareda 2003").

9 See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982).

10 *Wal-Mart*, slip op. at 9-10 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (hereinafter "Nagareda 2009")).

11 *See generally id.*, slip op. at 12-14.

12 *See generally id.*, slip op. at 14-20.

13 *See id.*

14 457 U.S. 147 (1982).

15 *Id*. at 160-61.

16 417 U.S. 156 (1974).

17 *See Wal-Mart.,* slip op. at 10 n.6.

18 249 F.3d 672 (7th Cir. 2001).

19 *See Wal-Mart*, slip op. at 10-12.

20 *See id.*, slip op. at 20 (quoting Nagareda 2009 at 132).

21 *See id.,* slip op. at 21-23.

22 *Id.,* slip op. at 23 (citing 39 F. R. D., at 102 (emphasis supplied by the Court)).

23 *Id*., slip op. at 24.

24 *See id*., slip op. at 26-27.

25 *See id*., dissenting op. at 2.

26 *See Dukes*, 603 F.3d at 581-82.

27 In addition to the Ninth Circuit, circuits that already permit merits inquiry to the extent necessary to conduct the "rigorous analysis" mandated under *Falcon* were the First Circuit, *see New Motor Vehicle Canadian Export Antitrust Litig*, 522 F.3d 6, 24 (1st Cir. 2008); the Second Circuit, *see In re Initial Public Offering Securities Litig.*, 471 F.3d at 33-34; the Third Circuit, *see In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312-26 (3d Cir. 2008); the Fourth Circuit, *see Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); the Fifth Circuit, *see Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); the Seventh Circuit, *see Szabo*, 249 F.3d at 675-76; the Eighth Circuit, *see Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005). The one notable dissenting jurisdiction was the Sixth Circuit, which (continued to rely on *Eisen* to forbid merits inquiry at the class certification stage. *See Cancino v. Yamaha Motor Corp., U.S.A.*, 2010 WL 2607251 at *4 (S.D. Ohio June 24, 2010) (citing *Beattie v. Century Tel. Inc.*, 511 F.3d 554, 560 (6th Cir. 2007)). The contrary authority in the Sixth Circuit has presumably been overruled by *Wal-Mart.*

28 *Compare Allison v. Citgo Petroleum Corp.*151 F.3d 402 (5th Cir. 1998) (a Rule 23(b)(2) class may assert claims for monetary relief that is "incidental" to the injunctive relief sought) with *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) (courts must, on a case-by-case basis, engage in an ad hoc balancing of the injunctive and monetary relief when evaluating whether to certify a Rule 23(b)(2) class for mixed monetary and injunctive relief).

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