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LEGAL ALERT

June 20, 2011

Wal-Mart Stores, Inc. v. Dukes: Supreme Court Reshapes Class Action Certification

In vacating this morning what some regarded as history's largest business class action, the Supreme Court's landmark opinion in *Wal-Mart Stores, Inc. v. Dukes* considerably tightens the criteria for class certification in all would-be class actions while confining Fed. R. Civ. P. 23(b)(2) class certification to cases in which essentially only declaratory or injunctive relief is sought, without monetary relief. The certification of Rule 23(b)(2) classes in federal cases involving claims for backpay or money damages thus appears to be impermissible; those cases now will have to meet the stricter criteria of Rule 23(b)(3). The (b)(2) section of the Court's opinion, significantly, was unanimous. The Court's new and more exacting interpretation of the Rule's general commonality requirement was endorsed by five justices.

Background

The district court had certified under Rule 23(b)(2) a nationwide class of more than one million current and former Wal-Mart employees who claimed sex discrimination in Wal-Mart's alleged "policy" of allowing local managers discretion in employment decisions. The Court of Appeals for the Ninth Circuit affirmed, finding, among other things, that the plaintiffs' claims for backpay were suitable for (b)(2) certification because the claims for monetary relief did not "predominate" over the requests for declaratory and injunctive relief. The Ninth Circuit described "predominance" in this context as "superior[ity in] strength, influence, or authority," aggravating an existing split among the Courts of Appeals.

Last December, the Supreme Court granted Wal-Mart's petition for certiorari on the question of "[w]hether 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 also directed the parties to brief and argue the question of "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."

Here are the highlights of today's far-reaching opinion:

Holding Applicable to All Classes—Commonality Requires Common Questions with Capacity for Common Answers

Justice Scalia's opinion, joined by four other justices, invigorates the commonality requirement in Rule 23(a)(2) that is applicable to all three types of federal class actions. The Court held that the ritual recital of common questions that is seen in every class action complaint is insufficient to establish commonality. The common questions instead must have the capacity to have common *answers* to satisfy the requirement. In a key passage, the Court explained:

> Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury,". . . This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere

> claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That 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.

(Slip op. at 9 (internal citations omitted).)

Holding Applicable to All Classes—Inquiry into Merits Often Required

The Court makes clear that class certification often involves inquiries into the merits, as most federal circuits have held in recent years. In footnote 6, the Court once and for all inters the argument, based on a quote from *Eisen v. Carlisle & Jacquelin*, 415 U.S. 156, 177 (1974), that inquiry into the merits is prohibited when determining class certification. "To the extent the quoted statement goes beyond permissibility of the merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases." (Slip op. at 10.) The fact that the requisite rigorous analysis of class certification requirements will often "entail some overlap with the merits of the plaintiff's underlying claim . . . cannot be helped." (*Id*.)

Extensive Weighing of Merits

The Court's detailed weighing of the merits is noteworthy. The Court concluded that the plaintiffs failed to demonstrate a pattern and practice of discrimination, which is necessary to establish not only the merits of their case but also commonality for class certification. In other words, it was not sufficient to establish commonality by *alleging* a pattern and practice of discrimination; the plaintiffs were required to *demonstrate* it factually, even though the issue overlaps with merits. (Slip op. at 11.) One way to demonstrate a class of persons who have suffered the same injury as the would-be class representatives would be to produce "significant proof" of a "general policy of discrimination." (*Id*. at 13.) But the Court found the plaintiffs' social science, statistical and anecdotal evidence of a general policy of discrimination each to be insufficient. The plaintiffs' social science expert, the Court noted, could not determine how his description of Wal-Mart's corporate culture played a meaningful role in employment decisions as to the plaintiff class. The only corporate policy the plaintiffs' evidence convincingly established was to allow discretion by local supervisors over employment matters, which was a policy *against* uniform employment practices.

The Court acknowledged that giving discretion to lower-level supervisors can be the basis for Title VII liability, under a disparate-impact theory, but pointed out that the fact that such a claim can exist "does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common." (Slip op. at 15.) "In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." (*Id*.) The Court pointed out that the plaintiffs failed to identify a common mode of exercising discretion that pervaded the entire company. The Court also deemed the plaintiffs' statistical and anecdotal evidence to fall far short of the required demonstration of a policy of discrimination. The Court agreed with the Ninth Circuit dissent that statistics about disparities at the regional and national level do not establish the existence of disparities at

individual stores or raise an inference that companywide discrimination is implemented by discretionary decisions at the store and district level. More fundamentally, the Court found that the statistical proof failed too because the plaintiffs did not identify a specific employment practice other than the bare existence of delegated discretion. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice." (*Id*. at 17.) Concluding its analysis, the Court stated, "Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question." (*Id*. at 19.)

The Court's opinion relies heavily on a law review article, Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009), written by the late Richard A. Nagareda, who was a professor at the Vanderbilt University Law School. Justice Ginsburg's dissent also quotes from Professor Nagareda's work.

Experts

The Court said that it doubted the district court's conclusion that *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), did not apply to the class certification stage but rejected the expert's opinion without reaching the question. (Slip op. at 13-14.)

Holding Applicable to All Classes—No "Trial by Formula"

The Ninth Circuit proposed that the district court could award backpay to class members by trying a random sample of backpay claims and then extrapolating the results to the claims of other class members, an approach approved in an earlier Ninth Circuit case, *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996). The Court derided this approach, characterizing it as "Trial by Formula" proscribed by due process and the Rules Enabling Act, which require that a defendant be afforded the right to litigate its defenses to each individual claim for backpay. (Slip op. at 27.) The Court's resounding rejection of "Trial by Formula" will have wide-reaching effects in the many types of cases in which resort to extrapolation from "representative" cases has been proposed in aid of class certification.

Rule 23(b)(2) Classes—No Monetary Relief, Including Backpay

The Court held unanimously that claims for monetary relief may not be certified under Rule 23(b)(2) if "each class member would be entitled to an individualized award of monetary damages." (Slip op. at 20-21.) The Court not only rejected the plaintiffs' argument that (b)(2) certification was appropriate because their claims for backpay did not "predominate" over their claims for injunctive and declaratory relief, but also spurned the suggestion that the relative "predominance" of various forms of relief was the relevant question *at all*. The critical question, according to the Court, is whether relief sought in a (b)(2) action is "individualized": "[W]e think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy [Rule 23(b)(2)]. The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that 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.'" (Slip op. at 20 (quoting Nagareda, 84 N.Y.U. L. Rev. at 132).) The Court left open the possibility that monetary relief that was somehow not "individualized" might be available to a (b)(2) class.

The (b)(2) analysis is not, the Court explained, a question of weighing the relative "predominance" of claims for relief; such an approach ignores a key difference between mandatory (b)(2) classes and (b)(3) classes with opt-out rights: "The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction." (Slip op. at 24.)

The Court also noted that the predominant-relief test would create "perverse incentives for class representatives to place at risk potentially valid claims for monetary relief": Class representatives might be reluctant to include claims for monetary relief in proposed (b)(2) classes for fear that the monetary claims might be found to "predominate," but carving monetary claims out of a (b)(2) class could leave class members vulnerable to collateral estoppel of the monetary claims by a decision unfavorable to the class. The Court was unmoved by the plaintiffs' claim that (b)(2) certification was appropriate for backpay claims because backpay is "equitable" relief; whether or not the "equitable" characterization is accurate, "it is irrelevant. The Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither." (Slip op. at 25.) The Court's holding that the important question for (b)(2) certification is whether the relief sought is "indivisible" versus "individualized" is different from *any* of the "predominant relief" tests previously adopted by the Courts of Appeals, each of which focused on the relationship between monetary and non-monetary relief rather than the divisibility of the monetary relief sought.[1] The holding should limit significantly the number of cases in which (b)(2) classes may be certified. Cases seeking individualized backpay or similar "equitable" monetary relief, in particular, now must be certified under Rule 23(b)(3) or not certified for class treatment at all.

The Court's searching commonality analysis is likely to recalibrate the analysis under Rule 23(b)(3)'s "predominance" and "superiority" criteria in money damage classes. The Court's analysis was considerably more rigorous than the analysis of predominance and superiority found in many cases. In

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[1] The Fifth, Sixth, Seventh and Eleventh Circuits have allowed 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 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 third 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)).

particular, the Court's deep dive into the merits to determine whether there are any bona fide common issues is groundbreaking and will likely have wide ramifications beyond employment cases.

Although *Dukes* is technically only applicable in federal courts, it is also likely to be influential in the many state courts with class action procedures based on federal Rule 23.

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If you have any questions regarding 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
Stacey McGavin Mohr	404.853.8004	stacey.mohr@sutherland.com

Related Attorneys

Thomas R. Bundy III	202.383.0716	thomas.bundy@sutherland.com
Nicholas T. Christakos	202.383.0184	nicholas.christakos@sutherland.com
Thomas W. Curvin	404.853.8314	tom.curvin@sutherland.com
Patricia A. Gorham	404.853.8298	patricia.gorham@sutherland.com
Allegra J. Lawrence-Hardy	404.853.8497	allegra.lawrence-hardy@sutherland.com
Phillip E. Stano	202.383.0261	phillip.stano@sutherland.com
Steuart H. Thomsen	202.383.0166	steuart.thomsen@sutherland.com
Gail L. Westover	202.383.0353	gail.westover@sutherland.com
Lewis S. Wiener	202.383.0140	lewis.wiener@sutherland.com