

Wal-Mart v. Dukes: Supreme Court Reverses Ninth Circuit, Clarifies Class Certification Standards

by Paula M. Weber, John M. Grenfell, Jacob R. Sorensen, Karen M. Harkins and George Chikovani

On June 20, 2011, the U.S. Supreme Court handed down its much-anticipated decision in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. __ (2011). In reversing the Ninth Circuit's certification of an immense plaintiff class, the Court clarified the class certification standards in ways that will be helpful to defendants.

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. To certify a class, the court must find that each of four criteria listed in Rule 23(a) is satisfied. One of those criteria, under Rule 23(a)(2), is the existence of "questions of law or fact common to the class." In addition, the court must find that one of three alternative tests listed in Rule 23(b) is satisfied. One of those tests, under Rule 23(b)(2), is that injunctive or declaratory relief is appropriate for the class as a whole. Another test, under Rule 23(b)(3), requires that the common issues predominate over individual ones and that a class action is the superior method of adjudicating the claims.

The Supreme Court's decision interprets Rule 23, and it has three important aspects. First, it confirms that courts must conduct a "rigorous analysis" of whether the elements of Federal Rule of Civil Procedure 23 are satisfied at the class certification stage, even where such an analysis overlaps with the merits and requires testing the plaintiff's allegations as a factual matter. Second, by a 5-4 vote, the Supreme Court tightened the requirements for "commonality" under Rule 23(a)(2). Finally, the Court unanimously held that a class cannot be certified under Rule 23(b)(2) if the class seeks monetary relief on an individual basis.

Background

The suit, originally filed in 2001, was brought by three female Wal-Mart employees who alleged they were denied promotions and pay raises because the corporate culture created a pattern and practice of gender-based discrimination across Wal-Mart stores nationwide. Plaintiffs claimed that local managers' discretion over pay and promotion determinations was exercised disproportionately in favor of men, resulting in an unlawful disparate impact on female employees. Plaintiffs claimed that Wal-Mart was aware of this effect and its refusal to control its managers' authority amounted to unlawful disparate treatment of women. Plaintiffs filed their suit pursuant to Title VII, 42 U.S.C. § 2000e-2(k).

In April 2010, the Ninth Circuit, sitting *en banc*, upheld the certification of a class of more than 1.5 million female Wal-Mart employees under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Class members sought injunctive and declaratory relief, as well as over a billion dollars in back pay. This is the decision that the Supreme Court has now reversed. See [Pillsbury Advisory, June 3, 2010](#).

Rule 23 Requires “Rigorous Analysis,” Even Where the Class Certification Criteria Overlap With the Merits

As an initial matter, the majority opinion explains that “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” Slip op. at 10. Thus, a court may not certify any class unless it determines, “after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,” and “[f]requently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.*¹ A 1974 Supreme Court case (*Eisen*) stated in dictum that Rule 23 did not authorize “a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action,”² and some courts understood that statement to require them to take the substantive allegations of the complaint as true at the class certification stage. The Ninth Circuit’s *en banc* opinion noted this split, and endorsed the “rigorous analysis” standard as the correct one. The Supreme Court agreed, and explicitly disapproved reliance on *Eisen* for the proposition that inquiries into the merits are prohibited at the class certification stage. Slip op. at 10, n. 6.

This aspect of the decision is applicable to all Rule 23 class actions, regardless of subject matter. The Court used an example from securities class action litigation to illustrate the potential overlap between Rule 23 requirements and the merits of a case. See Slip op. at 11, n. 6.

To Demonstrate “Commonality,” Plaintiffs Must Demonstrate Common Contention or Policy

While the Supreme Court agreed with the Ninth Circuit that a rigorous analysis was needed, it did not agree that the plaintiffs’ class certification arguments in *Dukes* met this standard. Five justices held that the plaintiffs had not satisfied Rule 23(a)(2) by demonstrating that their complaint raised “questions of law or fact common to the class.” To meet the commonality requirement, a plaintiff must provide significant proof of a “common contention” that is “capable of classwide resolution.” Slip op. at 9. In other words, the “determination of the [common question’s] truth or falsity [must] resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.*

This standard was not met in *Dukes* because the plaintiffs did not allege that Wal-Mart had a company-wide policy of discrimination, but rather that it gave too much discretion to its store managers in making promotion and pay decisions. The Court explained: “Without some glue holding the alleged *reasons* for all those [discretionary] decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.” *Id.* at 12. Indeed, “in a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.” *Id.* at 15.

In reaching this conclusion, the majority rejected all three types of evidence offered by the plaintiffs. First, the Court rejected the opinions of a sociologist who testified that Wal-Mart’s corporate culture made it vulnerable to gender bias because the expert could not estimate how many specific decisions were made based on stereotyped thinking. *Id.* at 14.

¹ Citing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

² *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

Next, the Court noted that plaintiffs' statistical evidence, a regression analysis comparing numbers of women promoted into management with the percentage of women in the available pool on a region-by-region basis, only demonstrated regional disparities and could not "by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." *Id.* at 16.

Finally, the Court rejected the plaintiffs' anecdotal evidence, noting that one affidavit for every 12,500 employees, which included workers in only 235 of 3,400 stores, even if true, was insufficient to demonstrate class-wide discrimination. *Id.* at 18.

The dissent, authored by Justice Ginsberg, criticized the majority's decision as confusing Rule 23(a)(2)'s commonality requirement with the more demanding Rule 23(b)(3)'s inquiry into whether common questions predominate over individual ones. Ginsberg slip op. at 8. But the majority concluded that because plaintiffs "have not established the existence of any common question," they failed the requirements for both Rule 23(b)(2) and the predominance test of 23(b)(3). Slip op. at 19.

Cases Requiring Individualized Analyses of Monetary Relief Must Be Certified Under Rule 23(b)(3)

Finally, the Court unanimously rejected certification of the class under Rule 23(b)(2), holding that claims for monetary relief may not be certified under that Rule— unless the monetary relief is incidental to injunctive or declaratory relief. The Court explained that Rule 23(b)(2) "applies only when a single injunction or declaratory relief would provide relief to each member of the class," and that class certification is not proper pursuant to Rule 23(b)(2) if class members are entitled to individualized awards of monetary damages. *Id.* at 20.

The plaintiffs in *Dukes* sought monetary relief in the form of back pay, which they claimed was incidental to their requests for injunctive and declaratory relief. Although the lower courts had accepted such arguments, the Supreme Court held that individualized awards of back pay were inconsistent with the structure of Rule 23(b)(2). Instead, such monetary claims must be pursued under Rule 23(b)(3), which requires a showing not merely that common questions exist (the issue under Rule 23(a)(2)) but that they "predominate" over individual issues, and that a class action is superior to other methods of adjudication. The procedural protections under Rule 23(b)(3) are also more stringent, requiring mandatory notice and the right to opt out. *Id.* at 22.

Although the Court did not directly define what claims for monetary relief could be "incidental" to the injunctive and declaratory relief appropriately sought in a Rule 23(b)(2) class action, it emphasized that the necessity of litigating individualized claims prevents back pay from being "incidental." Accordingly, it appears that unless monetary damages can be determined on a classwide basis, as in the case of statutory damages, class certification via Rule 23(b)(2) is not a viable option for a case in which damages like back pay are sought.

What This Means

This holding is good news for businesses facing class actions. The Ninth Circuit *en banc* decision, had it been allowed to stand, would have made it much easier for plaintiffs to obtain certification in cases in which they sought significant monetary damages on behalf of a class if they also sought injunctive or declaratory relief. This Supreme Court decision returns to what most practitioners believed was the standard before the Ninth Circuit *en banc* decision: class actions seeking individualized monetary damages will need to meet the more stringent requirements of Rule 23(b)(3). Among other things, this will make it more difficult for plaintiffs to raise discrimination-based claims where individualized monetary damages are at issue.

In the employment context, plaintiffs will need to articulate clearly the connection between their claims and any challenged policy of the employer-defendant. *Dukes* also suggests that a company's personnel policies will be more significant for class certification decisions. Employees will have a harder time meeting class certification requirements for company-wide discrimination claims against companies that provide managers with discretion to make employment decisions or to use subjective standards, so long as the company has express anti-discrimination policies. On the other hand, companies with personnel policies that require the use of rigid formulas and explicit, objective criteria may still find themselves susceptible to company-wide classes if these policies have a disparate impact on a protected group. However, this should not be read as an invitation for companies to avoid providing guidance to managers about pay and promotion decisions; the failure to do so could result in more individual lawsuits or smaller class actions.

This decision may also help address commonality concerns in other areas of employment law, such as overtime exemption and misclassification suits, because the degree of factual commonality among class members may need to be more significant than what had previously been deemed sufficient. Reliance on a small sample of putative class members for anecdotal support or expert analysis claiming "a culture" of working off the clock or managers performing non-exempt functions may no longer be sufficient for class certification.

Outside of employment law, the decision will likely prove most important for its insistence on a "rigorous analysis" of the factual basis for each of the criteria of Rule 23, including expert evidence, and for definitively rejecting any notion that the plaintiffs' allegations must be accepted as true for purposes of class certification.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or one of the attorneys below.

Paula M. Weber (bio)
San Francisco
+ 1.415.983.7488
paula.weber@pillsburylaw.com

John M. Grenfell (bio)
San Francisco
+ 1.415.983.1488
john.grenfell@pillsburylaw.com

Jacob R. Sorensen (bio)
San Francisco
+ 1.415.983.1893
jake.sorensen@pillsburylaw.com

Brian D. Martin (bio)
San Diego
+ 1.619.544.3204
brian.martin@pillsburylaw.com

Kenneth W. Taber (bio)
New York
+ 1.212.858.1813
kenneth.taber@pillsburylaw.com

Christine Nicolaidis Kearns (bio)
Washington, DC
+ 1.202.663.8488
christine.kearns@pillsburylaw.com

Karen M. Harkins (bio)
San Diego
+ 1.619.544.3231
karen.harkins@pillsburylaw.com

George Chikovani (bio)
San Francisco
+ 1.415.983.1373
george.chikovani@pillsburylaw.com

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