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The U.S. Supreme Court Issues Important Decision Limiting Availability of Class Action Procedure in *Wal-Mart*

On June 20, 2011, the United States Supreme Court, in its highly anticipated decision on class certification in *Wal-Mart Stores, Inc. v. Dukes, et al.*, No. 10-277, ruled that the nationwide class action lawsuit challenging gender discrimination in pay and promotions at Wal-Mart could not go forward. In a case Justice Scalia, writing for the Court, described as "one of the most expansive class actions ever," the Court reversed the decision of the *en banc* Court of Appeals for the Ninth Circuit and held that the class of over 1.5 million current and former female Wal-Mart employees was improperly certified under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

In *Wal-Mart*, the plaintiffs asserted claims against Wal-Mart for gender discrimination under Title VII of the 1964 Civil Rights Act on behalf of every female employee who has worked in any Wal-Mart store throughout the United States since December 26, 1998. Plaintiffs' central theory was that Wal-Mart vests its managers with discretion to make excessively subjective decisions regarding compensation and promotion, resulting in a pattern and practice of discrimination against Wal-Mart's female employees. In particular, plaintiffs claimed that Wal-Mart pays its female employees less than comparable males and awards them fewer and less frequent promotions.

The Supreme Court's decision addressed two questions: (1) whether the plaintiff class met the commonality requirements of Rule 23(a); and (2) whether Rule 23(b)(2) permits certification of a class with claims for monetary relief and, if so, under what circumstances. The Court ruled for Wal-Mart on both questions. The Court held that the plaintiffs did not present common "questions of law or fact" as required under Rule 23(a) and that plaintiffs' claims for individualized grants of monetary relief foreclosed certification as a Rule 23(b)(2) class.

The Court's decision is significant in many respects.

On the first issue, a five Justice majority ruled that the plaintiffs failed to meet their burden of demonstrating "commonality" because they could not identify a general policy of discrimination applicable to the class as a whole. In explaining this decision, the Court provided guidance on the standard for class certification. It reiterated that district courts must conduct a "rigorous analysis" into the requirements of Rule 23(a), including commonality. The Court also resolved a long-running debate over whether a district court should consider the evidence in the case (as opposed to the plaintiff's allegations), and should do so even if the same evidence would be relevant to the plaintiff's claims on the merits. *Wal-Mart* decisively held that in considering whether a plaintiff has satisfied the requisites for class certification

under Rule 23, a district court should assess the evidence, and should do so even if that evidence also bears on the merits. "Frequently," the Court stated, the "rigorous analysis" required on a motion for class certification "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."

The Court also reaffirmed its prior holding in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), that the commonality requirement of Rule 23(a) may be satisfied through "significant proof that an employer operated under a general policy of discrimination . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." The Court, however, rejected the notion that a "policy" of excess subjectivity alone could suffice to demonstrate a general policy of discrimination. The Court observed that "the recognition that this type of Title VII 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." Noting Wal-Mart's "size and geographical scope," the Court found that "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."

As to the specific evidence proffered by the plaintiffs, the Court rejected what it deemed the only evidence of a general policy of discrimination—the expert testimony of plaintiffs' sociologist, who opined that Wal-Mart had a "strong corporate culture" that makes it "vulnerable" to "gender bias." The Court explained that the expert could not "determine with any specificity how regularly stereotypes play[ed] a meaningful role in employment decisions." Turning to plaintiffs' statistical evidence, the Court held that regional and national statistics did not establish a store-by-store disparity, and that, in any event, statistics showing a pay disparity, without more, were insufficient to demonstrate a general policy. Likewise, the Court found that plaintiffs' anecdotal evidence, which amounted to 120 affidavits, primarily from employees from six states, proved nothing given that plaintiffs' claims concerned millions of employment decisions. Without setting forth a bright-line rule that a discrimination claim, if accompanied by anecdotal evidence, must supply such evidence in a number proportionate to the size of the class, the Court held that "a few anecdotes selected from literally millions of employment decisions prove nothing at all."

With respect to the second question, the Court unanimously held that the class was improperly certified under Rule 23(b)(2) because the class claims for backpay were not "incidental to the injunctive or declaratory relief." Rule 23(b)(2) allows class treatment when "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 Court emphasized the uniform and "indivisible" nature of relief covered by Rule 23(b)(2), which does not authorize individually tailored declaratory or injunctive relief, let alone monetary awards. Instead, individualized monetary claims can be certified only under Rule 23(b)(3).

While the Court declined to reach the question of whether a claim for any type of monetary relief would be consistent with certification under Rule 23(b)(2) and the Due Process Clause, it concluded that, at a minimum, plaintiffs' claims for backpay were not "incidental" to their requested injunctive relief. Under Title VII's "detailed remedial scheme," even after the plaintiff has established that an employer engaged in a pattern or practice of discrimination, the Court reiterated that employers must be given an opportunity to prove "that the individual

[employee] was denied an employment opportunity for lawful reasons." If the employer succeeds, the employee is not entitled to backpay under the statute. The Court rejected the Ninth Circuit's "Trial by Formula" approach as an inadequate and unlawful replacement for this statutory defense. The Court held that Wal-Mart was entitled to an individualized determination of each employee's eligibility for backpay. The necessity of individualized litigation, the Court held, prevents claims for backpay from being "incidental" to any class-wide injunction sought and therefore acts as a bar to certification under Rule 23(b)(2).

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Wal-Mart is a significant victory for the defense bar. It substantially curtails plaintiffs' ability to claim excessive subjectivity in employment decisions as a basis for class-wide Title VII relief. It makes clear that the Supreme Court will hold plaintiffs to a high burden in establishing that common legal and factual issues exist. And it provides that expert testimony and anecdotal evidence will not serve as a substitute for identification of a generally applicable discriminatory policy. The Court's ruling with respect to certification of a Rule 23(b)(2) class is also a huge victory for defendants, as it establishes that an employer is entitled to mount a defense with respect to each claim for back pay, and calls into question plaintiffs' ability to certify any class under Rule 23(b)(2) where monetary damages are sought.

But *Wal-Mart* has implications far beyond the employment-law context. Parties in class actions frequently proffer expert evidence in support of factual positions that are relevant to class certification. Defendants in all those cases will be likely to contend that *Wal-Mart* supports similarly searching examination of the expert evidence from economists and others that plaintiffs often proffer in support of motions for class certification. Likewise, the Court's limitation on the availability of Rule 23(b)(2) certification may have wide-ranging application in all cases where monetary damages are sought.

Wal-Mart is likely to be cited frequently in the securities context. In a footnote, the Court acknowledged that "[p]erhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud." As the Court indicated, plaintiffs in putative class actions asserting claims for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 often seek to invoke the fraud-on-the-market presumption. Where that presumption is applicable, a plaintiff can attempt to use the presumption to prove reliance, which is an element of a claim under Section 10(b) and Rule 10b-5. If, however, the presumption does not apply, reliance can be proved only on an individual, rather than class-wide, basis. For that reason, if the presumption does not apply, plaintiffs will be unable to establish that "questions of law or fact common to the class predominate over any questions affecting only individual members," which is a showing required for certification under Rule 23(b)(3). Certification consequently will not be possible in such circumstances.

For these reasons, defendants in putative class actions under the federal securities law often oppose class certification on the ground that the plaintiff cannot establish the applicability of the fraud-on-the-market presumption. The *Wal-Mart* Court seemed to go out of its way to state that defendants in such cases may appropriately require the plaintiff to demonstrate the applicability of the fraud-on-the-market presumption through evidence at the class certification stage. "To invoke [the fraud-on-the-market] presumption," the Court wrote, "the plaintiffs

seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, an issue they will surely need to prove *again* at trial in order to make out their claim on the merits."

Defendants will certainly cite this statement in support of arguments that in securities cases, a district court adjudicating a motion for class certification should examine all of the evidence bearing on whether the fraud-on-the-market presumption applies or has been rebutted. *Wal-Mart* also may contain an intriguing hint about the substantive scope of the fraud-on-the-market presumption. The Court refers to the presumption as applicable in cases brought by "traders who purchase stock" concerning the "accuracy of a *company's* public statements." (Emphasis added.) This phrasing may have negative implications for future efforts by plaintiffs to invoke the presumption in cases concerning statements by an entity that is not the issuer of the relevant securities, such as statements by a securities analyst.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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