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Aidan Synnott & William B. Michael
Paul, Weiss, Rifkind, Wharton & Garrison LLP

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I. INTRODUCTION

On June 20, 2011, the United States Supreme Court ruled that “one of the most expansive class actions ever” had been improperly certified under Federal Rule of Civil Procedure 23(a) and (b).² The proposed class included 1,500,000 current and former female employees of Wal-Mart, who alleged that the nationwide retailer had discriminated against them in pay and promotion matters. Although plaintiffs’ claims concerned alleged violations of Title VII, the implications of the Court’s decision extend well beyond the employment discrimination context.

In *Wal-Mart v. Dukes*, the Supreme Court confirmed a growing trend among the federal courts of appeals, by holding that plaintiffs must prove, not merely allege, that they can satisfy the requirements for class certification under Rule 23. The Court focused in particular on Rule 23(a)(2)’s requirement that common questions of law or fact exist among the class, insisting that district courts conduct a rigorous analysis of evidence regarding commonality at the certification stage even where such analysis overlaps with the merits. As four dissenting justices acknowledged, this ruling will make it harder for plaintiffs to obtain class certification in all types of actions—including antitrust cases.

II. BACKGROUND

The *Wal-Mart* case arose from the allegations of three named plaintiffs seeking to represent every female employee who had worked in a Wal-Mart store anywhere in the United States since December 1998. Plaintiffs did not allege that Wal-Mart had any express corporate policy to discriminate against women. Rather, they claimed that Wal-Mart afforded its local managers near complete discretion to set employees’ pay and determine promotions, and that the managers had exercised that discretion to favor men. By allowing the discriminatory decisionmaking of its local managers to go unchecked, Wal-Mart allegedly had permitted a “strong and uniform ‘corporate culture’” of bias against women to thrive.³

Plaintiffs sought to certify the proposed class under Rule 23(b)(2), which applies 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.”⁴ In addition to an injunction and declaratory judgment, plaintiffs sought monetary relief in the form of punitive damages and backpay.

¹ Aidan Synnott is a litigation partner in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP. William B. Michael is a litigation associate at the firm.

² *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.----, 131 S. Ct. 2541 (2011).

³ *Id.* at 2548.

⁴ Fed. R. Civ. P. 23(b)(2).

The District Court granted class certification, determining that plaintiffs had satisfied the requirements of Rule 23(a) as well as 23(b)(2). As evidence that there were “questions of law or fact common to” all members of the proposed class, plaintiffs offered three forms of proof: (1) statistical evidence showing pay and promotion disparities between male and female employees of Wal-Mart; (2) anecdotal reports of discrimination from about 120 female Wal-Mart employees; and (3) the expert testimony of a sociologist, who opined that Wal-Mart’s “culture” and personnel practices made it “‘vulnerable’ to gender discrimination.”⁵ The District Court rejected Wal-Mart’s motions to strike much of this evidence. With respect to the proffered expert testimony, the District Court held that the standards set forth in *Daubert*⁶ did not apply at the class certification stage.

Wal-Mart appealed the District Court’s decision, and the Ninth Circuit Court of Appeals affirmed. The case was then re-heard *en banc*. A majority of the *en banc* Court of Appeals agreed with the District Court that the plaintiffs had satisfied the Rule 23(a) requirements and that the class could proceed under Rule 23(b)(2). With respect to commonality, the Court of Appeals concluded that plaintiffs had presented sufficient evidence to “raise the common question whether Wal-Mart’s female employees nationwide were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them.”⁷

The Supreme Court granted certiorari to hear two questions: (1) whether Federal Rule of Civil Procedure 23(b)(2) permits certification of claims for monetary relief and, if so, under what circumstances; and (2) whether the plaintiffs in *Wal-Mart* had met the requirements for class certification under Rule 23(a).

III. THE WAL-MART DECISION

On the first issue, the Supreme Court’s decision was unanimous. The Court held that the class had been improperly certified under Rule 23(b)(2) because plaintiffs’ claims for backpay were not incidental to the injunctive or declaratory relief sought. The Court emphasized the “indivisible” nature of relief covered by Rule 23(b)(2), which does not authorize individually tailored declaratory or injunctive relief, let alone monetary awards. The Court also observed that, under Title VII, employers must be given an opportunity to prove “that the individual [employee] was denied an employment opportunity for lawful reasons” as a defense to a claim for backpay.⁸ The Court rejected the Ninth Circuit’s “Trial by Formula” approach—under which damages would be determined on the basis of a sampling of individual claims—as an inadequate and unlawful replacement for this statutory defense.⁹

Although the Court declined to resolve whether monetary damages could ever be available in a Rule 23(b)(2) class action, it concluded that plaintiffs’ claims for backpay were more than “incidental” to their request for injunctive relief and that such claims could be certified only under Rule 23(b)(3)—the more common mechanism for asserting class-wide claims for damages.

With respect to the second question—whether plaintiffs had satisfied the requirements of Rule 23(a)—the Court split five to four. The majority ruled that plaintiffs had failed to meet their

⁵*Wal-Mart*, 131 S. Ct. at 2549.

⁶*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

⁷*Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 612 (9th Cir. 2010) (*en banc*) (emphasis in original).

⁸*Wal-Mart*, 131 S. Ct. at 2561 (internal quotation marks omitted).

⁹*Id.*

burden of demonstrating “commonality” because they could not identify a general policy of discrimination applicable to the class as a whole.

In an opinion by Justice Scalia, the Court reviewed the standards of proof to be applied at the class certification stage. The decision also resolved a long-running debate over whether a district court should consider the evidence in the case—as opposed to restricting its review to plaintiffs’ allegations—even if the same evidence would be relevant to plaintiffs’ claims on the merits. The Court held that in determining whether class certification is appropriate, a district court should conduct a “rigorous analysis” of whether each of the elements of Rule 23 has been satisfied and should assess the evidence on both sides before reaching a conclusion. “Frequently,” the Court acknowledged, “that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”¹⁰

In the past, some federal courts had applied a relaxed standard of proof to plaintiffs’ claims at the class certification stage and had been reluctant to decide disputed issues that could overlap with the merits of an action. This was largely an outgrowth of the Supreme Court’s 1974 decision in *Eisen v. Carlisle & Jacquelin*—a Sherman Act case—which held that courts lack “authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”¹¹ The *Eisen* decision, however, seemed to be in tension with later Supreme Court precedent, including *General Telephone Co. of Southwest v. Falcon*, which recognized that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question” and that class certification “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”¹²

In *Wal-Mart*, the Supreme Court resolved this tension by favoring *Falcon*. In *Eisen*, the Court noted, the district judge had already determined that class certification was proper under Rules 23(a) and (b), and had “conducted a preliminary inquiry into the merits of a suit” for a different purpose—“in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants.”¹³ To the extent that the often-quoted language in *Eisen* concerning courts’ authority to inquire preliminarily into the merits of a suit goes beyond this particular purpose, “it is the purest dictum and is contradicted by our other cases.”¹⁴

As to the class certification decision at issue in *Wal-Mart*, the Supreme Court determined that the lower courts’ analysis had not been rigorous enough. The Court rejected the testimony of plaintiffs’ expert witness, explaining that the expert could not “determine with any specificity how regularly stereotypes play[ed] a meaningful role in employment decisions.”¹⁵ Indeed, at his deposition, plaintiffs’ expert had admitted that he could not determine whether employment decisions at Wal-Mart might be driven by stereotypes 95 percent of the time, or 0.5 percent. Yet, that determination, the Court held, was “the essential question” on which plaintiff’s theory of commonality depended.¹⁶ The Court expressed doubt regarding the District Court’s conclusion

¹⁰*Id.* at 2551.

¹¹ 417 U.S. 156, 177 (1974).

¹² 457 U.S. 147, 160 (1982).

¹³ *Wal-Mart*, 131 S. Ct. at 2552 n.6.

¹⁴*Id.*

¹⁵*Id.* at 2553.

¹⁶*Id.* at 2554.

that *Daubert* did not apply at class certification, but found that even if the expert testimony were properly considered, it did nothing to advance plaintiffs' case.¹⁷

The Court likewise rejected plaintiffs' other forms of proof. It held that the regional and national pay disparity statistics plaintiffs had offered were insufficient to demonstrate a general policy of discrimination and did not establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."¹⁸ The Court found that plaintiffs' anecdotal evidence, which amounted to 120 affidavits from Wal-Mart employees from six states, proved nothing as to commonality given that plaintiffs' claims concerned millions of individual employment decisions.

Because the plaintiffs had not submitted "convincing proof of a companywide discriminatory pay and promotion policy," the Court concluded that they had not "established the existence of any common question" of law or fact, and therefore could not proceed as a class.¹⁹

Four justices dissented. In an opinion by Justice Ginsburg, they argued that the Court's analysis improperly blended the threshold criterion of Rule 23(a)(2), which should be "easily satisfied," with the more demanding criteria of Rule 23(b)(3), which requires an additional determination that "questions of law or fact common to class members *predominate* over any questions affecting only individual members" and that a class action is "*superior* to other available methods" for adjudicating the dispute.²⁰ By over-emphasizing the dissimilarities between class members, the dissent maintained, the Court had essentially conducted a Rule 23(b)(3) predominance and superiority analysis.

IV. THE BROADER IMPLICATIONS OF WAL-MART

The *Wal-Mart* decision confirms a trend among the federal courts of appeals toward the application of more stringent standards of review at class certification. In the antitrust context, most courts of appeals had already moved in the direction signaled by *Wal-Mart*—insisting that lower courts conduct a rigorous analysis to determine whether all the requisite elements of Rule 23 had been met, even where such analysis requires the determination of disputed legal and factual issues.

For example, in *In re Hydrogen Peroxide Antitrust Litigation*, the Third Circuit rejected some of its own earlier decisions suggesting that a future "intention" by plaintiffs to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure was enough to warrant class certification.²¹ Rather, the Court held, plaintiffs must actually demonstrate their ability to meet such requirements by a preponderance of the evidence—not a mere "threshold showing."²² Other courts of appeals have similarly held that district courts must "look[] behind the pleadings" in making class certification decisions,²³ that courts may "certify a class only after making determinations that each of the Rule 23 requirements has been met," and that such

¹⁷*Id.*

¹⁸ *Id.* at 2555.

¹⁹*Id.* at 2556.

²⁰*Id.* at 2558 (Ginsburg, J. concurring in part and dissenting in part) (emphasis added).

²¹ 552 F.3d 305 (3d Cir. 2008).

²²*Id.* at 307.

²³*Blades v. Monsanto*, 400 F.3d 562, 566 (8th Cir. 2005).

determinations necessarily involve resolving factual disputes that may overlap with the merits of a case.²⁴

Wal-Mart confirms that the stricter standards of proof applied in these cases—which involved Rule 23(b)(3) actions—apply in all federal class actions, and clarifies that the requirements of Rule 23(a), including commonality, must be proved, not merely alleged. The Ninth Circuit majority in *Wal-Mart* purported to adopt the same standards set forth in cases such as *In re IPO Securities Litigation* and *In re Hydrogen Peroxide*, but—following the Supreme Court’s decision—its interpretation and application of those standards is no longer tenable.²⁵ While the Ninth Circuit acknowledged that a “district court must sometimes resolve factual issues related to the merits to properly satisfy itself that Rule 23’s requirements are met,” it emphasized that “the purpose of the district court’s inquiry at this stage remains focused on, for example, common questions of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), not the proof of answers to those questions or the likelihood of success on the merits.”²⁶ Thus, the Ninth Circuit concluded that no “significant proof” standard (or burden, or requirement) applies in class certification decisions.²⁷ That holding was inconsistent with decisions like *In re Hydrogen Peroxide*, which held that plaintiffs must establish the requirements of Rule 23 by a preponderance of the evidence, and can no longer be maintained after the Supreme Court’s decision in *Wal-Mart*.

The *Wal-Mart* decision also underscores the importance of expert testimony in determining class certification—an issue on which there has been considerable divergence of opinion among the lower courts. Although the Supreme Court declined to decide whether a district court could conduct a full *Daubert* analysis at the class certification stage, it suggested that such analysis likely would be appropriate—at least in certain cases—and that the testimony of a plaintiff’s expert on class certification should be subject to the same rigorous scrutiny as other forms of proof.

Consistent with the Supreme Court’s observations in *Wal-Mart*, the Third Circuit and other courts of appeals have made clear that district courts must resolve “expert disputes in order to determine whether a class certification has been met,” regardless of “whether a dispute might appear to implicate the ‘credibility’ of one or more experts, a matter resembling those usually reserved for a trier of fact.”²⁸ In light of such decisions, expert testimony—and expert discovery—at the class certification stage in antitrust cases can be expected to take on an even more prominent role. In one recent district court case, for example, the parties engaged in extensive expert discovery and testimony—including written reports, depositions, and a four-day evidentiary hearing—before the Court reached a decision on class certification.²⁹ The District Court ultimately rejected the testimony of plaintiffs’ expert, along with plaintiffs’ argument that it was improper for the Court to resolve a “battle of the experts” at the class certification stage. “Weighing conflicting expert testimony at the certification stage,” the District Court held, “is not only permissible, it may be integral to the rigorous analysis Rule 23 demands.”³⁰

²⁴*In re IPO Securities Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

²⁵*Dukes*, 603 F.3d at 584.

²⁶*Id.* at 590.

²⁷*Id.* at 597.

²⁸*Hydrogen Peroxide*, 552 F.3d at 324.

²⁹*Reed v. Advocate Health Care*, 268 F.R.D. 573 (N.D. Ill. 2009)

³⁰*Id.* at 593 (internal quotation marks omitted).

Not all lower courts have been so willing to engage in an analysis of disputed expert testimony in deciding class certification. The District Court in *Wal-Mart* rejected defendant's effort "to engage the court in a merits evaluation of the expert opinions," and held that plaintiffs' expert had offered "at least a reasonable means of conducting a statistical analysis," which was sufficient to "create an inference of discrimination" for class certification purposes.³¹ Likewise, in *In re EPDM Antitrust Litigation* after examining competing expert testimony, the District Court held that it was inappropriate to place itself "in the role of the ultimate factfinder by choosing which expert's econometric model or theory is 'correct.'"³² Rather, the Court observed that the "real question" at the class certification stage "is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works*."³³ After *Wal-Mart*, proof that an expert's analysis actually works, not merely that it is "workable," is likely to be expected, if not required, in antitrust cases as well as other class actions.

Still, the exact standards that courts apply in weighing disputed evidence at class certification will continue to evolve, especially in the context of expert testimony. A recent Eighth Circuit decision demonstrates that while courts will engage in some degree of scrutiny of expert opinions on class certification, they may stop short of conducting a full merits inquiry. In *In re Zurn Pex Plumbing Products Liability Litigation*, the Eighth Circuit affirmed a District Court ruling certifying under Rule 23(b)(3) a class of Minnesota homeowners alleging that the defendants had sold them defective plumbing fittings.³⁴ Plaintiffs submitted expert testimony to show that the cause of failure in defendants' fittings was poor manufacturing. Defendants moved to strike the testimony under *Daubert*. Both sides agreed that expert testimony should be considered, but they disagreed over the standard to be applied. The District Court declined to conduct a "full and conclusive" *Daubert* analysis, as defendants had urged. Instead, the District Court applied "a 'tailored' *Daubert* analysis," and "examined the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered" without determining the ultimate admissibility of the testimony.³⁵ The Court of Appeals determined that this was a proper approach, acknowledging, "class certification is inherently tentative, and may require revisiting upon completion of full discovery."³⁶ More broadly, the Eighth Circuit emphasized that "[b]ecause a decision to certify a class is far from a conclusive judgment on the merits of the case, it is 'of necessity . . . not accompanied by the traditional rules and procedure applicable to civil trials.'"³⁷

V. CONCLUSION

Wal-Mart undoubtedly makes it harder for plaintiffs to obtain class certification in federal cases, including antitrust class actions. The Supreme Court's opinion requires lower courts to conduct a rigorous analysis of the facts and law to determine that all elements of Rule 23 have been met before certifying a class, and raises the bar to establishing elements such as commonality, which were previously understood to be "easily satisfied." Whereas lower courts in the past had shown reluctance to inquire into issues at the class certification stage that might

³¹*Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 154 (N.D. Cal. 2004).

³² 256 F.R.D. 82, 102 n.11 (D. Conn. 2009).

³³*Id.* at 100 (emphasis in original).

³⁴--- F.3d ---, 2011 WL 2623342 (8th Cir. July 6, 2011).

³⁵*Id.* at *4.

³⁶*Id.* at *5 (internal quotation marks omitted).

³⁷*Id.* at *5 (quoting *Eisen*, 417 U.S. at 178).

overlap with the merits of a case, *Wal-Mart* concludes that such inquiries are necessary and that some overlap with the merits is inevitable.

The precise implications of the Court's decision, however, remain to be worked out in the district courts, where some variation in the standards applied in class certification decisions will persist. Questions regarding the extent to which courts will weigh competing expert testimony—and the standards of proof and admissibility they will apply in doing so—are likely to remain a subject of controversy, and may require the Supreme Court to decide in the future issues left open by *Wal-Mart*.