# WAL-MART v. DUKES: A GIANT WIN FOR WAL-MART; SMALLER STEPS FOR EVERYONE ELSE

June 20, 2011

To Our Clients and Friends:

This morning, in *Wal-Mart Stores, Inc. v. Dukes*, a unanimous Supreme Court not unexpectedly held that the Ninth Circuit should not have certified a Rule 23(b)(2) class comprising 1.5 million former and current female employees of the country's largest private employer. A five-justice majority went further, however, finding that the proposed class failed to satisfy the "commonality" requirement of Rule 23(a)(2), thus blocking the plaintiffs from trying to recertify even a subgroup of the class under Rule 23(b)(3).

Wal-Mart's success in this case has been widely predicted since the Supreme Court heard oral argument. What was unknown was the degree to which the Court would alter the landscape of employment class actions and class actions generally. The answer, it seems, is that although the Court made some significant news today, it did not go nearly as far as some hoped and others feared.

Those concerned with employment claims will note the unanimous Court's bottom-line: Individualized claims for back pay never can be certified under Rule 23(b)(2), and if any claims for monetary relief may be certified at all under that Rule—a possibility the Court did not foreclose—they must be "incidental to the requested injunctive or declaratory relief." Rule 23(b)(2) classes, the Court held, are reserved for cases "[w]hen a class seeks an indivisible injunction benefitting all its members at once," in which "there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute [because] [p]redominance and superiority are self-evident."

All class action practitioners will take note of the majority's explicit rejection of the argument that its 1974 decision in *Eisen v. Carlisle & Jacquelin* precludes judges from examining the merits of a case when considering motions for class certification. "Rule 23 does not set forth a mere pleading standard," the Court wrote. Instead, "[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. . . . Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." Class action defendants also will cheer the majority's statement of "doubt" that courts can avoid conducting a full *Daubert* analysis of expert testimony offered at the certification stage.

The decision's long-range impact, however, will depend on how lower courts apply the majority's interpretation of Rule 23(a)(2)'s commonality requirement. The Court wrote that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . . . 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 the 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."

Justice Ginsburg's dissent, joined by Justices Breyer, Sotomayor and Kagan, accuses the majority of "blend[ing] Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevat[ing] the (a)(2) inquiry so that it is no longer 'easily satisfied,'" as commentators long have suggested. Justice Scalia, for the majority, wrote that the dissent misapprehends the ruling: "We quite agree that for purposes of Rule 23(a)(2) even a single common question will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there is even a single common question. And there is not here."

Clearly, the Court has toughened the Rule 23(a)(2) commonality requirement, at least to some degree. Where plaintiffs cannot allege a truly common course of conduct affecting an entire class, today's decision in *Dukes* certainly will prevent use of Rule 23(b)(2) to get around an inability to satisfy the predominance requirement of Rule 23(b)(3). The extent to which the Court today has made certification harder to achieve in cases where Rule 23(b)(2) classes would previously have been thought appropriate, however, will remain to be seen.

*  *  *

Please do not hesitate to contact us with any questions.

Anne E. Cohen
+1 212 909 6078
aecohen@debevoise.com

Jyotin Hamid
+1 212 909 1031
jhamid@debevoise.com

Mary Beth Hogan
+1 212 909 6996
mbhogan@debevoise.com

Jeffrey S. Jacobson
+1 212 909 6479
jsjacobson@debevoise.com