LJN LAW JOURNAL NEWSLETTERS

The Corporate Counselor®

An ALM Publication

Volume 26, Number 4 • August 2011

Class Action Lessons from *Wal-Mart v. Dukes*

By Scott Burnett Smith and Andrew L. Brasher

The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S. June 20, 2011), provided much-needed guidance to lower courts on the law of class actions. Class actions can be used to seek damages on behalf of millions of class members, and they can pose a great risk to the solvency of a business. Therefore, if a court certifies a class (in other words, determines that the plaintiffs can sue together instead of separately), a business can be forced to settle a case even if the plaintiffs' claims do not have merit.

In *Wal-Mart v. Dukes*, the Supreme Court decertified a class action in which more than a million female employees were attempting to sue Wal-Mart for gender discrimination in pay and promotion. The Court's decision to reverse the lower court was unanimous, but the Court split 5-4 on whether the class could be certified for the purpose of seeking an injunction. Justice Antonin Scalia wrote the majority opinion. Justice Ruth Bader Ginsburg dissented in part, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

The Supreme Court's decision draws bright lines that will redound to businesses' benefit and limit the size and scope of class actions in the future.

Common Questions of Law or Fact for the Class

The Court's most important ruling was 5-4. To sue as a class, plaintiffs must show that there are "questions of law or fact common" to all the members of the class. But because Wal-Mart allows each manager significant discretion in pay and promotion decisions, the employees in Wal-Mart could not point to a companywide decision that affected them in the same way. Instead, the employees argued that Wal-Mart's policy to give discretion to local managers itself had a negative impact on women, especially when combined with a "corporate culture" that allegedly permitted bias.

The Supreme Court majority rejected that theory as a basis to certify any kind of class action, even one that does not seek damages. The Court held that merely identifying some common question is not good enough. Instead, the Court explained that the question must go to a core issue in the case. In other words, the truth or falsity of that core issue "will resolve an issue that is central to the validity of each one of the [individual's] claims in one stroke." Under that standard, the employees' class could not be certified because the policy did not affect every class member in the same way: "left to their own devices most mangers in any corporation … would select sex-neutral, performance-based criteria for hiring and promotion," "[o]thers may choose to reward various attributes that produce disparate impact," "[a]nd still others managers may be guilty of intentional discrimination that produces sex-based disparity." Going forward, classes will only be certified if the common question is truly central to the claim that the class is trying to make.

Burden Begins at the Certification Stage

The same 5-4 majority also ruled that the plaintiffs must support their claim with evidence even at the class certification stage. "A party seeking class certification must affirmatively demonstrate 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." The Court reasoned that the employees could be joined in a class action if their managers "exercise[d] their discre-

Scott Burnett Smith is a partner and founder of the Appellate Practice Group at Bradley Arant Boult Cummings LLP. He can be reached at ssmith@babc.com or 256-517-5198. **Andrew L. Brasher** is an associate in the firm's Appellate Practice Group and can be reached at abrasher@babc.com or 205-521-8339.

tion in a common way," but the Court held there was no proof that the managers did so. Specifically, the Court discounted the employees': 1) anecdotal evidence of discriminatory statements, 2) statistical evidence of pay and promotions patterns that differ from nationwide figures, and 3) expert testimony that Wal-Mart's corporate culture made it "vulnerable to gender bias." This evidence was not "convincing proof of a companywide discriminatory pay and promotion policy." Because the employees could not tie together the "literally millions of employment decisions" about which they were complaining, it is "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."

Limitations on Individualized Monetary Relief

The Court unanimously ruled that plaintiffs cannot certify claims for individualized monetary relief under a rule providing for class actions 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 established a bright-line rule that this rule "does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment" or "when each class member would be entitled to an individualized award of monetary damages."

More Freedom for Trial Courts

The Supreme Court also signaled that it would no longer forbid trial courts from closely examining the merits of a plaintiff's claim when deciding whether to certify a class. This rule makes it harder to certify a class because future courts will have the chance to examine plaintiffs' actual proof before taking the drastic step of certifying a class.

Likewise, the Supreme Court hinted that it would allow a more-searching examination of the expert testimony offered by a party at the certification stage by requiring courts to apply the *Daubert* test to that testimony. Though the Court did not expressly require that a court apply *Daubert*, the majority opinion states that "[t]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so … " This statement makes the argument for applying *Daubert* much stronger, even if it stops short of an explicit requirement.

After *Wal-Mart*, courts will have more freedom to look at the merits and have more discretion to limit the kinds of expert evidence that plaintiffs can rely upon in certifying a class. The net effect is that plaintiffs will have a heavier evidentiary burden to carry at class certification, making certifying a class more difficult.

Novel Class Procedures Are Not Favored

If a business does not settle after a class is certified, it frequently faces a stacked deck at trial. Courts sometimes allow plaintiffs to choose "representative" class members who have the most favorable claims. Then the results of the trial of those representative class members' claims are extrapolated over the entire class. The Supreme Court expressly disapproved of such a "Trial by Formula." The Court held that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." This holding could have a broad impact on all sorts of representative actions, especially collective actions under the Fair Labor Standards Act (or "FLSA"), which are routinely tried using "representative" evidence.

State Courts Are the Next Battleground

The Court dodged the question of whether the U.S. Constitution puts limits on the size and scope of class actions. Because the Court instead based its decision on the Federal Rules of Civil Procedure, the Court's opinion is only binding on class actions filed in federal courts. (The Court also denied certiorari in *Philip Morris USA, Inc., et al. v. Jackson* (docket 10-735), which turned on the constitutionality of the certification of a far-reaching class action.) Unless and until the Supreme Court addresses the constitutional question, it may be that there are substantially different rules for class actions in federal and state courts.

The Impact of *Wal-Mart* For Corporate Counsel

It is tempting to cast *Wal-Mart* as a total victory for corporations, but this decision actually presents significant challenges to in-house lawyers formulating policy and assessing exposure to employment suits. These challenges arise from the importance the Supreme Court placed on the discretion that Wal-Mart granted to its store managers.

The prevailing wisdom in employment law has long been that the uniform enforcement of clear employment policies is the best protection from litigation by disgruntled employees. *Wal-Mart* puts a new spin on that wisdom. One reason for Wal-Mart's success is that there was no uniform policy that

governed promotion and hiring decisions across Wal-Mart's footprint. Without a uniform policy of universal application, the plaintiffs had to argue that the absence of a policy is itself a policy of discrimination. The Supreme Court rejected that argument, so future plaintiffs will have to point to a specific policy that applies to all members of a class in a manner that allows them to show a common injury.

Does that mean that corporations should look to reduce their reliance on employment policies? On the whole, we think not. Leaning heavily on discretion may reduce exposure to employment class actions, but it may cause individual suits to multiply.

There are better lessons to learn from *Wal-Mart*. Here are a few that we think strike an appropriate balance between taking full advantage of the Supreme Court's guidance without unduly increasing exposure to individual plaintiffs:

- Establish clear anti-discrimination policies: The best place to start is to draft and implement policies that forbid all forms of discrimination. *Wal-Mart* makes it more difficult for plaintiffs to prove a uniform policy of discrimination, and there is no better defense than to have a proven policy that shows just the opposite.
- Get policies off of the page and into practice: It is not enough to have a written policy anymore. Train and educate decision makers in your employment policies. Evaluate and reward them for successful and consistent implementation. Set up complaint procedures that shorten the distance between identifying a problem and getting it addressed.
- Document the role of discretion in employment policies: Because discretionary policies are less susceptible to class treatment, it behooves companies to document the areas where they give their managers discretion in employment decisions. This exercise has two benefits. First, a written policy that pushes discretion over employment decisions down to lower-level managers can be used to prevent class treatment in subsequent litigation. Second, and perhaps more importantly, it can provide a clearer picture of how employment decisions are actually made. The result of this "discretion audit" may be that a corporation sees areas in which its managers need additional policy guidance. It may also identify opportunities to devolve more decision-making authority to lower levels of management. In any event, it helps to know who has discretion over what.
- Remember that a lot depends on individuals: The people making decisions must appreciate the importance of their conduct in the company's broader anti-discrimination efforts. To put it more bluntly, a policy of discretion is only as good as the people exercising the discretion. Companies should train managers in how to document and evaluate their employees.

Finally, it is important not to take this opinion to say more than it does. The *Wal-Mart* class was massive. It contained more than 1.5 million members across the county, and implicated thousands if not tens of thousands of decision makers. It remains to be seen whether a smaller class could have been certified. Could a court certify a class consisting of employees from one department or one store? What about all of the stores in a region or business unit? There are no easy answers to these questions, and litigation is sure to come. Indeed, counsel for the decertified *Wal-Mart* class have promised to bring a flood of individual suits now that the collective action has been stopped.

Conclusion

The *Wal-Mart v. Dukes* decision is an important victory for corporations facing employment class actions. It makes massive classes much harder to certify, especially in employment cases. However, the risk of smaller class actions remains present, and plaintiffs may always elect to bring individual actions instead. Reducing exposure to employment class actions requires continued vigilance to employment policies and a commitment to the exercise of careful discretion by decision makers from top to bottom.