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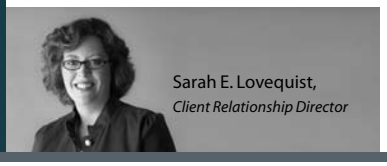

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Wal-Mart v. Dukes:
Maintaining The Procedural Status Quo

As has been widely- publicized, the case *Wal-Mart v. Dukes* was recently argued to the Supreme Court after Wal-Mart appealed a Ninth Circuit decision allowing a colossal class of former and current Wal-Mart employees to join together against their allegedly discriminating employer.[i] Wal-Mart's position is not unique: companies have sought to limit class action lawsuits like *Dukes* in favor of an individual or a small group of plaintiffs, and the Supreme Court has historically agreed.[ii]

Should the Supreme Court affirm the Ninth Circuit's certification, the proverbial barn doors will undoubtedly open for plaintiffs to attempt to certify various classes in employment discrimination actions, and any other area of law that focuses on individualized facts, such as drug and device product claims, consumer protection actions, medical malpractice, etc. The basic economies of defending large litigations often force unjustified settlements as trial in these situations is improbable and impractical.

Those who support the Supreme Court ruling that class certification was appropriate view *Dukes* as an employment discrimination case that promotes the right of women to be fairly and justly compensated and promoted in line with Title VII standards. However, a finding in favor of Wal-Mart for class decertification is separate and apart from whether Wal-Mart's actions were legal or correct - such a decision will support the letter of the law as intended by the drafters of Federal Rules of Civil Procedure Rule 23.

PROCEDURAL HISTORY

In the lower court-captioned *Dukes, et. al., v. Wal-Mart Stores, Inc.*, plaintiffs allege that Wal-Mart's policies promote company-wide discriminatory practices in violation of Title VII of the 1964 Civil Rights Act. Specifically, a would-be class of at least 500,000 female plaintiffs claims that Wal-Mart's women employees are paid less than men in comparable positions, and receive fewer and wait longer for promotions to in-store management positions than men. Plaintiffs sought to certify a nationwide class of former and current Wal-Mart employees subjected to these allegedly discriminatory policies and conditions, and the District Court for the Northern District of California certified same.[iii]

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Wal-Mart appealed class certification to the Ninth Circuit Court of Appeals on the grounds that 1) the district court erred in concluding plaintiffs met the class requirements under Rule 23(a); 2) Wal-Mart was deprived of its right to respond to individual plaintiff's claims of discrimination; and 3) the district court failed to recognize that plaintiffs' monetary claims predominated over their claims for injunctive or declaratory relief.[iv]

The Ninth Circuit affirmed class certification, and the Supreme Court granted certiorari on December 6, 2010 to decide whether a claim for monetary relief can be certified under Rule 23(b)(2) and whether the class was proper altogether under Rule 23.

RULE 23

Federal Rules of Civil Procedure Rule 23(a) sets forth initial requirements that must be met in order to certify a group of plaintiffs as a "class," namely commonality, typicality and adequacy of representation.[v]

Assuming these pre-requisites are satisfied, Rule 23(b) outlines three different types of class actions that may be maintained. A class action may be maintained if Rule 23(a) is satisfied and prosecuting separate actions would create a risk of inconsistent or varying adjudications, or adjudications for one class member would substantially impede the ability of other class members to protect their own interests.[vi] A class could instead be certified under Rule 23(b) if final injunctive or corresponding declaratory relief may be granted to the class as a whole.[vii] The third option for certifying a class under Rule 23(b) is if a court finds common questions of law or fact to the class members predominate over any questions affecting only one class member, making a class action superior to any other available method for adjudication.[viii]

In finding a class action exists under Rule 23(b)(3), a court must take into account the class members' individual interest in controlling a separate action, the extent and nature of any litigation concerning the same controversy already underway, whether or not concentrating the litigation in the particular forum is desirable, and the likely difficulties in managing a class action.[ix]

THE NINTH CIRCUIT'S DECISION

In affirming the lower court's class certification, the Ninth Circuit Court of Appeals set forth the standards that district courts should apply in deciding motions for class certification pursuant to Rule 23.[x] Citing to the Supreme Court's decision in *Gen. Tel. Co. of Sw. v. Falcon*[xi], the Court specifically stated that, "district courts are not at liberty to, but must, perform rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims."[xii] The Court went on to explain that a district court may not consider the merits of any issues not related to Rule 23's class certification requirements, and that assessing whether Rule 23's requirements have been met is owed "great deference" by the district court.[xiii]

Applying this standard, the Court proceeded to analyze whether the lower court correctly certified the Dukes class. The bulk of the Court's analysis centered on Rule 23(a)(2)'s "commonality" requirement[xiv]: "Evidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory."[xv] Relying on fact, expert, statistical and anecdotal evidence, the Court ultimately affirmed the district court's certification under Rule 23(b)(2). Once satisfied that Rule 23(a)'s requirements had been met, the Court turned its focus to whether certification was appropriate under Rule 23(b)(2) or (b)(3). The Court found that plaintiffs' claims were appropriately brought pursuant to Rule 23(b)(2) with regard to current Wal-Mart employees despite plaintiffs' significant claim for back pay since back pay is an equitable remedy under Title VII.[xvi] The Court remanded the issues of bifurcated punitive damages and monetary relief for plaintiffs no longer employed by Wal-Mart as of the date of filing to the district court to decide under Rule 23(b)(2) and (b)(3) respectively.[xvii]

The Ninth Circuit, in affirming certification of the Dukes class, disregarded the Federal Rules as a whole and the intent of Rule 23 specifically. Both California courts refused to require plaintiffs to identify a specific policy that caused the differences, and that the policy was enacted with discriminatory intent to the detriment of all class members. Instead, both courts stated that the glue that binds

the class together is whether or not Wal-Mart's "non-policy policy" is discriminatory. Stated differently, "it is the shared quest for an answer to why female Wal-Mart employees make less than men that gives lawyers the power to assemble [plaintiffs] into one huge class action."[xviii]

IMPRESSIONS FROM ORAL ARGUMENT

Although the *New York Times* reports that the Justices "appeared closely divided"[xix] during oral argument over the questions raised on appeal, other news stories report that the Justices were skeptical about allowing a massive Title VII case based on statistical evidence to proceed, begging the assumption that the Court will hold the women may not form one class in which to bring their claims.

The standards set forth in Rule 23 were vetted from both the defense and plaintiffs' perspectives. Wal-Mart argued that Rule 23(a)'s "cohesion requirements" were not met: plaintiffs' class is internally fractured because, in addition to a myriad of other reasons, it contains 544 women managers who are part of the group that allegedly made the decisions that negatively affected the remainder of the class.[xx] Questioning whether commonality exists, Justice Antonin Scalia pointed out that the class includes both those women who were underpaid and who were not underpaid or who suffered no harm at all.[xxi]

Plaintiffs' responded that Wal-Mart enforces a company-wide policy that gives local store managers too much discretion in deciding pay increases and promotions, giving rise to discriminatory practices; however, plaintiffs also assert that local store managers did not have any discretion in making these decisions, but instead were directed by Wal-Mart policy. Justice Anthony Kennedy pointed out that plaintiffs present a discrimination theory that is blatantly inconsistent:

> *". . . your complaint faces in two directions. Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that's going on.*

Then in the next breath, you say, well, now there supervisors have too much discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is."[xxii]

Justice Scalia echoed Kennedy's sentiment:

> *"I'm getting whipsawed here. On one hand, you say the problem is that they were utterly subjective, and on the other hand you say . . . a strong corporate culture guides all of this. Well, which is it? It's either the individual supervisors are left on their own, or else there is a strong corporate culture that tells them what to do."*[xxiii]

Justice Scalia went on to state that, "if somebody tells you how to exercise discretion, you don't have discretion."[xxiv] Although Rule 23(a)'s commonality, typicality and representation standards should be relatively easy for one seeking class certification to overcome, the dialogue exchanged at oral argument suggests that plaintiffs may not have met this initial burden.[xxv]

Notwithstanding any Rule 23(a) deficiencies, a lengthy discussion was had regarding Rules 23(b)(2) and (b)(3)'s application to the within matter. To be sure, several Justices supported the possibility that a case could be certified under Rule 23(b)(2) for injunctive relief only[xxvi], on the ground that Wal-Mart's hiring policies are discriminatory because they are excessively subjective. Justice Ruth Bader Ginsburg referred to the advisory committee's notes in pointing out that Rule 23(b)(2) is not the proper certification tool for classes where money damages predominate, noting that about half of the plaintiffs have exhibited disinterest in injunctive relief, but that everybody is interested in money.[xxvii] Justice Ginsburg continued that, if damages predominate, plaintiffs need to make their case under Rule 23(b)(3).

In discussing Rule 23(b)(3), Justice Sonia Sotomayor questioned plaintiffs' contradictory assertion that an individualized hearing

is impossible with a class of this size, but that the class would instead have individualized hearings through statistical data, to the detriment of Wal-Mart's opportunity to defend itself, to which plaintiffs agreed.[xxviii]

Overall, the Justices' sentiment was predominately against allowing Rule 23(b)(2) to be used as a vehicle to resolve individual back pay claims. Several Justices' questions begged responses that highlighted the differences between the women who form the class and their individual claims, thus defeating Rule 23(a)'s "commonality" and "typicality" prongs. Also, several Justices seemed to agree that subjecting Wal-Mart to a trial of this magnitude, especially if based on statistical evidence, would contradict traditional due process concepts.

CONCLUSION

When one considers only Rule 23(a), the *Dukes* class fails the commonality, typicality and adequacy requirements as different types of Title VII employment discrimination are alleged. Plaintiffs' claims range from inequality in pay to unequal opportunity for advancement within the company, and decisions on these issues were made by different store managers at different Wal-Mart stores across the county.[xxix]

This case currently, at its core, is not about civil rights, consumers, unions, or protecting corporate America, but rather preserving the original intent of Rule 23. As stated by Wal-Mart at oral argument, "I think the drafters of Rule 23(b)(2) would have been shocked if they had learned that this case that involves millions of claims for individualized monetary relief . . . were being sought to be included in a (b)(2) class."[xxx]

The Court's decision is expected sometime in June 2011.

ENDNOTES

i *Dukes v. Wal-Mart Stores, Inc., infra.*
ii James Vicini, *Wal-Mart opposes big sex-bias case at top court,* msnbc.com, March 29. 2011, http://www.msnbc.msn.com/cleanprint/CleanPrint-Proxy.aspx?unique=1301411611583, March 29, 2011.
iii *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141-42 (N.D.Cal.2004); filed June 19, 2001.
iv *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571,579 (9th Cir. 2010).
v Fed. R. Civ. P. 23(a)vi Fed. R. Civ. P. 23(b)(1)
vii Fed. R. Civ. P. 23(b)(2)
viii Fed. R. Civ. P. 23(b)(3)
ix *Id.*
x *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).
xi *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)
xii *Dukes* at 581.
xiii *Id.* at 579.
xiv Wal-Mart did not dispute Rule 23(a)(1)'s "numerosity" requirement, see *Id.* at 599.
xv *Dukes* at 612.
xvi *Id.* at 619.
xvii *Id.* at 621, 623.
xviii Daniel Fisher, *Wal-Mart v. Dukes Ask Courts To Fix The World,* Forbes, March 28, 2011, http://blogs.forbes.com/danielfisher/2011/03/28/wal-mart-v-dukes-ask-courts-to-fix-the-world, March 29, 2011.
xix Adam Liptak, *Justices Take Up Crucial Issue In Wal-Mart Suit,* The New York Times, March 29, 2011, http://www.nytimes.com/2011/03/30/business/30walmart.html, March 31, 2011.
xx *Wal-Mart Stores, Inc. v. Betty Dukes, et. al.,* Supreme Court cause 10-277, oral argument, transcript page 3, lines 11-19; page 54, lines 13-24.
xxi *Id.* at page 38, line 18 – p. 39, line 4.
xxii *Id.* at page 28, lines 2-7.
xxiii *Id.* at page 29, lines 13-20.
xxiv *Id.* at page 30, lines 8-9.
xxv *Id.* at page 33, lines 11-17.
xxvi See e.g. *Id.* at page 54, lines 8-12.
xxvii *Id.* at page 50, lines 6-21.
xxviii *Id.* at page 46, lines 2-25
xxix *Id.* at pages 9-10, line 5.
xxx *Id.* at page 21, line 24 – p.22, line 3