

Wal-Mart v. Dukes: Implications For Antitrust Class Actions

July 11, 2011 By [David R. Garcia](#) & [Leo Caseria](#)

On June 20, 2011, the United States Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, holding that 1.5 million female Wal-Mart employees around the nation could not bring discrimination claims under Title VII of the Civil Rights Act of 1964 against Wal-Mart on a classwide basis, because the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) were not satisfied. The decision is yet another major decision from the Court this term relating to class actions. (*See, e.g., AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. Apr. 27, 2011)). The Supreme Court's decision in *Wal-Mart* clarifies the "rigorous analysis" that courts must conduct under Rule 23, and reaffirms that the Rules Enabling Act, 28 U.S.C. section 2072(b), cannot be applied in a way that changes substantive rights. *Wal-Mart* gives antitrust defendants additional potential ammunition to defeat class certification, but it remains to be seen how courts will apply *Wal-Mart* to a Rule 23(b)(3) antitrust class action instead of a Rule 23(b)(2) Title VII discrimination class action.

The *Wal-Mart* Decision

The named plaintiffs in *Wal-Mart* alleged that Wal-Mart's local store managers exercised their discretion over pay and promotion matters in a way that disproportionately favored men over women. Plaintiffs alleged that Wal-Mart itself was liable under Title VII because Wal-Mart knew its managers were treating men and women differently but refused to do anything about it. According to

plaintiffs, Wal-Mart's inaction gave rise to a "corporate culture" of bias against women that affected each and every female Wal-Mart employee. (Slip Op. at 4).

The District Court and Ninth Circuit both held that the prerequisites to class certification under Federal Rule of Civil Procedure 23(a) -- numerosity, commonality, typicality, and adequacy -- were satisfied. The Supreme Court reversed, holding that commonality was lacking because plaintiffs failed to prove the existence of common "questions of law or fact." Plaintiffs had presented three types of evidence to establish commonality: (1) "statistical evidence about pay and promotion disparities between men and women" at Wal-Mart; (2) "anecdotal reports of discrimination from about 120 of Wal-Mart's female employees"; and (3) expert testimony from sociologist Dr. William Bielby, who conducted a "social framework analysis" of Wal-Mart's culture and practices. (Slip Op. at 5-6). The Court held that none of this evidence constituted "significant proof" of a "general policy of discrimination" at Wal-Mart, as required to establish commonality in Title VII cases. (Slip Op. at 12-13) (the other method of establishing commonality in a Title VII case, showing a "biased testing procedure," had no application to the case). The Court held that plaintiffs' anecdotal and statistical evidence regarding disparities between men and women at the national and regional level could not establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." (Slip Op. at 16-17). Moreover, plaintiffs' anecdotal evidence was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory," because the number of anecdotes was simply too small. (Slip Op. at 17-18). Dr. Bielby testified, based on his social framework analysis, that Wal-Mart had a strong corporate culture and was vulnerable to gender bias, but this evidence also failed to establish commonality because he could not determine to what extent specific employment decisions were actually guided by gender bias. (Slip Op. at 13-14).

The Supreme Court also held that plaintiffs' claims for backpay could not be certified under Rule 23(b)(2), again reversing the District Court and Ninth Circuit. Rule 23(b)(2) authorizes class actions where "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 explained that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." (Slip Op. at 20). In contrast, the Court held that "individualized monetary claims belong in Rule 23(b)(3)," and a court must make findings regarding predominance and superiority before such a class can be certified. (Slip Op. at 22-23).

***Wal-Mart* Definitely Explains The Court's Obligation To Conduct A "Rigorous Analysis" At The Class Certification Stage**

In holding that commonality was lacking under Rule 23(a), the Court clarified the standards applicable at the class certification stage. It reaffirmed the holding of *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) that a court must conduct a "rigorous analysis" to satisfy itself that the prerequisites of Rule 23(a) have been satisfied. The Court held that under the "rigorous analysis" standard, an inquiry into the merits of plaintiff's underlying claims is necessary to the extent merits issues overlap with class issues. (Slip Op. at 10-11). Indeed, the Court held that such overlap would occur "frequently." (Slip Op. at 10). The Court also noted that Rule 23 "does not set forth a mere pleading standard," and that a party seeking class certification "must affirmatively demonstrate his compliance with the Rule." (*Id.*).

This decision solidifies what had been an emerging trend among the Courts of Appeal, including the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits, and adopted by the Ninth Circuit in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). As the Ninth Circuit noted, arguments in favor of a less rigorous analysis at the class certification stage were often based on a "misunderstanding" (see *Dukes*, 603 F.3d at 582) of the following statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974): "We find nothing in either the language or history of Rule 23 that gives a court any

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." The Supreme Court agreed, and explained that *Eisen* was distinguishable because the district court there had conducted a preliminary inquiry into the merits in order to shift the cost of class notice under Rule 23(c)(2), and "not in order to determine the propriety of certification under Rules 23(a) and (b)." (Slip Op. at 10 n.6). The Court then eliminated any doubts regarding *Eisen* with the following statement: "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases." (*Id.*).

The implications for antitrust cases are significant and evident from decisions such as *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009), *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008), and *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005). In determining whether a plaintiff class should be certified, courts cannot take the allegations in an antitrust plaintiff's complaint at face value if defendants have presented contrary evidence. Arguments for and against class certification in antitrust cases are often based on expert testimony that overlaps with the merits of plaintiff's antitrust claims, and *Wal-Mart* leaves no doubt that a federal court in such a case should consider this evidence regardless whether it comes from a plaintiff or defendant, if it is necessary for the court to satisfy itself that the prerequisites of Rule 23 have been met.

***Wal-Mart* Holds That The Rules Enabling Act "Forbids" Courts From Using Class Procedures To Change Substantive Rights**

In holding that plaintiffs' claims for backpay could not be certified under Rule 23(b)(2), the Court rejected the argument that plaintiffs' backpay claims were merely "incidental" to plaintiffs' claim for injunctive relief, because they were subject to individualized defenses by Wal-Mart. (Slip Op. at 26-27). Specifically, under Title VII's "detailed remedial scheme," if Wal-Mart could "show that it took

an adverse employment action against an employee for any reason other than discrimination," Wal-Mart could avoid liability. (Slip Op. at 26). The Ninth Circuit had held that individualized defenses could be avoided if the trial court implemented a trial plan based on sampling and extrapolation. 603 F.3d at 625-27. The Supreme Court disagreed, holding that because the Rules Enabling Act, 28 U.S.C. section 2072(b), "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" the trial court had no power to certify a class "on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (Slip Op. at 27).

The implications of the Court's interpretation and application of the Rules Enabling Act has major potential consequences for antitrust class actions, which typically seek monetary relief and are usually certified under Rule 23(b)(3). The heart of the Rules Enabling Act portion of the decision seems to suggest that a federal statute containing a specific method for calculating damages upon the finding of a violation arguably requires a defendant to have an opportunity to see the damage calculation in the damage statute applied one plaintiff at a time. In the antitrust context this has particular application to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), H.R. 1086, 108th Cong., 150 Cong.Rec. H3656, Title II, Section 201, *et seq.* (recently extended until 2020 pursuant to H.R. 5330), which provides a detailed remedial scheme applicable to cooperative civil antitrust defendants who have successfully applied for criminal amnesty under the U.S. Department of Justice's antitrust leniency program. ACPERA limits the damages recoverable against such a defendant to the actual damages caused by its own conduct, instead of the joint and several liability and treble damages typically available in antitrust conspiracy cases. *Wal-Mart* may bar antitrust plaintiffs from obtaining class certification against an ACPERA defendant using a common expert formula if doing so would deny an antitrust defendant's statutory right under ACPERA to present individualized evidence as to whether particular class members were actually affected by that defendant's own conduct. Also, even if an ACPERA defendant could be permitted to present individualized evidence regarding ACPERA damages within the

context of a class action, a court would be faced with the tough question as to whether common issues can predominate over individualized questions under Rule 23(b)(3) if hundreds or thousands of mini-trials regarding ACPERA damages are planned.

Wal-Mart's Rules Enabling Act analysis may have even broader implications. If the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right'" (Slip Op. at 27), then applying Rule 23 to enlarge a plaintiff's antitrust claim should be just as forbidden as applying Rule 23 to abridge an affirmative defense, as was the case in *Wal-Mart*. If so, then class certification for many antitrust lawsuits may be difficult to obtain. For instance, state law indirect purchaser antitrust class actions, which are often removed to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. sec. 1332(d) ("CAFA"), would be barred to the extent that defendants are not permitted to present individualized evidence to establish that any alleged overcharge was not "passed on" through a specific distribution channel to a particular plaintiff. And if defendants are permitted to disprove pass-on, for instance, by showing that individual retailers absorbed an alleged overcharge by offering coupons or a sale price to consumers, and thereby prevented the overcharge from being passed on to certain plaintiff consumers, certifying such a class may be barred by the predominance and superiority requirements under Rule 23(b)(3). The same problem likely arises in many direct purchaser class actions brought under federal antitrust law where prices are individually negotiated between defendants and each direct purchaser. Defendants should have the right to present individualized evidence to establish that prices were based on factors unique to each purchaser and each transaction.

On the other hand, oppositions to class certification based on the Rules Enabling Act are arguably nothing new in antitrust cases. *Wal-Mart* may be viewed as simply reaffirming the Supreme Court's earlier holdings that Rule 23 must be interpreted in conjunction with the Rules Enabling Act. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591, 612-13, 629 (1997). If so limited, it may provide little help to antitrust defendants.

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