



## Recent Supreme Court Decisions Could Prove Favorable For Oklahoma Business Climate

Recent United States Supreme Court decisions making it more difficult to certify lawsuits as class actions have the potential to create a more business friendly climate in Oklahoma. In theory, a class action lawsuit saves resources because individuals who share the same legal claim can band together in one lawsuit. Unfortunately, in practice, the class action system has been prone to abuse by opportunistic class action attorneys who leave no stone unturned in their search for courts with a history of readily certifying cases for class action treatment. Some see the class action primarily as a weapon for coercing settlements from businesses that often cannot afford to the risk of defending a large class action in court. However, the plaintiffs in these cases often end up with comparatively little, while their attorneys walk away with the lion's share of settlement money paid by the targeted business defendant. In fact, as many can attest, class members often will not go to the trouble of filling out paperwork to claim the trivial amounts they might receive from a class action settlement.

Over the last decade or so, there have been significant numbers of class actions filed in and certified by Oklahoma courts, thus creating an unfriendly climate for businesses. A common variety has been against companies who operate oil and gas wells in Oklahoma. The plaintiffs in those actions are typically mineral owners who have been recruited by class action attorneys. The plaintiffs allege that the oil and gas operator has underpaid their royalties. Often, Oklahoma courts have been quick to certify these types of cases as class actions. Given that oil and gas companies can choose where to invest their exploration budgets, such companies might think twice about investing in Oklahoma with its history of opportunistic class actions.

The United States Supreme Court has recently issued decisions that potentially improve the situation by emphasizing just how stringent the requirements are for establishing a class action. In the 2011, in the *Wal-Mart v. Dukes* case, in which Wal-Mart was accused of widespread gender discrimination, the Supreme Court clarified "commonality," a fundamental prerequisite in class action cases. The court noted that crafty attorneys often claim commonality is satisfied by pointing to high level "common questions." The Supreme Court held that focusing on common questions is the wrong approach. Instead, courts must focus on whether there would be a common answer to the central questions (questions that will drive resolution of the entire litigation) for all potential plaintiff class members. Absent a common answer to a common question that drives the litigation, certification of a class is improper. For example, in a class action challenging an oil and gas company's royalty payments to mineral owners, it would not be enough to say there is a common question as to whether the company

is paying royalties properly. The answer to that question would vary from one royalty owner to the next based on the specific terms of his or her oil and gas lease, or the particular circumstances of the oil and gas being produced and sold subject to the lease. Consequently, given the lack of a common answer, certifying a class in which a handful of royalty owners decide the claims of all royalty owners in the class should be improper.

In 2013, the Supreme Court followed up its landmark *Wal-Mart* decision with *Comcast Corp. v. Behrend*. Although the *Wal-Mart* decision had clearly telegraphed that class action analysis must be stricter than in the past, *Comcast*, following on *Wal-Mart's* heels, leaves no doubt that a new era in class litigation has arrived. *Comcast*, which involved a dispute with a cable TV provider, reversed a class certification decision and in the process emphasized that the difficulty of calculating damages on a class-wide basis can be enough to prevent certification. In the past, courts had often held that difficulties in calculating damages would never be enough to prevent certification of a case as a class action.

Businesses are already seeing the positive influence of these important decisions. Cases that might have been certified with little trouble are now being denied class action status. The 10th Circuit Court recently vacated two United States District Court decisions (one in Kansas and one in Oklahoma) certifying claims against XTO Energy, Inc. (a subsidiary of ExxonMobil) for class action status. The 10th Circuit sent the cases back to the district courts, directing the courts to more carefully analyze the class action requirements.

In sum, class action lawsuits are expensive to litigate and can threaten the very existence of a company. With the new emphasis by the Supreme Court on trying to ensure that only those claims that can truly meet the requirements of a class action are certified for class action treatment, businesses may be spared the threat of coercive class actions that, in many cases, have padded the pockets of plaintiffs' attorneys while doing little to provide justice for the plaintiffs.

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