

Dukes v. Wal-Mart: What It May Mean for Mass Torts

June 21, 2011 by [Sean Wajert](#)

Three new Supreme Court decisions to comment on this week. Let's take one at a time and start with [Dukes v. Wal-Mart](#), 564 U.S. ___ (2011). The U.S. Supreme Court yesterday overturned a lower-court decision that had certified a massive class action against retailer Wal-Mart. The suit was filed by current or former employees of petitioner Wal-Mart, who sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a class of some 1.5 million female employees. They claimed that local managers exercised their discretion over pay and promotions disproportionately in favor of men.

The District Court certified the class, finding that respondents satisfied Federal Rule of Civil Procedure 23(b)(2)'s requirement of showing that "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 Ninth Circuit substantially affirmed, and ruled that the class action could be "manageably" tried without depriving Wal-Mart of its right to present its statutory defenses.

We will leave to our colleagues on the [Labor team](#) how this decision impacts employee discrimination claims. But let's talk about the larger potential significance of the decision for mass tort class actions.

The Court began where we always like to begin in class certification briefing, reminding everyone that a class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims, when applied correctly.

The crux of this case, said the Court, was commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." But that language, warned the Court, is "easy to misread" as any competently crafted class complaint can raise seemingly common questions. (citing the [late mass tort scholar](#) R. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 131–132 (2009)). Such as the standard ones relating to defendant's alleged conduct. But simply reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury, which in turn does not mean merely that they have all suffered a violation of the same provision of law. The allegedly common contention must be of such a nature that it is capable of class-wide resolution—which means that 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. So, what matters is not the raising of seemingly common questions, but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Thus, the Court came down on the side of the [lower courts that have applied the commonality rule](#) with rigor and with common sense, requiring meaningful common questions. And commonality thus becomes a more potent weapon in your efforts to defeat mass tort class actions.

Second, the Court re-emphasized that a party seeking class certification must affirmatively demonstrate his compliance with the Rule. Sometimes it may be necessary for the trial court to probe behind the pleadings before coming to rest on the certification question. Certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. And frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. "That cannot be helped." The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Not completely new, but an important reminder.

Third, the Court noted that the parties disputed whether plaintiffs' expert's testimony met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class action proceedings. Although dicta, the Court went out of its way to note, "We doubt that is so." A signal to the lower courts who somehow think junk science is acceptable at the class certification hearing, and a green light to [those that apply *Daubert*](#).

Fourth, the Court also concluded that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2), holding that such claims cannot be, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief. One possible reading of this provision is that it applies only to requests for injunctive or declaratory relief and does not authorize the class certification of monetary claims *at all*. The Court did not have to reach that question because, at a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy this Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Thus, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. The Court said it was "clear that individualized monetary claims belong in Rule 23(b)(3)." While not deciding in this case whether there are any forms of truly "incidental" monetary relief that are consistent with this interpretation of Rule 23(b)(2) and that comply with the Due Process Clause, the Court's ruling may impact mass torts such as medical monitoring claims in which the plaintiffs try to avoid the predominance test of Rule 23(b)(3) by seeking a so-called court administered fund to pay for medical monitoring for the class rather than

individual medical monitoring damages. When the "program" sought is in essence an injunction ordering defendant to pay for each class member's individual medical screening tests, (b)(2) should not be available.

Fifth, the Court noted that the 9th Circuit had found the trial of the proposed class action to be manageable and in accord with due process by ignoring the traditional procedures and proceeding "with Trial by Formula." In other words, a sample of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a special master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. This extrapolation methodology has been proposed by many mass tort plaintiffs (including in asbestos) as a means to make the class trial "manageable." The Supreme Court was clear: "We disapprove that novel project." Because the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right, a class cannot be certified on the premise that the defendant will not be entitled to litigate its defenses to individual claims. The same issue applies to the trial plans proposed by many mass tort plaintiffs, which try to use the class rule to prevent defendants from ever having an opportunity to litigate individual defenses as to individual class members.

Lots to think about.