The Upshot: What Wal-Mart v. Dukes Means for Future Aggregate Litigation

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The Supreme Court's decision overturning the certification of the massive gender discrimination class in *Wal-Mart v. Dukes* [pdf] has been well-publicized. We go behind the headlines, therefore, to offer a few educated guesses as to what the case will mean for the future of class actions and other forms of aggregate litigation:

- Statewide classes barred on state law will become more common as claimants will seek friendlier state jurisprudence on the commonality question;
- Some counsel will seek to litigate claims through "mass actions" of large numbers of individual claimants rather than face rigorous class action requirements;
- Greater care will be taken in framing class definitions to meet *Wal-Mart*'s more rigorous commonality standards;
- The practice of "smuggling" monetary claims into purported injunctive class actions will stop;
- Attempts to bring medical monitoring claims as injunctive class actions will face increased scrutiny;
- Merits-related evidence will usually be essential at certification hearings;
- Expert testimony at the certification stage will be subject to *Daubert* scrutiny;
- The unanimous rejection of "trial by formula" will stifle "creative" attempts to dispose of aggregated claims by denying the defendants' right to present individual defenses. "Bellweather" trials will not be binding.