

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

Against "Rough Justice" Part One: The Fidelity Imperative

May 8, 2011 by [Vance Wittie](#)

In his recent [article](#) in the online magazine, *Slate*, Richard Thompson Ford discusses the key class action case, *Wal-Mart v. Dukes*, currently pending before the Supreme Court. Ford notes some of the problems of handling such an enormous number of claims as class actions. Under the *Dukes* trial plan, each class member's entitlement to back pay will be determined by a mathematical model, without permitting Wal-Mart to challenge the merits of a particular class member's claim.

Ford is okay with this because, in his view, "rough justice is better than no justice at all." His rationale is revealing. He notes that proving individual discrimination is difficult and that "even if the statistics prove that Wal-Mart discriminated against a lot of women, very few would be able to prove they were one of them."

Ford's concern for "rough justice" is typical of advocates for procedures that aggregate many claims together for a single adjudication. Generally, these advocates worry about "false negatives" in civil litigation—the risk that a wrong will go unpunished rather than false positives—the risk that an innocent party will be forced to pay. While advocates of "rough justice" are right to worry that procedures should not be so cumbersome as to preclude legitimate claims, their proposed remedy is worse than the disease for several reasons. This post explores one of those reasons. Other reasons will be addressed in future posts.

Ford's concern that many women would be unable to prove a claim gives away the game. He advocates the class action approach not simply because it deals with numerous claims more efficiently, but because it allows persons to recover as part of an aggregated claim who would not have been able to recover as an individual claimant. It allows losers to become winners, not because the merits of the individual cases require that result but because weaknesses in individual claims are obscured when the dispute is litigated on a mass basis.

Ford's argument is not really about class actions at all. His "rough justice" position ultimately boils down to a preference that a member of a group that has experienced discrimination should be permitted to recover, even if the particular individual cannot show that she has been affected by that discrimination.

Whatever the merits of this view, it is simply not the law. To obtain money damages, a plaintiff must show that she has been personally injured. Converting a case to a class action should not be permitted to change this result. The Rules Enabling Act prescribes that the rules of procedure are not to be used to alter a party's substantive rights.



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Procedural devices such as class actions are meant to implement the law more efficiently, not to change what a claimant must establish to win the case. Hence, the American Law Institute's Principles of Aggregate Litigation speaks of the essential requirement of "fidelity" in all forms of aggregate litigation. Aggregation of claims must be used to implement the law faithfully, not to alter it. Indeed, to use class procedures to change the law is undemocratic. It alters the policy choice enacted by Congress when it restricted the back pay remedy to those who had personally been victims of discrimination.

It's tempting to use techniques such as class actions as a kind of a short cut to justice. But too often such short cuts never reach the intended destination. Sometimes they take you places you never wanted to go.