

THE LARGEST EMPLOYMENT CLASS ACTION WE'VE EVER SEEN - REJECTED/ DE-CERTIFIED BY THE U.S. SUPREME COURT

IN THE LAND OF CLASS ACTIONS, THE GROUND HAS SHIFTED

The U.S. Supreme Court has just handed down *Dukes v. Wal-Mart Stores, Inc.*,¹ a highly-anticipated decision that will have enormous impact on future class action litigation. As the largest potential employment-related class we have ever seen (roughly 1.5 million possible class members), the *Wal-Mart* action can be viewed as the sister case to the largest securities class action that the U.S. has ever had: *In re IPO Securities Litigation*, decided in New York at the end of 2008.² Legal experts and the business community have been eagerly awaiting the reconciliation of these two cases on the certification or procedural mandates of class actions.

Both decisions ultimately denied class action status to the plaintiffs. But, as we learned, it's never over 'til it's over.³ There is no doubt, however, that the Supreme Court's decision in *Wal-Mart* has radically changed the playing field for future class action litigation.

TELLING US SOMETHING WE DON'T KNOW - ABOUT CLASS ACTIONS

In *Wal-Mart*, the Supreme Court reminded us that “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’ [And that] [i]n 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.” The Court then focused on the *commonality* requirement as the crux of the case – the rule requiring a plaintiff to show that “there are questions of law or fact common to the class.”⁴



Class Action...a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class. This procedure is available in federal court and in most state courts under the Federal Rule of Civil Procedure 23. [*Black's Law Dictionary*]

Mass Action...refers to any civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. [The Class Action Fairness Act of 2005 (CAFA)]

Noting that it's easy to get this wrong, the Court instructed us to consider not only whether the class members “have suffered the same injury”⁵ and pointed out that Title VII,⁶ for example, can be violated in many ways (by intentional discrimination, by hiring and promotion practices that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company), but we must also consider whether the same remedy would suffice for all class members. So, in addition to a common complaint (e.g., a discriminatory bias on the part of the same supervisor), the common contention must be capable of class-wide resolution in order to be granted class certification and permitted to continue as a class. This is a much different analysis than has been used to date.

The Court also held that proof of commonality will frequently overlap with the merits of the case – a shift from the usual position that it is inappropriate to consider the merits of plaintiffs’ claims at the certification stage of class litigation.

TELLING US SOMETHING WE DON'T KNOW - ABOUT CLASS ACTIONS

The plaintiffs’ theory in *Wal-Mart* was that a strong, uniform corporate culture – even in the decentralized decision-making environment of the country’s largest private employer – permitted bias against women to impact, perhaps subconsciously, the discretionary decisions of Wal-Mart’s thousands of managers, thereby making every woman at the company victim of one common discriminatory practice. Based on this analysis, an easy takeaway could be that decentralized decision-making may be a strong deterrent to national class actions.

The plaintiffs then relied on statistical evidence about pay and promotion disparities between men and women at the company, supported by the testimony of a sociologist as well as anecdotal reports of discrimination from about 120 employees. The scathing response of the majority of the Court to the statistical evidence also suggests that even where there may be a centralized Human Resources function, purely statistical evidence, without support of direct evidence, may not be sufficient for plaintiffs to win the day.

HAS THE SKY FALLEN FOR PLAINTIFFS IN OTHER FUTURE CLASS ACTIONS?

While *Wal-Mart* was an employment matter, the federal rules used to constitute or certify a class are the same for **all** federal class actions (and are the basis of many state rules as well). This means that the decision here will be relevant to **all** federal class actions as well as a large number of state-based class actions, including:

- Products Liability
- Environmental
- Securities
- Wage and hour
- ERISA matters

Looking to the plaintiffs in *Wal-Mart*, the fight may continue with smaller class actions. The Supreme Court’s decision addressed only whether a nationwide class action could go forward, not the merits of the plaintiffs’ contentions of gender-based employment discrimination. Actions are already being taken to rally potential plaintiffs whose period to bring claims was tolled (frozen) while the national class action was pending.⁷ Some may decide to bring small classes or file charges with the EEOC or state agencies.⁸

While it may seem counter-intuitive that, after failing as a federal class action, smaller local- or state-based class actions could be filed over the same basic allegations against the same defendants, the same Supreme Court that decided *Wal-Mart* handed down a decision on this issue in a products liability decision just days before their decision in the employment case.⁹ In this earlier decision, the Court held that denial of class certification on a federal basis did not serve as a ban on state-based class-action suits; rather, it was up to each relevant state to make its own determination as to whether or not a class action would meet its own standards for certification. (Of course, as noted above, many of the state rules on class certification are based on the federal rules, so the outcome of additional litigation on class certification may well [but only “may”] reach the same outcome.)

When it comes to other employment cases, any fallout from *Dukes* may be shockingly temporary. “The number of class actions that will be filed will be the same, they’ll just be smaller groups,” says Seyfarth Shaw partner Francis “Tipper” Ortman III.¹⁰

As both sides re-brief their class certification arguments and adjust their strategies going forward, we’ll be watching the impact of these decisions very closely.

¹ *Wal-Mart Stores, Inc. v. Betty Dukes et al.*, 564 U.S. ____ (2011).

² Often referred to as the “IPO laddering claims,” Civil Action No. 21 MC 92 resolved 309 potential class actions alleging that the underwriters of hundreds of initial public offerings (IPOs) improperly required or induced certain investors in those IPOs to purchase additional shares in the aftermarket, often at inflated prices. The plaintiffs had alleged that these undisclosed and manipulative activities caused investors to pay artificially inflated prices and sustain damages.

³ While the shareholder class action was ultimately decertified in *In re IPO Securities Litigation*, \$586 million was subsequently paid as part of a global settlement to finally resolve the shareholder litigation.

⁴ Federal Rule 23(a)(2).

⁵ Here the Court cited to the same earlier U.S. Supreme Court decision relied on in *In re IPO Securities Litigation*, that is: *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

⁶ Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin.

⁷ “Our lawyers and legal assistants across the country are reviewing thousands of potential claims from class members and speaking to those women for whom interviews are necessary in order to provide the best advice about your legal options. This is an enormous task – we have been contacted by more than 12,000 class members over the years. We will do our best to respond to all who have contacted us in the near future [http://www.walmartclass.com/public_home.html], 07.01.11, “The official site for women in the class action *Dukes v. Wal-Mart, Inc.*”].

⁸ Closely watched time periods will include the 180 days from the date of the Supreme Court decision, which most individuals will have to file a timely charge of discrimination with the EEOC or their state’s fair employment agency. For most former class members, the deadline to file a suit without filing a charge with the EEOC is shortened to 90 days after the Supreme Court decision.

⁹ *Smith v. Bayer Corp.*, 09-1205.

¹⁰ “Employment Law Associates Are in Demand, ‘Wal-Mart’ Notwithstanding,” *The Recorder*, June 30, 2011.

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