Wal-Mart Stores, Inc. v. Dukes - The demise of class actions?

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Introduction

To paraphrase Mark Twain, the reports on the death of class actions have been greatly exaggerated.

In *Wal-Mart Stores, Inc. v. Dukes, et al.*, __ U.S.__, 131 S.Ct. 2541 (2011) ("*Wal-Mart*"), the U.S. Supreme Court issued its latest attack on ordinary Americans in favor of large corporations. While its precise impact is still unclear, there is no question that the 5-4 opinion, written by Justice Scalia, has erected barriers that will make it difficult if not impossible to bring the most ambitious class actions, particularly under our anti-discrimination laws. And no doubt plaintiffs' lawyers will have to spend time distinguishing it in our future motions for class certification. But let's not throw in the towel just yet. Even if there is no legislative fix (and with right wing Republicans firmly in control of the House of Representatives, we should not expect one soon), the decision still leaves the class action practitioner with viable class action options to vindicate the rights of employees and consumers.

The Decision

In *Wal-Mart*, the U.S. District Court for the Northern District of California (at 222 F.R.D. 137 (N.D. Cal. 2004)) had certified a nationwide class of current and former female employees of Wal-Mart, Inc. under Fed. R. Civ. P. 23(b)(2) who alleged that Wal-Mart violated Title VII of the Civil Rights Act, 42 U.S.C. §2000e-1 *et seq.*, by paying them less than their male counterparts and by denying them promotional opportunities. The class consisted of about 1.5 million women who worked, over a ten-year period, in over 3,400 stores operated by Wal-Mart. The certification order was appealed to the Ninth Circuit Court of Appeals, which affirmed it, first by a three-judge panel, at 509 F.3d 1168 (2007), and later in a divided 6-5 rehearing *en banc* decision, at 603 F.3d 571 (9th Cir. 2010).

Justice Scalia's opinion includes two basic rulings. First, on behalf of five of the justices, he held that the plaintiffs had not satisfied the "commonality" requirement contained in Fed. R. Civ. P. 23 (a)(2). Second, the Court unanimously held that certification of the plaintiffs' back pay claims was improper under Rule 23(b)(2) because this subpart is limited to claims of injunctive or declaratory relief with only an incidental monetary component. According to Justice Scalia, an "incidental" recovery should not "introduce new substantial legal or factual issues, nor entail complex individualized determinations." 131 S.Ct. at 2560.[1]

The more highly publicized portion of the decision, on which the Court was divided, is the majority's discussion of Rule 23(a)(2). This subpart has always been understood as requiring limited proof of the existence of common issues of law and fact. The plaintiffs argued that this element is met by virtue of Wal-Mart's corporate culture that permitted, encouraged and/or condoned bias against women. The plaintiffs supported their motion for class certification with strong statistical evidence of pay and promotion disparities, sociological evidence (known as "social framework" analysis), and 120 affidavits containing direct, anecdotal evidence of discrimination. The District Court certified the class on the basis that the common question was whether Wal-Mart permitted a male dominated managerial workforce to use "arbitrary and subjective criteria" when making pay and promotion decisions, thus infecting the process with gender stereotypes.

The majority rejected this approach and held that the plaintiffs had not shown "significant proof" that Wal-Mart had "operated under a general policy of discrimination." Justice Scalia focused on

the discretion afforded store managers: "[i]n a company of Wal-Mart's size and geographic scope, it is quite unbelievable, that all managers would exercise their discretion in a common way without common direction." *Id.* at 2555. In fact, according to Justice Scalia, "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." *Id.* These statements betray Justice Scalia's breathtaking hostility to large class action cases, as well as his willingness to defer to corporate management and to willfully disregard the persistence of widespread discriminatory behavior in contemporary American society.

Writing for the dissent, Justice Ginsburg pointed out that the majority opinion wrongly "disqualifies the class at the starting gate…," *id.* at 2561, and that Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common…indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement." *Id.* at 2562 (citations omitted). She argued that the majority opinion "blends Rule 23 (a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer 'easily satisfied.'" *Id.* at 2565 (citations omitted). Finally, Justice Ginsburg agreed with the plaintiffs that "Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout the stores," and provides the necessary "commonality" under Rule 23(a)(2). After all, Justice Ginsburg wrote, "[t]he practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware." *Id.* at 2564.

Impact On Class Actions

The *Wal-Mart* case is the latest of a string of several recent cases displaying the Supreme Court's willingness to erect procedural and substantive barriers to class actions.[2] Both the content and tone of the opinion will no doubt infect the views of some courts and make it more difficult to sustain large class actions challenging discriminatory practices on a corporate-wide basis. Even so, the carefully tailored class action remains alive and well.

To be sure, complaints will need to be drafted to avoid the new minefields created by *Wal-Mart*. At the very least, however, strong arguments can be made that class actions brought under other statutes, such as federal and state wage-and-hour laws, where questions of liability are not so entwined with individual and subjective employment interactions, are removed from the policy concerns at issue in *Wal-Mart* and are therefore distinguishable. In one recent example, a federal magistrate judge in New York recently granted class certification for plaintiffs seeking back pay under the state prevailing wage law, and held that "[t]he relevant facts and circumstances in *Wal-Mart* have little bearing here." *Ramos v. Simplex Grinnell, LP*, __ F. Supp.2d __, 2011 WL 2471584 at *8 (E.D.N.Y., June 21, 2011). In addition, proposed classes that are more tightly focused geographically, temporally, or by a defendant's organizational units will more easily satisfy *Wal-Mart's* call for "significant proof" of unlawful policy at the class certification stage, either through anecdotal, statistical, or documentary evidence. Further, Washington courts may well decide that the *Wal-Mart* opinion does not reflect our state law, and that our courts should not abandon Washington precedent requiring the liberal interpretation of our Rule 23. *See e.g., Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318–19, 54 P.3d 665 (2003).

There is also the prospect that Wal-Mart itself may regret its legal victory. The claims of over one million women members of the decertified *Wal-Mart* class have been tolled for over 10 years. Now that the case has been decertified, their claims can proceed, either as individual cases or as part of new revised class actions. The plaintiffs' current attorneys have pledged to re-file class action cases focused on the corporate divisions where discriminatory practices have been the most rampant. And hundreds of individual actions will be filed as well. Thus, Wal-Mart will be forced into legal battles in a vast array of state and federal courts, and we can hope that our nation's largest company will eventually suffer defeats at trial, and be compelled to settle with at least a substantial number of these discrimination victims.

Now, that would be a satisfying and ironic ending Mark Twain would appreciate!

Endnotes:

1. Under Rule 23(b)(2), a class is certified without notice to putative class members who do not have the opportunity to "opt out." The Court's unanimous holding regarding Rule 23(b)(2) will unquestionably result in a substantial curtailment in the number of Rule 23(b)(2) certifications.
2. *See also Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, __ U.S. __, 130 S.Ct. 1758(2010) (holding that the Federal Arbitration Act ("FAA") prohibits the imposition of class arbitrations in that case where the arbitration provision was silent on the availability of class cases); and *AT&T v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (2011)(holding that the FAA preempts California's prohibition of class action waivers in arbitration agreements).

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