Wal-Mart Stores Inc. v. Dukes: Has It Lived Up to the Hype?

1/24/2014 By Gerald L. Maatman Jr., Ada Dolph and Annette Tyman

When the Supreme Court issued its landmark ruling in *Wal-Mart Stores Inc. v. Dukes,* 131 S.Ct. 2541, on June 20, 2011, media headlines predicted sweeping changes in the world of class action lawsuits. "Wal-Mart: 1 - Female workers: 0" announced CNN. A *New York Times* opinion column asked "A Death Blow to Class Action?"

This article assesses whether *Wal-Mart Stores Inc. v. Dukes* has lived up to the hype. We conclude it has. Nonetheless, plaintiffs' counsel have begun to mount successful workarounds by pruning class sizes, geographies and units, and have stumbled on at least one effective workaround in Fed. R. Civ. P. 23(c)(4), which certain courts have interpreted to permit certification of "issue" classes. Contrary to *Wal-Mart*, in our view, courts have used this provision to certify "liability only" classes, leaving for another day (if ever) the question as to whether complex, individualized damages issues predominate over issues common to the class.

The Case

To recap, the Supreme Court in *Wal-Mart* reversed a class certification decision that joined the claims of 1.5 million female salaried and hourly employees who held any number of positions across Wal-Mart's 3,400 stores because the plaintiffs could not articulate a common question that was capable of common answers as to the entire class.

The Supreme Court ruled that the plaintiffs were required to demonstrate that Wal-Mart operated under a "general policy of discrimination," which it concluded from the evidence was "entirely absent." The Supreme Court also held that Rule 23(b)(2) could not be used to recover individualized monetary relief as well as clarified that where merits issues overlap with factual issues that implicate Rule 23, those factual issues must be resolved in the class certification context.

Fewer Mega Class Actions and Smaller Settlements

After *Wal-Mart*, plaintiffs' counsel predicted that there would be fewer mega class actions but that this would cause an increase in the number of cases brought on behalf of individuals or smaller groups. We have seen a reduction in the size of the classes and the monetary settlements of employment class actions, but this does not appear to have affected significantly the overall number of filings.

In 2010, the last year prior to *Wal-Mart*, the top 10 employment discrimination settlements totaled $346 million. In 2012, the first year after *Wal-Mart*, the top 10 employment discrimination settlements totaled $45 million. Clearly, employers have been more successful after *Wal-Mart* in opposing employment discrimination class actions, and, to the extent that they settle such litigation, they are doing so for fewer dollars.

Less-expansive class actions do not appear, however, to have resulted in more cases being brought overall, as initially predicted. In 2012, filings of employment discrimination cases remained relatively constant, down slightly from 2011. These trends continued into 2013, with a few anomalies here and there.

Indeed, *Wal-Mart*'s own tortured procedural history is a case study in the marked shift in courts' attitudes toward class actions. After the plaintiffs' defeat before the U.S. Supreme Court, they rebooted their claims in a fourth amended complaint alleging class-based gender discrimination claims on behalf of largely California claimants with changes intended to address deficiencies identified by the Supreme Court as barriers to class certification. They also filed several tag-along class actions involving regional classes in Texas, Tennessee, Wisconsin and Florida federal courts.

In the original *Wal-Mart* case, the plaintiffs moved again for class certification, relying on their "repackaged" theories focused on a smaller class of current and former female employees who worked in Wal-Mart regions centered in California and allegations of bias by a "discrete" group of California district and regional managers.

However, the plaintiffs did not benefit from their proverbial second bite of the apple. Noting that the "[p]laintiffs' proposed class suffers from the same problems identified by the Supreme Court, but on a somewhat smaller scale," Judge Charles Breyer of the U.S. District Court for the Northern District of California denied the motion, finding that "the commonality issue is dispositive." The court noted that there was "no precise scope to the class" and "[r]ather than identify an employment practice and define a class around it, plaintiffs continue to challenge the discretionary decisions of hundreds of decision makers, while arbitrarily confining their proposed class to corporate regions that include stores in California, among other states."

action may be brought or maintained as a class action with respect to particular issues." Prior to *Wal-Mart*, views of Rule 23(c)(4) fell into two opposing camps—it was either (1) a "housekeeping" rule that could not be used to "manufacture predominance," or (2) an acceptable way to certify a claim that would not ordinarily meet Rule 23(b)(3)'s stringent predominance requirement.

Rule 23(c)(4) is experiencing a renaissance after *Wal-Mart*. In particular, plaintiffs' counsel have looked to *McReynolds v. Merrill Lynch & Co.*, 672 F.3d 482 (7th Cir. 2012), perhaps the leading post-*Wal-Mart* ruling certifying an employment discrimination disparate impact class claim for injunctive relief under Rule 23(c)(4). In *McReynolds*, a decision authored by Judge Richard Posner, the 7th U.S. Circuit Court of Appeals reversed the district court's decision to deny certification of a race discrimination class claim challenging the impact of two Merrill Lynch policies—one that allowed brokers to decide to work in "teams" and one that suggested success-based criteria for distribution of departing brokers' accounts—even though managers had discretion regarding implementation of both policies.

In permitting such a class certification theory, the 7th Circuit distinguished *Wal-Mart* from the facts before it in *McReynolds* and concluded that the only "companywide" policies at issue in *Wal-Mart* forbade discrimination and delegated employment decisions to local managers.

In contrast, *McReynolds* involved "companywide" policies that permitted individuals to exercise discretion in a manner that allegedly disparately impacted black employees. Therefore, the 7th Circuit reversed the denial of class certification and permitted the class to proceed under Rule 23(c)(4) notwithstanding its recognition that separate trials could be necessary if the plaintiffs prevailed to determine which class members were actually impacted by one or both of the challenged policies and the extent and nature of their individualized damages. The 7th Circuit concluded, however, that the individualized nature of such damages calculations was insufficient to defeat class certification for claims brought under Rule 23(c)(4) and Rule 23(b)(2). In October 2012, the Supreme Court denied Merrill Lynch's petition for a writ of certiorari to review the decision.

The *McReynolds* certification necessarily impacted the trajectory of that case—it recently settled for $160 million. Judge Posner's ruling shows how certification of any aspect of the litigation— even a narrow issue unrelated to damages—drives litigation and settlement decision-making by litigants.

While the defense bar would like to limit *McReynolds* to disparate impact claims that do not explicitly seek monetary damages, in *Gulino v. Bd. of Educ. of City School Dist. of City of New York*, 96-CV-8414 (S.D.N.Y. Dec. 2012), the court granted the plaintiffs' motion to certify a class under Rule 23(b)(3) and embraced their proposal for a two-stage remedial phase, even though some aspects of those proceedings will necessarily require consideration of some individualized evidence. Specifically, the court concluded that the question of whether the use of standardized tests for licensing teachers had a disparate impact on black and Latino teachers was appropriate for certification under either Rule 23(b)(3) or Rule 23(c)(4)(A). The plaintiffs' request for monetary damages, however, was bifurcated, to be decided in a later remedial phase in which the plaintiffs could seek class certification under Rule 23(b)(3) if they successfully established liability.

However, the ability to obtain Rule 23(b)(3) certification on damages is sharply curtailed by *Comcast v. Behrend*, a ruling of the U.S. Supreme Court in March 2013 that holds that plaintiffs must adequately explain how a classwide determination of damages is possible. If there is no certification of a class as to damages, it is likely that the plaintiffs will bootstrap the initial liability finding to any later hearing on damages, arguing under *Teamsters v. United States*, 431 U.S. 324 (1977), that they are entitled to a presumption that they were discriminated against and that their individual damages should be heard in mini-trials per *Teamsters*. Defendants will be forced to consider the transaction costs of hundreds or perhaps thousands of mini-hearings, but it is unclear how many class members would actually take the time to participate in such mini-trials, and it may be worth the gamble.

Broad Application

While courts have resisted application of *Wal-Mart* outside of the Title VII context, no area of law has been immune. *Wal-Mart* has even been applied to cases involving mortgage lending. Additionally, just as in the employment discrimination context, plaintiffs' counsel and courts in all areas of law are turning to Rule 23(c)(4) for relief from *Wal-Mart*. We discuss two additional affected areas below.

Wal-Mart has also been applied in settings outside of a contested class certification. For instance, the 3rd U.S. Circuit Court of Appeals held in *Rodriguez v. National City Bank*, No. 11-8079 (3d Cir. Aug. 12, 2013), that *Wal-Mart* applied to proposed settlement classes, an area that traditionally has invited less scrutiny in light of the policy goal of early resolution of such cases. After *Wal-Mart*, however, certification of a class for settlement purposes only is far from guaranteed.

The 3rd Circuit held that a district court did not abuse its discretion in refusing to approve a settlement class based on *Wal-Mart*, concluding that "whether class-action representatives are seeking certification for the purpose of settlement or with the intent to litigate, the members of the proposed class must meet the threshold requirements of Rule 23(a), and our policy preference for voluntary settlement cannot and does not

all subclasses. Meriter also argued that monetary relief claims are inconsistent with Rule 23(b)(2) certifications where the monetary relief is not incidental to the injunctive or declaratory relief.

The 7th Circuit rejected both arguments. First, it concluded that the reasoning in *Wal-Mart* regarding a single injunction or single declaratory judgment did not apply where each subclass member has the same claim. Second, the court reasoned that, because each subclass is seeking only a declaration of rights under Meriter's defined benefit pension plan and reformation of the plan to accord with the declaration, any monetary relief credited would be automatic and thus "incidental." In short, *Meriter* is consistent with *McReynolds*' willingness to certify a class under Rule 23(b)(2) despite the possibility of individualized damages issues. It is likely that other district courts will follow suit.

For the first time, ERISA plaintiffs' counsel are also advocating that if certification pursuant to Rule 23(b)(2) is not appropriate, then it may be appropriate pursuant to Rule 23(b)(3) or 23 (c)(4). *See Pennsylvania Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n,* 286 F.R.D. 355, 380 (N.D. Ill. 2012) ("Plaintiffs also now contend, for the first time, that if certification under Rule 23(b)(1)(A) and 23(b)(2) is not appropriate, then certification under Rule 23(b)(3) or 23(c)(4) is.").

Fair Labor Standards Act

The impact of *Wal-Mart* in Fair Labor Standards Act (FLSA) cases has been mixed, resulting in successful opposition to class certifications but also the emergence of "issue" class certifications pursuant to Rule 23(c)(4).

Wang v. Chinese Daily News, 709 F.3d 829 (9th Cir. 2013), in which the 9th Circuit initially remanded an FLSA case to the district court for reconsideration of whether the class could be certified pursuant to Rule 23(b)(3), provides some hope that *Wal-Mart* will take hold in FLSA cases in the 9th Circuit.

The optimism has been tempered slightly by the 9th Circuit's issuance of a revised decision (*Wang v. Chinese Daily News Inc.*, No. 08-55483 (9th Cir. Sept. 3, 2013)) in which it reversed its prior position on certifying a Rule 23(b)(2) class, stating that "the possibility of a Rule 23(b)(2) class seeking injunctive relief remains." Nonetheless, the 9th Circuit has remanded this case to the district court for consideration regarding whether the requirements for 23(b)(2) and (b)(3) certification can be met.

Another example is *Till v. Saks Inc.*, Nos. C 11-00504 SBA and C 12-03903 SBA, (N.D.Cal Sept. 30, 2013), in which, citing *Wal-Mart*, the Northern District of California denied the plaintiffs' motion to certify a class of exempt managers and associates at Saks' retail stores, and granted Saks' unusual pre-emptive bid to deny approval of a nationwide FLSA certification.

The plaintiffs claimed that they were improperly classified as exempt, and alleged various related claims under the FLSA and California Labor Code. The plaintiffs pointed to this common question to support class certification: "whether the job duties of assistant managers qualify for the executive exemption under California law." They alleged that the answer could be shown by "common proof"; however, the court ruled that the experiences of the named plaintiffs "diverge[d] significantly" from those of the proposed class members.

We also have seen a number of cases in which plaintiffs have advocated that the court certify FLSA classes pursuant to Rule 23(c)(4), albeit with mixed results (*Casida v. Sears Holdings Corp.*, No. 1:11-cv-01052 AWI JLT (E.D.Cal. Aug. 8, 2012) (refusing to certify class, including pursuant to Rule 23(c)(4))).

In one example in which plaintiffs were successful, *Jacob v. Duane Reade Inc.*, No. 11 Civ. 160 (JPO) (S.D.N.Y. Aug. 8, 2013), the court certified a "liability only" class, holding that the defendant's "misclassification, if proved, will have necessarily caused a uniform type of injury to class members: namely, the lack of overtime to which all class members would be entitled." Thus, it concluded, "[t]he only remaining question then will be how much each individual is owed—an inquiry that may require varying levels of individualized proof." The court explained that certifying the class pursuant to Rule 23(c)(4) "can act as a tool that is appropriate and useful when classwide proof and predominance exist as to some, but not all issues."

Prediction

Wal-Mart has had far-reaching effects on class certification, but here's our prediction: If the Supreme Court does not reconcile Rule 23(c)(4) with *Wal-Mart*, the provision will increasingly become one of the most popular tools for evading Rule 23(b)'s more exacting certification standards. Defense counsel should be prepared to argue that such certifications render Rule 23 superfluous and improperly make an end-run around *Wal-Mart*, which is—without a doubt—here to stay.

Gerald L. Maatman Jr. is a partner in Seyfarth Shaw's Chicago and New York offices. Ada Dolph is a partner in the firm's Chicago office, as is Annette Tyman.