

American Bar Association
 Section of Antitrust Law
 Business Torts & Civil RICO Committee

BUSINESS TORTS & RICO NEWS

A Note About this Issue

For this issue, we have veered from our usual format by including not only an article giving background on a major decision—here, the United States Supreme Court's decision in *Wal-Mart v. Dukes* from June of this year—but also inviting antitrust practitioners from the defense bar and the plaintiffs' bar to submit commentary on the decision. As many readers may have noted at the time the Court issued the decision, commentators' predictions about how the holding would affect class certification varied widely, often depending on which counsel table they most often sit behind. Our intent is that the commentary pieces will not only represent divergent perspectives but also provide a window on the *Dukes*-oriented themes we are likely to see in future advocacy in the antitrust class action context. For a greater variety of argument, we recommend perusing the the amicus briefs, available at <http://www.scotusblog.com/case-files/cases/wal-mart-v-dukes/>.

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Wal-Mart (v. Dukes) Sells Rule 23's New Roadmap

By *Bethany D. Krueger and Kathryn N. Hibbard of Greene Espel P.L.L.P.*¹



I. Introduction

In June of this year, the United States Supreme Court issued an opinion that reversed a class-action certification that had the potential to expose the world's largest employer to as many as 1.5 million claims of sex discrimination.² The Supreme Court's decision in *Wal-Mart v. Dukes* sheds light on at least two subparts of the Rule 23 class action scheme:

- Rule 23(a)(2): The Court held that class-action plaintiffs must

satisfy the commonality requirement in Rule 23(a) by showing that the claims depend on a common contention, the truth or falsity of which can be resolved the same way for each and every member of the proposed class. The Court held that the plaintiffs, who were female employees against whom Wal-Mart had allegedly discriminated, could not satisfy this standard because it is "impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."³

- Rule 23(b)(2): The Court held that the plaintiffs' monetary claims for backpay could not proceed under a Rule 23(b)(2) class action because a

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FROM THE CHAIRS

Greetings from your Business Torts & Civil RICO Committee. We hope you have enjoyed your summer!

We welcome Bruce Blefeld of Jackson Walker LLP to the committee leadership as a new Vice-Chair while we thank departing Vice Chair Svetlana Gans of the Federal Trade Commission for her three years of outstanding service to the committee. Svetlana has been promoted to Co-Chair of Committee Operations for the Section of Antitrust Law.

We hope you enjoy the contrasting commentary in this issue that accompanies the background article on the Supreme Court's *Wal-Mart v. Dukes* class certification decision. We are always looking for new articles and ideas for our upcoming newsletters. Please contact our newsletter editor Holden Brooks (hbrooks@foley.com). As always, we also provide the latest RICO developments grid for February through August 2011.

Once again we will be organizing a number of outstanding programs for the 2011-2012 year. We will offer a program this fall (date TBD) on state RICO laws which will accompany the Committee's publication this fall of the second edition of **RICO State by State: A Guide to Litigation Under the State Racketeering Statutes**.

Also, don't forget to mark your calendars for the Antitrust Section's 60th Annual Spring Meeting in Washington, D.C. which is scheduled for March 28-30, 2012. We will announce our sponsored Spring Meeting programs soon. If you have ideas for programs, or other ways in which we can make the Committee more relevant and useful to your legal practice, please do not hesitate to contact us.

Finally, if you haven't joined our LinkedIn page, please do so. Our community is growing every month and provides a great forum to network with fellow BTCR Committee members. You may join here –<http://www.linkedin.com/groupRegistration?gid=3569221&csrfToken=ajax%3A6105320959963377656>. Contact BTCR Committee Young Lawyer Representative Dan Schiffer (dschiffer@morganlewis.com) with any questions.

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single injunction or declaratory judgment would not resolve those claims. It made clear that individualized monetary claims brought in the context of a class action belong under Rule 23(b)(3).⁴

While this case was decided in the context of a Title VII claim, its holdings will have implications in all class-action lawsuits—including in the antitrust context. As the accompanying articles reveal, however, the import of these implications remains open to debate.

II. District Court

The *Wal-Mart v. Dukes* lawsuit began when Betty Dukes sued Wal-Mart after it demoted her as a result of her violations of company policies.⁵ Ms. Dukes never denied that she committed these violations, but she claimed that her demotion was in retaliation for internal complaints and that no male employees had been similarly disciplined.⁶

Ms. Dukes' suit was eventually joined by other women, and her original claims evolved into a class action for sex discrimination based on disparate-impact theory in violation of Title VII of the 1964 Civil Rights Act. The plaintiffs alleged that women employed by Wal-Mart are paid less and receive fewer promotions than men.⁷ The plaintiffs claimed that these disparities were the result of a strong, centralized corporate culture that favors gender discrimination, and the delegation of excessive subjectivity to individual managers in a manner that provides a conduit for gender bias.⁸ The plaintiffs sought injunctive and declaratory relief, backpay, and punitive damages on behalf of all members of the class.⁹

In support of their motion for class certification, the plaintiffs submitted regression analyses showing statistically significant gender-based disparities throughout Wal-

Mart's forty-one regions.¹⁰ The plaintiffs' analyses controlled for major variables, such as length of employment, full-time versus part-time status, store location, job position, and job review ratings, and thus the plaintiffs' expert concluded that gender is the only factor that could explain the five to 15 percent difference between the total earnings paid to women and men.¹¹

The plaintiffs also presented evidence showing a "statistically significant shortfall of women being promoted into each of the in-store management classifications."¹² The plaintiffs' statistical evidence further showed that, even when promotions did occur, it consistently took women approximately one-and-one-half years longer than it took men to achieve these promotions.¹³

In June 2004, the district court granted the plaintiffs' motion to certify a class consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."¹⁴ The district court acknowledged the "unique" size of the proposed class, but found that that did not preclude certification because "the issues are not novel, and Plaintiffs' claims are relatively narrow in scope."¹⁵

Rejecting Wal-Mart's argument that the plaintiffs had not met the commonality requirement defined in Rule 23(a), the district court held that "Rule 23(a)(2) does not require that all questions of law or fact be common. The test is qualitative rather than quantitative—one significant issue common to the class may be sufficient to warrant certification. *Indeed, the necessary showing to satisfy commonality is 'minimal.'*"¹⁶ The district court found that the plaintiffs' fact and expert opinions and statistical and anecdotal evidence adequately supported their contention that there were factual and legal questions

common to all class members regarding whether "Wal-Mart has engaged in company-wide discrimination against female in-store employees in pay and promotions."¹⁷

III. The Ninth Circuit Court of Appeals

Wal-Mart appealed, and, after two panel decisions and a full en banc review, the Ninth Circuit upheld the district court's class-certification decision.¹⁸

Like the district court, the Ninth Circuit looked only for common questions when determining whether the class satisfied Rule 23(a)(2)'s commonality requirement.¹⁹ It held that Rule 23(a)(2) simply requires common questions, and that a determination of how those questions will be resolved is reserved for Rule 23(b)(3)'s inquiry into whether the common questions predominate over questions affecting only individual class members.²⁰ In other words, the court held that the "factual determinations" under Rule 23(b)(3) have to be "more precise" than under Rule 23(a)(2).²¹

Mindful of this distinction between Rules 23(a)(2) and 23(b)(3), the court of appeals found that the plaintiffs' "factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support to raise the common question" required by Rule 23(a)(2)—specifically, "whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII."²²

The court of appeals further upheld the district court's inclusion of backpay claims, holding that "a request for backpay in a Title VII case is fully compatible with the certification of a Rule 23(b)(2) class."²³ It concluded that the award of backpay was merely one element of a

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larger equitable remedy, and therefore it did not conflict with the limitations in Rule 23(b)(2).²⁴

In a one-paragraph dissent, Chief Judge Kozinski foreshadowed the approach the U.S. Supreme Court would take on appeal.²⁵

[T]he half-million members of the majority’s approved class held a multitude of jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member’s job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

IV. The United States Supreme Court

Wal-Mart again appealed, and the Supreme Court granted review on a single question: “Whether the class certification ordered under Rule 23 (b)(2) was consistent with Rule 23 (a).”²⁶

Wal-Mart argued that the class failed the test of commonality because it included a “kaleidoscope” of “individualized, fact-intensive claims for monetary relief that are subject to individualized statutory defenses.”²⁷ Wal-Mart also argued that the plaintiffs failed to submit significant proof that Wal-Mart operated under a general policy of discrimination,²⁸ and that the plaintiffs could not present such evidence because Wal-Mart has policies that prohibit discrimination and promote diversity.²⁹ Wal-Mart conceded that plaintiffs were not required to prove that there was an actual policy of discrimination, but argued that the

plaintiffs “at least needed to point to a policy that was common and that linked all of these disparate individuals and disparate locations.”³⁰

In its challenge to the lower courts’ inclusion of the plaintiffs’ backpay claims, Wal-Mart argued that the potential monetary awards predominated over claims for injunctive relief, and were not appropriate for treatment under the purpose of Rule 23(b)(2).³¹

In response, the plaintiffs stressed that the combination of Wal-Mart’s top-down management structure and its grant of discretion to individual managers constituted a policy that linked all class members’ claims together.³² They urged the Supreme Court to consider the evidence accepted by the lower courts and to reject what the plaintiffs described as Wal-Mart’s attempt to impose a heightened certification requirement.³³ The plaintiffs argued that their lawsuit posed several common questions,³⁴ and that “[n]othing in Rule 23 or Title VII imposes such heightened certification standards for employment discrimination cases challenging a policy providing for subjective personnel decisions.”³⁵

In the end, the Supreme Court ruled against Dukes and her colleagues. Its decision produced two key holdings. First, it imposed what some have described as a higher standard upon plaintiffs seeking to establish commonality under Rule 23(a). And second, the Supreme Court’s decision prohibited claims for money damages in class actions certified under Rule 23(b)(2) unless they are merely incidental to injunctive or declaratory relief.

A. Rule 23(a)(2): Claims Must Depend on a Common Contention Capable of Classwide Resolution

The Supreme Court’s decision in *Wal-Mart v. Dukes* sets forth the analysis that courts must now apply when analyzing commonality for

class certification. In a five-to-four decision authored by Justice Scalia, the Court held that “[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury.”³⁶ It is not enough for a plaintiff-class to merely suffer a violation of the same law. Rather, the “claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.”³⁷ That “common contention” must be “capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”³⁸

The Supreme Court explained that this proof of a common contention must happen at the class-certification stage, and that Rule 23’s “rigorous analysis” will “entail some overlap with the merits of plaintiff’s underlying claim.”³⁹

The Supreme Court conducted this “rigorous analysis,” and held that the plaintiffs’ claims were not dependent upon a “common contention.” Instead, the plaintiffs “wish [ed] to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”⁴⁰ Rejecting the plaintiffs’ argument that they had pointed to a company-wide policy allowing supervisor discretion, the Supreme Court held that that policy “is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.”⁴¹ Where such a policy is involved, the Supreme Court held that “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalid-

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ity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions."⁴²

The Supreme Court also rejected the plaintiffs' statistical regressions, holding that they were "insufficient to establish that [the plaintiffs'] theory can be proved on a classwide basis."⁴³ It held that disparities at the regional level, such as what the plaintiffs had shown, do not "establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level."⁴⁴ More fundamentally, though, the Supreme Court held that, even if the plaintiffs' statistical evidence had established a pay or promotion pattern, "that would still not demonstrate that commonality of issue exists" because the plaintiffs had not identified a specific employment practice that ties all 1.5 million claims together.⁴⁵ As the Court held, "[m]erely showing that Wal-Mart's policy of [manager] discretion has produced an overall sex-based disparity does not suffice."⁴⁶

In response to criticisms from the dissent, the Supreme Court insisted that its holding did not change the standard for establishing commonality under Rule 23(a) by blending it with Rule 23(b)(3)'s inquiry: "We quite agree that for purposes of Rule 23(a)(2) even a single common question will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is even a single common question."⁴⁷

Justice Ginsburg authored the four-justice dissent, which Justices Breyer, Sotomayor, and Kagan

joined. The dissent stressed the relatively low threshold traditionally required to show commonality under Rule 23(a): "The Rule does not require that all questions of law or fact raised in the litigation be common; indeed, even a single question of law or fact common to the members of the class will satisfy the commonality requirement."⁴⁸ It stated that the majority's opinion had improperly blended Rule 23(a)(2)'s commonality criterion "with the more demanding criteria of Rule 23(b)(3)," and, in doing so, it had "elevate[d]" the Rule 23(a)(2) inquiry "so that it is no longer easily satisfied."⁴⁹ By "conduct[ing] a 'dissimilarities' analysis at the Rule 23(a)(2) stage," the dissent concluded that the majority had left nothing for consideration under Rule 23(b)(3).⁵⁰

The dissent would have determined that the district court had satisfied Rule 23(a)(2)'s commonality requirement by identifying a common question—"whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination."⁵¹ "That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages," the dissent stated, "should not factor into the Rule 23(a)(2) determination."⁵² Put another way, the dissent stated that it would not have "disqualif[ed]" the class at the Rule 23(a)(2) "starting gate."⁵³

B. Rule 23(b)(2): Claims for Monetary Relief May Not Be Certified, At Least Where They Are Not Incidental to Injunctive or Declaratory Relief

The Supreme Court also addressed the backpay claims, and, in a unanimous decision, held that those claims had been improperly certified.⁵⁴ It held that claims for monetary relief may not be certified under Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."⁵⁵ The Court re-

jected the plaintiffs' argument regarding the equitable nature of their backpay claims, and held that it was "irrelevant" whether the backpay claims were equitable because Rule 23(b)(2) "does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments."⁵⁶

The Court explained that Rule 23(b)(2) applies to classes in which the party opposing the class has acted or refused to act on grounds that apply generally to the class, such that final injunctive relief or corresponding declaratory relief is appropriate.⁵⁷ It, therefore, held that claims for individualized relief—*e.g.*, back pay—did not satisfy the Rule.⁵⁸ It further held that Rule 23(b)(2) applies only when a *single* injunction or declaratory judgment would provide relief to each member of the class.⁵⁹ It held that individualized monetary claims generally belong under Rule 23(b)(3).⁶⁰

V. Cases Applying *Wal-Mart*

There are only a handful of cases applying *Wal-Mart v. Dukes*, which is still less than three months old. And there has, as of yet, been no in-depth treatment. A few courts have addressed the *Dukes* commonality holding and have reached differing results based on the facts before them. In one such case, the Northern District of California declined to certify a nationwide class because the plaintiffs had failed to "identify [y] the law to be applied in this action," such that the court could not find that there were questions of law or fact common to the proposed class.⁶¹ In another case, the District of South Carolina declined to certify a class based on its finding that the questions that would need to be resolved related to individual supervisors' decisions regarding individual employees.⁶² Although it cited *Dukes*, the district court held that it need not base its commonality finding on that decision because "numerous district courts have

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reached similar results without the benefit of this clearly reasoned Supreme Court decision.”⁶³

In other cases, district courts found that commonality, even over defendants’ arguments that class certifications should be denied on the basis of *Wal-Mart*.⁶⁴ For example, the Western District of Tennessee certified a class even though the plaintiffs had asserted alternative theories of recovery (i.e., breach of contract, negligence, violations of the Tennessee Consumer Protection Act) based on its determination that the plaintiffs had presented “common questions equally applicable across the class regarding the elements of each cause of action.”⁶⁵ It held that these common questions were not limited to questions regarding the defendant’s legal duties and obligations, but rather whether the defendant had systematically engaged in actions that later injured the plaintiffs.⁶⁶

At least one case has applied the second holding of *Dukes* regarding backpay. The Western District of Washington denied the plaintiffs’ application for hybrid certification under Rules 23(b)(2) and 23(b)(3) because, as *Dukes* had held, “[c]laims for individualized relief, such as back pay, do not satisfy Rule 23(b)(2).”⁶⁷

¹ The authors thank Haley L. Waller for her assistance in preparing this article.

² *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ----, 131 S.Ct. 2541, 2547 (2011).

³ *Id.* at 2552.

⁴ *Id.* at 2557-60.

⁵ *Id.* at 2548; Brief for Petitioner at 4-5 (*Wal-Mart Store, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

⁶ *Id.*

⁷ 222 F.R.D. 137, 141 (N.D. Cal. 2004).

⁸ *Id.* at 145.

⁹ *Id.* at 141.

¹⁰ *Id.* at 156.

¹¹ *Id.*

¹² *Id.* at 160.

¹³ *Id.* at 161.

¹⁴ *Id.* at 188.

¹⁵ *Id.* at 142.

¹⁶ *Id.* at 145 (internal citation omitted) (emphasis added).

¹⁷ *Id.*

¹⁸ 603 F.3d 571, 577 (9th Cir. 2010).

¹⁹ *Id.* at 592-93.

²⁰ *Id.* at 593.

²¹ *Id.*

²² *Id.* at 612 (emphasis in original).

²³ *Id.* at 618.

²⁴ *Id.*

²⁵ *Id.* at 652.

²⁶ 131 S. Ct. 795 (2010).

²⁷ Brief for Petitioner Wal-Mart at 1 (*Wal-Mart Store, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

²⁸ *Id.* at 10.

²⁹ *Id.*

³⁰ Transcript of Oral Argument at 10 (*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

³¹ Brief for Petitioner Wal-Mart at 14 (*Wal-Mart Store, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

³² Brief for Respondents at 1 (*Wal-Mart Store, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

³³ *Id.* at 3-5.

³⁴ *Id.* at 15.

³⁵ *Id.* at 24.

³⁶ 131 S. Ct. at 2551 (quotation omitted).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2552.

⁴¹ *Id.* at 2554.

⁴² *Id.*

⁴³ *Id.* at 2555.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2556.

⁴⁷ *Id.* (quotations omitted).

⁴⁸ *Id.* at 2562 (citation and quotation omitted).

⁴⁹ *Id.* at 2565 (quotation omitted).

⁵⁰ *Id.* at 2566.

⁵¹ *Id.* at 2564.

⁵² *Id.* at 2567.

⁵³ *Id.* at 2561-62.

⁵⁴ *Id.* at 2557.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2560.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2557.

⁶⁰ *Id.* at 2558.

⁶¹ *Walter v. Hughes Commc’n, Inc.*, No. 09-2136, 2011 WL 2650711, *8 (N.D. Cal. July 6, 2011).

⁶² *MacGregor v. Farmers Ins. Exch.*, No. 10-03088, 2011 WL 2981466, *4 (D.S.C. July 22, 2011).

⁶³ *Id.*

⁶⁴ See, e.g., *Sullivan v. Am. Exp. Pub. Corp.*, No. 09-142, 2011 WL 2600702, *2 (C.D. Cal. June 30, 2011) (certifying a settlement class); *Ramos v. Simplex Grinnell LP*, No. 07-CV-981, 2011 WL 2471584, *1, 5 (E.D.N.Y. June 21, 2011) (stating plaintiffs had shown significant proof of a company-wide policy).

⁶⁵ *Ham v. Swift Transp. Co., Inc.*, No. 09-2145, 2011 WL 2712745, *7 (W.D. Tenn. July 1, 2011).

⁶⁶ *Id.*

⁶⁷ *Lee v. ITT Corp.*, No. C10-0618, 2011 WL 2516367, *6 (W.D. Wash. June 24, 2011) (“individualized monetary claims belong in Rule 23(b)(3)”).

The Impact of *Wal-Mart v. Dukes* on Antitrust Class Action Defense

By [Kenneth R. O'Rourke](#), [Katrina Robson](#), and [Ramesh Nagarajan](#) of [O'Melveny & Myers LLP](#)¹



Justice Scalia's opening sentence in *Wal-Mart Stores, Inc. v. Dukes*, describes the case as involving "one of the most expansive class actions ever."¹ The certified class in *Dukes*, a Title VII employment discrimination case, comprised about one and a half million plaintiffs.²

Antitrust litigators are no strangers to classes of a million members or more. Indeed, antitrust class actions have been certified with tens

of millions of members—even 100 million members.³ What, then, does *Dukes* offer for antitrust practitioners, aside from reversing certification of an expansive class?

The Court expounded on themes near and dear to antitrust class action defense lawyers—like "rigorous analysis" and "statistical evidence"—albeit under a legal framework distinct from the primary framework invoked by antitrust

class action plaintiffs. The Court's approach nonetheless suggests a tightening of class action standards that will have important implications in antitrust class action defense.

I. Rationale for Tightening Class Action Standards

Dukes is the latest in a line of cases that reviews procedural standards

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Commentary: Perspectives from the Plaintiffs' and Defense Bars



The Novelty of *Dukes v. Wal-Mart*

By [Brian A. Ratner](#) & [Sathya S. Gosselin](#) of [Hausfeld LLP](#)¹



The Supreme Court's recent decision in *Dukes v. Wal-Mart Stores Inc.*² has already sparked considerable dialogue about the future of class actions. For some, it is an opportunity to decry "adventurous, sweeping class action lawsuits, which too often have stretched the definition of what class actions were intended to accomplish," and applaud the Supreme Court for its vigorous language.³ For others, the decision is lamentable—a seemingly high hurdle for future class-action employment claims, which are

often impractical as individual actions. Notably absent from the media din so far, though, is the possibility that *Wal-Mart's* effect might actually be quite modest: a further refinement of the standards for class certification but no great obstacle to carefully assembled classes. Yet that seems an apt summary of *Wal-Mart's* significance, if the last month is any indication.

Case law interpreting *Wal-Mart* is admittedly in its infancy; nevertheless, recent district court activ-

ity suggests that while the Supreme Court provided some guidance about the boundaries of the Rule 23 inquiry, it did not radically alter the class-action calculus. Amid the recent clamor, it is easy to forget that *Wal-Mart* was a truly novel class action. As practitioners, corporations, organizations, journalists, current plaintiffs, and prospective plaintiffs try to make sense of *Wal-Mart*, a review of its unique features—which likely cabin its effects—is in order.

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against a backdrop of burgeoning class action costs and an increasingly overworked and stressed court system. The trend toward tightening procedural standards is not tethered to any particular substantive area of law: *Dukes* involved labor law and an “expansive class action” while another watershed case, *Bell Atlantic Corp. v. Twombly*, involved antitrust law and a “massive factual controversy.”

In *Twombly*, the Supreme Court held that an antitrust class action complaint “must be dismissed” where plaintiffs failed to “nudge[] their claims across the line from conceivable to plausible.”⁴ The Court refused to allow “a potentially massive factual controversy to proceed” absent “allegations that reach the level suggesting conspiracy.”⁵ The massiveness of the factual controversy was “obvious enough” in that antitrust class action, where “plaintiffs represent[ed] a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America’s largest telecommunications firms”⁶

The Court has good reason to be concerned about giant class actions. With larger classes comes exponentially greater risk for defendants and greater settlement leverage for plaintiffs. A \$200,000 dispute can become a \$200,000,000 dispute overnight.⁷ The exponential increase in defendants’ potential exposure can induce defendants to settle, even where the merit of plaintiffs’ claims is questionable⁸ or would not otherwise engender such fear of litigation.

Professor Richard Nagareda described this trend toward settlement as the spur for tightening the procedural restrictions on class actions:

What we are witnessing to-

day, not merely in class certification but across the spectrum of major pretrial procedural rulings, is an emerging effort to bring the system of notice pleading embraced in the 1938 overhaul of the Federal Rules into line with the on-the-ground reality of civil litigation today—a world dominated by settlement, in which the pretrial phase effectively *is* the trial.⁹

Professor Nagareda’s articulation of the realities of current-day litigation and his call for a new conceptualization of class standards was published two years before the Supreme Court decision in *Dukes*. Notably, his article was cited seven times by the majority and dissenting opinions in *Dukes*.

Professor Nagareda’s observations apply just as forcefully to antitrust class actions, where the often-staggering size of the class coupled with the attendant risk of massive joint and several liability and automatically trebled damages, forces defendants to settle once the class is certified or likely to be. The Court’s emphasis on a “rigorous” review prior to certifying an “expansive” class is, thus, clearly needed in antitrust class actions.

II. Full Satisfaction of Each Rule 23 Requirement

In *Dukes*, the Supreme Court endorsed and accelerated the trend of courts demanding rigorous analysis and full satisfaction of each requirement of Rule 23. Before *Dukes*, plaintiffs had, in some circuits, successfully moved for class certification even though they had made only a threshold showing of some of the components of Rule 23.¹⁰ But Circuit Courts began demanding a preponderance of evidence for each requirement of Rule 23 before *Dukes* reached the Supreme Court.¹¹ In *In re Hydrogen Peroxide Antitrust Litigation*, for example, the Third Circuit, in reversing a district court decision that certified

an antitrust class, held that a “threshold showing,” if defined to be a “lenient” burden or “deference or a presumption” in favor of certifying a class, was “an inadequate and improper standard.”¹²

Dukes ratifies this trend, explaining that “a party seeking class certification must affirmatively demonstrate his compliance with the Rule.”¹³ There is no hint that a mere “threshold showing” can suffice to satisfy Rule 23 any longer.

Furthermore, the Court clarified the law on another frequently disputed area of class certification in antitrust class actions: the role of the so-called merits inquiry. Some lower courts had shied away from any inquiry into the merits, believing it to be precluded by the Supreme Court’s statement in *Eisen v. Carlisle & Jacqueline* that there was “nothing in . . . Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”¹⁴ Although other Supreme Court decisions had suggested that looking at the merits when necessary to satisfy the requirements of Rule 23 was acceptable,¹⁵ there was some confusion over the effect of *Eisen*.

In *Dukes*, the Supreme Court put an end to any confusion, ruling that “rigorous analysis will” frequently “entail some overlap with the merits of the plaintiff’s underlying claim.”¹⁶ The Court also directly spoke to the proper interpretation of *Eisen*, explaining that in the underlying case the judge had looked at the merits of the suit for the purpose of the costs of notice under Rule 23(c)(2): “To the extent the quoted statement [in *Eisen*] goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.”¹⁷ The message to the lower courts is clear—when the merits of the underlying case are

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relevant to the Rule 23 inquiry, the courts must investigate as deeply into the merits as needed.

In addition, *Dukes* requires a more thorough inquiry into commonality under Rule 23(a)(2). Many courts have facily assumed this requirement has been met, particularly in antitrust price-fixing class actions, without engaging in the “rigorous analysis” required of all aspects of Rule 23.¹⁸ For example, in *In re Urethane Antitrust Litigation*, the district court quickly found that the Rule 23(a) commonality requirement was met, while it closely scrutinized whether common questions predominated under Rule 23(b)(3).¹⁹

Dukes put new emphasis on the commonality requirement under Rule 23(a)(2).²⁰ The Court, quoting Professor Nagareda, explained that

What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.²¹

The Court’s opinion detailed the dissimilarities that barred class certification in *Dukes*, including the localized decision-making that undermined the plaintiffs’ effort to use aggregate data at the regional level to show disparity in the treatment of men and women employed by Wal-Mart, ultimately finding that plaintiffs failed to meet the commonality requirement.²²

Although it is unclear how much more methodical courts will have to be in their commonality inquiry in antitrust class actions, *Dukes* instructs that a perfunctory analysis will no longer suffice.

III. Rigorous Analysis of Expert Testimony

Dukes also has implications for the use of expert evidence in antitrust class actions. Lower courts have long debated the proper review and use of expert evidence, particularly as the trend towards a more rigorous analysis increased. Antitrust class action plaintiffs—tasked with showing under a rigorous analysis that the facts necessary to their claims are susceptible to common proof—turned to expert analysis and aggregated data to meet that burden. Defendants countered with their own expert analysis, often critiquing plaintiffs’ reliance on aggregated data and highlighting variations between individual plaintiff class members to undercut any assertion that common issues predominate.

District courts invoked a range of approaches in dealing with dueling experts at the class certification stage. Some courts certified classes upon a minimal showing that the plaintiffs’ expert’s methodology comported with “basic principles of econometric theory,” had probative value, and would use evidence common to all members of the proposed class.²³ In these types of decisions, courts considered whether the expert’s methodology was “inherently faulty”²⁴ or “so insubstantial as to amount to no method at all.”²⁵ These courts based their approach on the rationale that class certification is not the appropriate stage for inquiring into the admissibility of expert testimony or resolving disputes between experts.²⁶

Other courts weighed the evidence of plaintiffs’ expert under *Daubert*, but went no further than determining admissibility. These courts considered it inappropriate at the class certification stage to engage in a “battle of experts” to “determine which expert [plaintiffs’ or defendant’s] is more credible.”²⁷ Under this standard, factual determina-

tions were out of bounds²⁸ and expert analysis was acceptable providing it had probative value and did not cross the line into junk science.²⁹

A number of courts went one step further. In *In re Hydrogen Peroxide*, the Third Circuit held that “the court’s obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.”³⁰ The evidence of plaintiff’s expert was not to be credited “merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason.”³¹ Rather, the court must be “persuaded” by the expert testimony, particularly where there is conflicting expert analysis or factual disputes. “Weighing conflicting expert testimony at the certification stage,” explained the court, “is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.”³²

Although the *Dukes* decision affirmed the trend toward “rigorous analysis” and brought into sharp focus the issue of expert evidence, the Court did not choose explicitly or definitively between these three approaches. Rather, it seemed to chart a novel course, expressing “doubt” that “*Daubert* did not apply to expert testimony at the certification stage of class proceedings”³³ but ultimately sidestepping the question, and instead focusing on the dissimilarities that could exist at the local store level, variations that undercut the evidence of plaintiffs’ experts and plaintiffs’ claims to commonality.

In *Dukes*, plaintiffs’ statistician conducted a region-by-region analysis of promotions and concluded that there were gender disparities at Wal-Mart, explainable only by discrimination.³⁴ Wal-Mart’s statistician criticized the analysis, pointing out that statistical disparities at the

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regional level could be the product of only a small percentage of Wal-Mart stores. The district court in *Dukes* dismissed such objections, explaining that it would “delve[] into the substance of the expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create a common question.”³⁵

Judge Ikuta’s dissent in the Ninth Circuit criticized the District Court for “expressly reject[ing]” the responsibility of “rigorously analyzing whether the plaintiffs’ evidence was significant proof of a general policy of discrimination”³⁶ Judge Ikuta concluded that “[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level” and for that reason, among others, plaintiffs’ statistics lacked probative value.³⁷

Like Judge Ikuta, the Supreme Court found plaintiffs’ expert evidence lacking. That evidence fell “well short” of showing a company-wide common mode of gender discrimination. Quoting Judge Ikuta’s dissent, the Supreme Court explained that the experts’ region-by-region analysis failed to establish disparity at individual stores or a company-wide policy of discrimination.³⁸

Although the Court criticized plaintiffs’ expert evidence, it did not go so far as to say that plaintiffs’ experts’ methodology was “so insubstantial as to amount to no method at all.” Nor did it apply *Daubert* or weigh the credibility of plaintiffs’ expert against defendants’ expert. Rather, the Court considered whether the conclusion of plaintiffs’ experts, grounded in a region-by-region methodology, was sufficient proof of commonality in light of localized

decision-making about promotions.³⁹

Professor Nagareda’s oft-cited article may help to shed some light on the Court’s approach. Professor Nagareda asserted that

Courts today properly engage aggregate proof as a question of class certification . . . when disputes concerning that proof pertain to whether there exist disabling dissimilarities within the proposed class—dissimilarities that would prevent a class-wide proceeding from yielding common answers.⁴⁰

In *Dukes*, the Court appeared to engage in a review of plaintiffs’ expert evidence for the purpose of determining whether there were dissimilarities that “have the potential to impede the generation of common answers.”⁴¹

How courts will choose to interpret the Court’s approach to evaluating expert evidence is far from clear. The analysis certainly seems to exceed an examination of whether plaintiffs’ experts’ evidence is “inherently flawed” and to favor an interpretation that requires a more rigorous analysis that does not shy away from delving into the “battle of experts.” On the other hand, the analysis seems to step outside the various existing frameworks for evaluating expert evidence at the class certification stage, calling into question the usefulness of those frameworks in interpreting the Court’s decision.

IV. Injunction-Based Classes

The Court’s commentary on the interplay between Rules 23(b)(2) and (b)(3) also has interesting implications for antitrust class action defense involving injunction-based classes. Antitrust plaintiffs often assert that the class is certifiable under (b)(2) because the primary relief being sought by the class is

injunctive.⁴² Similarly, courts have allowed the certification of classes based on both Rule 23(b)(2) and 23(b)(3), even in an antitrust case where the plaintiffs’ monetary damage claims were estimated at \$8 billion.⁴³ In effect, antitrust plaintiffs have been able to use Rule 23(b)(2) as a potential backstop when they have faced difficulty certifying a class under Rule (23)(b)(3)’s standards.

In *Dukes*, however, the Supreme Court drew a sharp distinction between classes certified under Rule 23(b)(2) and those certified under Rule 23(b)(3). *Dukes* held that claims for monetary relief may not be certified under Rule 23(b)(2) “where . . . the monetary relief is not incidental to the injunctive or declaratory relief.”⁴⁴ While the Supreme Court left open the question of “whether there are any forms of ‘incidental’ monetary relief” still available under Rule 23(b)(2), it emphasized that “individualized monetary claims belong in Rule 23(b)(3).”⁴⁵ After *Dukes*, courts will likely be more hesitant to certify classes under both Rule 23(b)(2) and 23(b)(3), and may not certify 23(b)(2) classes at all if monetary damages—as they are in many antitrust cases—are a large and important part of the remedy plaintiffs seek.

V. Conclusion

A pendulum of enhanced procedural safeguards applicable to large civil litigation⁴⁶ has been swinging toward the outcome reached in *Dukes*. Certifying expansive class actions will be more challenging for plaintiffs in light of the *Dukes* decision. At the same time, some open questions remain. For example, the proper standard for addressing competing expert evidence on class certification is hinted at but not answered in *Dukes*.

Perhaps the broader question for antitrust and non-antitrust practitioners alike is less about where the

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pendulum is today on specific procedural safeguards applicable to massive civil actions; it is where the pendulum will swing next. Time will tell.⁴⁷ Until then, the plaintiffs' bar will no doubt be awaiting an equal and opposite judicial or legislative reaction. One could say it is inevitable.⁴⁸

¹ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ---, 131 S.Ct. 2541, 2547 (2011).

² *Id.*

³ See, e.g., Rule 23(f) Petition for Leave to Appeal from District Court's Order Granting Class Certification at 1, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M:07-CV-01819-CW (9th Cir. Dec. 10, 2009) (stating that class of SRAM memory chip purchasers is comprised of at least 100 million class members); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 693 (N.D. Ga. 1991) (12.5 million); *In re TFT-LCD Flat Panel Antitrust Litig.*, 267 F.R.D. 291, 315-16 (N.D. Cal. 2010) (certifying classes of all plaintiffs who, between 1999 and 2006, purchased a TFT-LCD panel or a television, computer monitor, or notebook computer containing a TFT-LCD panel from any of the over 30 defendants, including Samsung, Toshiba, Hitachi, and LG); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (alleging class of at least 90% of U.S. subscribers of local telephone and/or high speed Internet services).

⁴ *Twombly*, 550 U.S. at 570.

⁵ *Id.* at 558 (citing *Car Carriers Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)) & *id.* at 559.

⁶ *Id.* at 559.

⁷ In *Szabo v. Bridgeport Machines, Inc.*, the Seventh Circuit noted that interlocutory appeal was warranted where class certification had turned a \$200,000 dispute into a \$200,000,000 dispute. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001).

⁸ See *id.*

⁹ Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 109 (2009) (emphasis original).

¹⁰ See, e.g., *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d. Cir. 1999).

¹¹ See, e.g., *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40-42 (2d. Cir. 2006); *Szabo*, 249 F.3d at 676-77.

¹² *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d. Cir. 2008).

¹³ *Dukes*, 131 S.Ct. at 2551.

¹⁴ *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1974).

¹⁵ See, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

¹⁶ *Dukes*, 131 S.Ct. at 2551 (internal quotation marks omitted).

¹⁷ *Id.* at 2551 n.6.

¹⁸ See, e.g., *Paper Sys. v. Mitsubishi Corp.*, 193 F.R.D. 601, 612 (E.D. Wis. 2000) ("the first allegation in a price-fixing case, that there were antitrust violations, is generally sufficient to satisfy the commonality requirement of Rule 23(a)(2)").

¹⁹ *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 633 (D. Kan. 2008).

²⁰ *Dukes*, 131 S.Ct. at 2551.

²¹ *Id.*, quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009).

²² *Id.* at 2554-2557.

²³ *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 26 (N.D. Ga. 1997)

²⁴ *Id.* at 29.

²⁵ *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995).

²⁶ See *id.*; *Polypropylene*, 996 F. Supp. at 26; *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998) ("Defendants' objections, however, are directed at the merits of Plaintiffs' claims, which are not currently before this Court. . . . At this stage of the litigation, therefore, an inquiry into the admissibility of Plaintiffs' proposed expert testimony as set forth in *Daubert* would be inappropriate.")

²⁷ *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001); *In re Carbon Black Antitrust Litig.*, 2005 U.S. Dist. LEXIS 660 (D. Mass. Jan. 18, 2005), at *71 (internal quotation omitted); *In re Polyester Staple Antitrust Litig.*, 2007 U.S. Dist. LEXIS 52525, at *53 (W.D.N.C. July 19, 2007) ("The likelihood of the plaintiffs' success on the merits . . . is not relevant to the issue of

whether certification is proper.") (internal quotation omitted); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 410 (S.D. Ohio 2007) ("For purposes of class certification, this Court need not entertain Defendants' arguments that essentially question whether [the expert] is correct in his assessment of these market characteristics Rather, this is for the trier of fact to later decide."); *All Bromine Antitrust Plaintiffs v. All Bromine Antitrust Defendants*, 203 F.R.D. 403, 408 (S.D. Ind. 2001) (quoting *In re Linerboard* for the proposition that to preclude plaintiffs' expert analysis at the class certification stage, "it must be shown that the opinion is the kind of "junk science" that a *Daubert* inquiry at this preliminary stage ought to screen.").

²⁸ *In re Pressure Sensitive Labelstock Antitrust Litig.*, 2007 U.S. Dist. LEXIS 85466, at *28 (M.D. Pa. Nov. 19, 2007) ("Defendants dispute the factual basis of Dr. Beyer's economic analysis of the PSL industry and contend . . . that this Court must resolve these factual disputes. The Court disagrees.").

²⁹ *In re OSB Antitrust Litig.*, 2007 U.S. Dist. LEXIS 56584, at *17 (E.D. Pa. Aug. 3, 2007) ("I may reject Dr. Beyer's analysis only if it has no probative value").

³⁰ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008); see also *Blades v. Monsanto Co.*, 400 F.3d 562, 569-70, 575 (8th Cir. 2005) (affirming denial of class certification where the district court denied defendants' *Daubert* motion and "considered all expert testimony offered by both sides in support of or in opposition to class certification" and "afforded that testimony such weight as [it] deemed appropriate.").

³¹ *Hydrogen Peroxide*, 552 F.3d at 323.

³² *Id.*

³³ *Dukes*, 131 S.Ct. at 2554.

³⁴ *Id.* at 2555.

³⁵ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 155 (N.D. Cal. 2004).

³⁶ *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 637 (9th Cir. 2010) (Ikuta, J., dissenting) [*Dukes II*].

³⁷ *Id.*

³⁸ *Dukes*, 131 S.Ct. at 2555 (quoting dissent of Ikuta, J., in *Dukes II*, 603 F.3d at 637).

³⁹ *Dukes*, 131 S.Ct. at 2555-56.

⁴⁰ Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 133 (2009).

⁴¹ *Dukes*, 131 S.Ct. at 2551, quoting *id.* at 132.

⁴² See, e.g., *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1046 (N.D. Miss. 1993) (“[R]ecent trends in 23(b)(2) utilization appear to favor a broader application of equitable relief certification; and, 23(b)(2) certification has been ordered where the primary relief sought was clearly money damages pursuant to 23(b)(3).”).

⁴³ *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146-47 (2d. Cir. 2001) (Sotomayor, J.). See also *In re Currency Conversion Fee Antitrust Litigation*, 2005 U.S. Dist. LEXIS 21084 (S.D.N.Y. Sept. 27, 2005).

⁴⁴ *Dukes*, 131 S.Ct. at 2557.

⁴⁵ *Id.* at 2558 & 2560.

⁴⁶ See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 321 (class certification standards); *Twombly*, 550 U.S. at 570 (pleading standards).

⁴⁷ See generally EDGAR ALLAN POE, THE PIT AND THE PENDULUM (1842) (pendulum pivoting from Time).

⁴⁸ See Newton’s Third Law.

Additional ABA-Sponsored Programming about *Wal-Mart v. Dukes*

July 22, 2011, “Class Certification in Consumer Fraud Class Actions After *Wal-Mart v. Dukes*,” program of the ABA Section of Antitrust Law, Civil Practice & Procedure Committee

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Ten Points from *Wal-Mart v. Dukes*, by Daniel M. Hutchinson of Lieff, Cabraser, Heimann & Bernstein, LLP, from the website of the ABA Section of Litigation, Class Actions & Derivative Suits Committee

<http://apps.americanbar.org/litigation/committees/classactions/articles/083010-Dukes-vs-WalMart.html>

July 13, 2011, ABA-ALI CLE program, “*Wal-Mart v. Dukes*: Death of Complex Class Actions?”

http://207.103.74.122/index.cfm?fuseaction=online.course_products&containerid=40828



To begin with, the *Wal-Mart* plaintiffs' core contention was pioneering. They proposed that Wal-Mart operated under a general policy of gender discrimination, which was entirely a product of the limitless discretion enjoyed by local managers.⁴ This despite a corporate policy expressly forbidding gender discrimination and the absence of evidence indicating how often discriminatory thinking governed Wal-Mart's employment decisions.⁵ As Justice Scalia so scathingly observed, Wal-Mart had "the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.'"⁶ To be sure, the Court noted, unbounded discretion among local supervisors can give rise to disparate-impact claims.⁷ Class certification is another matter, however; proof that one manager has abused his or her discretion does not suggest that the next manager has done so as well.⁸

The Supreme Court also criticized the *Wal-Mart* plaintiffs for a perceived dearth of reliable data and testimony in support of class certification. To buttress their theory of commonality, the *Wal-Mart* plaintiffs presented three types of circumstantial evidence: statistical evidence concerning pay and promotion disparities; anecdotal accounts of discrimination from roughly 120 female employees; and the testimony of an expert sociologist who concluded that Wal-Mart was ripe for gender discrimination.⁹ But the statistical evidence focused only on disparities at the regional and national levels, leaving the Court without information about uniformity among actual stores.¹⁰ And the affidavits carried no weight with the Court either. The Court noted that

the 120 submissions amounted to one for every 12,500 class members, an impossibly low figure.¹¹ Equally problematic, the affidavits only addressed 235 of Wal-Mart's 3,400 stores, omitting along the way Wal-Mart's operations in some fourteen states.¹² That left plaintiffs' expert Dr. William Bielby, who admitted at his deposition that he could not predict the frequency with which gender bias affected employment decisions at Wal-Mart.¹³

This novelty is also evident in the *Wal-Mart* plaintiffs' selection of Rule 23(b)(2) as their procedural vehicle. That provision speaks in terms of "final injunctive relief or corresponding declaratory relief," not monetary damages. FED. R. CIV. P. 23(b)(2). The *Wal-Mart* plaintiffs tried for both, asserting that the language of 23(b)(2) does not limit the relief available and that back pay is, in any event, essentially equitable relief.¹⁴ But the Court sidestepped that first proposition and deemed the second irrelevant, holding instead that Rule 23(b)(2) does not permit *individualized* relief of any stripe; only class-wide relief may be sought under Rule 23(b)(2).¹⁵ That procedural choice in the district court has lasting implications as well. In the absence of a 23(b)(3) class, the Supreme Court's recent pronouncements do not reach predominance, which is the typical avenue for class-action lawsuits.¹⁶ True enough, Justice Ginsburg articulated a concern that the majority might have conflated commonality (23(a)(2)) and predominance (23(b)(3)).¹⁷ The Court safeguarded against this possibility, however, reiterating that even a single common question is enough to satisfy Rule 23(a)(2), adding that "[w]e consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is 'even a single [common] question.'"¹⁸

Unsurprisingly, courts have taken

note of *Wal-Mart's* unique facts and recognized that, without a single common question, it is the unusual case. *Ramos v. SimplexGrinnell LP*, No. 07-CV-981 (SMG), 2011 WL 2471584 (E.D.N.Y. June 21, 2011), provides an apposite illustration. In *Ramos*, fifteen laborers filed suit against their employer for failing to pay "prevailing wages," as required by New York law, for their work on various public projects.¹⁹ In evaluating the proposed class under Rule 23(b)(3), the District Court for the Eastern District of New York agreed that commonality was easily met.²⁰ Numerous employees attested that they never received "prevailing wages" for their work on public job sites.²¹ What is more, SimplexGrinnell's payroll system was centralized, and even required a manual override in order to dole out prevailing wages.²² SimplexGrinnell, meanwhile, proposed that class certification was inappropriate given that some offices had actually managed to pay prevailing wages at times.²³ But, as the court explained, that missed the point: what united SimplexGrinnell's operations was a failure to ensure, by any method, that its employees were paid the wages due them under the statute.²⁴

The court observed that the Supreme Court's recent decision in *Wal-Mart*, decided one week earlier, had "little bearing here."²⁵ Unlike in *Wal-Mart*, the court concluded that the laborers had provided significant proof that their employer routinely denied them prevailing wages.²⁶ And there was no discretion or subjective component at work; plaintiffs' entitlement to prevailing wages was a creature of statute.²⁷ Furthermore, whereas in *Wal-Mart* there was an "announced policy" forbidding discrimination, SimplexGrinnell had no such safeguard that might prevent the statutory violation.²⁸ Finally, in contrast to the statistical data offered by the *Dukes* plaintiffs, the *Ramos* laborers had, according to the court, "come forward with class-wide proof

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culled from defendant's electronic data that . . . is sufficiently reliable to be presented at trial."²⁹

Wal-Mart's application to antitrust cases, and price-fixing cases in particular, is likely all the more narrow. Courts have repeatedly affirmed that Rule 23(a)(2) is little obstacle where proof of defendants' unlawful anticompetitive conduct will invariably be common to all class members.³⁰ And that is no less the case after *Wal-Mart*, as the District Court for the Central District of California recently confirmed in *In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, No. 09-ml-2007, slip op. at 4-5 (C.D. Ca. July 25, 2011) ("*Auto Lights*"). Faced with plaintiffs' motion for class certification under Rule 23(b)(3), the court noted the recent *Wal-Mart* decision and defendants' attendant argument that *Wal-Mart* somehow "categorically precludes certification in this case."³¹ But that position, the court concluded, was an "overreach."³² Here, the court reasoned, in contrast to the *Wal-Mart* plaintiffs' failure to show the single common issue of a class-wide discriminatory policy, "the existence of a 'general policy' of price-fixing is—at least for the purpose of this motion—undisputed. The question to be resolved [under Rule 23(b)(3)] is, once again, whether Plaintiffs will be able to present proof of impact and damages resulting from this alleged policy on a class-wide basis. Nothing in *Wal-Mart Stores* suggests that Plaintiffs will inevitably be unable to present such evidence in this case."³³ Grasping at straws, the *Auto Lights* defendants also proposed that *Wal-Mart* somehow bars the use of a regression analysis that reveals that, on average, prices of products were impacted by the conspiracy.³⁴ The court made short work of this argument too, explaining that there is no analogy between the averaging methodology under

consideration and the *Wal-Mart* plaintiffs' use of statistics at the national and regional level, which did not, after all, reveal disparities at local stores or identify a discriminatory reason for any local disparities.³⁵

These are just two recent examples of the limited reach of *Wal-Mart*. Still, they are not isolated. Other similarly instructive recent opinions include: *Sullivan v. Am. Express*, No. SACV 09-142-JST (ANx), 2011 WL 2600702 (C.D. Cal. June 30, 2011) (noting an abundance of common questions in action alleging unlawful debt-collection practices, among them whether the defendants qualified as debt collectors under the statute; whether the mailings constituted debt collection; and whether the violations were intentional); *In re Partsearch Technologies*, No. 11-10282 (MG), 2011 WL 2456227 (Bkrcty. S.D.N.Y. June 21, 2011) (enumerating various common questions among a settlement class of former employees alleging violation of federal Warn Act, such as whether employer's actions amounted to a "plant closing" or "mass layoff" under the statute and whether a sufficient number of employees suffered an "employment loss" so as to activate the notice requirements of the statute); and *Altier v. Worley Catastrophe Response, LLC*, Nos. 11-241, 11-242, 2011 WL 3205229, at *7 (E.D. La. July 26, 2011) (reiterating that even after *Wal-Mart* "[t]he test for commonality is not demanding") (quotation marks and citation omitted).

Perhaps, then, speculation about *Wal-Mart's* calamitous effects on class actions is premature and the glass should be seen as half full. Certainly the last few months have strongly suggested this is the case, as does a close reading of the Supreme Court's decision. Nevertheless, plaintiffs must now be prepared for an unflinchingly rigorous analysis in the district court, one that may well include fact determi-

nations previously thought to be off-limits. Likewise, plaintiffs would be wise not to rely on incomplete, piecemeal data to support a determination of commonality. Those are not daunting requirements, however—particularly for those who have long suspected that the Supreme Court would clarify the standards for class certification as it did in *Wal-Mart*. Nor is there reason to believe that generating a single common question will be a significant challenge in many cases. Few are the classes that will present the same novel defects identified in *Wal-Mart*.

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² *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ---, 131 S.Ct. 2541, 2547 (2011).

³ *E.g.*, <http://blogs.wsj.com/law/2011/06/20/what-does-wal-mart-ruling-mean-for-class-actions/>.

⁴ *Dukes*, 131 S. Ct. at 2548.

⁵ *Dukes*, 131 S. Ct. at 2553-54.

⁶ *Id.* at 2554 (citation omitted).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2549.

¹⁰ *Id.* at 2556.

¹¹ *Id.* at 2555.

¹² *Id.*

¹³ *Id.* at 2553.

¹⁴ Brief for Respondents at 49, 56, *Dukes v. Wal-Mart Stores Inc.*, 131 S. Ct. 2541 (2011) (No. 10-227); *Dukes*, 131 S. Ct. at 2557-60.

¹⁵ *Dukes*, 131 S. Ct. at 2557-61.

¹⁶ See Fed. R. Civ. P. 23(b)(3) (requiring that the questions of law or fact common to class members predominate over any questions affecting only individual members").

¹⁷ *Dukes*, 131 S. Ct. at 2565-67 (Ginsburg, J., concurring in part and dissenting in part).

¹⁸ *Dukes*, 131 S. Ct. at 2556 (emphasis in original) (citation omitted).

¹⁹ *SimplexGrinnell LP*, No. 07-CV-981 (SMG), 2011 WL 2471584, at *1.

²⁰ *Id.* at *1.

²¹ *Id.* at *3-6.

²² *Id.* at *3.

²³ *Id.* at *4.

²⁴ *Id.*

²⁵ *Id.* at *5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 131 (D.P.R. 2010) (“Even without considering any of the other factors presented by Plaintiffs, the Court finds that the supported allegation regarding the anti-trust conspiracy targeting local cabotage purchasers, standing alone, is sufficient to establish commonality.”); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 462 (E.D. Pa. 2008) (“Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy.”) (quotation marks and citation omitted); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D. Cal. 2005) (“[c]ourts consistently have held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12 (D.D.C. 2001) (“[n]umerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2).”) (citation and internal quotation marks omitted); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 164 (S.D.N.Y. 2000) (“[t]he issues of the existence and scope of a price fixing conspiracy frequently have been held to satisfy the requirement of antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2).”) (citation and internal quotation marks

omitted); *In re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D. Fla. 1993) (“[p]laintiffs allege a horizontal conspiracy to stabilize prices in a single, fungible product in violation of the Sherman Act. By their nature, anti-trust conspiracy actions such as this one involve common questions of law or fact.”); *In re Workers' Compensation*, 130 F.R.D. 99, 105 (D. Minn. 1990) (acknowledging that “[a]ntitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy”); see generally 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 18.5, Vol. 6, at 16-20 (4th ed. 2002) (“An allegation of price fixing, tying, monopolization, or conspiracy will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question.”).

³¹ *In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, No. 09-ml-2007, slip op. at 4 (C.D. Ca. July 25, 2011).

³² *Id.*

³³ *Id.* at 4-5. This analysis is consonant with *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), in which the Third Circuit (three years ago) arrived at the very same conclusion as the Supreme Court in *Dukes*: that “rigorous analysis” requires actual compliance with Rule 23 and consideration of the merits, as necessary, to determine conformity with the rule. Ever since, scores of antitrust lawyers on the plaintiff side have integrated *Hydrogen Peroxide* into their arguments in support of class certification—no matter the circuit. See, e.g., Pls.’ Mem. in Support of Mot. for Class Certification 50-56, *In re Rail Freight Fuel Surcharge Antitrust Litig.* (D.D.C. Mar. 30, 2010) (Dkt. No. 339-1). It is little surprise then that the impact of *Dukes* will be all the more limited in the antitrust arena.

³⁴ *Id.* at 8.

³⁵ *Id.*

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by Holden Brooks, Foley & Lardner LLP

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