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Class Action Litigation In the Wake of Dukes v. Wal-Mart and ATT Mobility v. Concepcion

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This paper summarizes the history and holdings of the recent Supreme Court’s decisions regarding certification of class actions and class action arbitration. It also discusses the implications of these decisions on class action practice and procedure from the point of view of both management and plaintiff side lawyers.

I. DUKES V. WAL-MART

On June 20, 2011, the Supreme Court held that a nationwide class of Wal-Mart and Sam’s Club employees could not be certified in a sex discrimination lawsuit against their employers because their claims were not sufficiently common under Federal Rule of Civil Procedure 23(a), and because backpay was not an available remedy under Rule 23(b)(2). The class consisted of approximately one and a half million employees—the largest civil rights class action ever. Class members included women in positions ranging from part-time entry-level employees to salaried managers. In their complaint, the plaintiffs’ alleged that female employees were paid less than male employees in comparable positions, and that female employees received fewer promotions and were required to wait longer for promotions than male employees.

This section discusses the history of the Dukes v. Wal-Mart litigation before the District Court, the Ninth Circuit, and the U.S. Supreme Court. It focuses on what the Ninth Circuit and Supreme Court held regarding the standards to be applied in certifying a class action under Rules 23(a) and 23(b)(2). It also summarizes what the Court held in regard to expert testimony, statistics, and anecdotal evidence at the class certification stage.

A. BACKGROUND

The Dukes v. Wal-Mart litigation has a lengthy history. Just over ten years ago, six current and former female Wal-Mart and Sam’s Club employees filed a complaint in the Northern District of California. On June 21, 2004, the Northern District of California granted in part plaintiffs’ motion for class certification. Wal-Mart appealed this ruling under Federal Rule of Civil Procedure Rule 23(f) and the plaintiffs cross-appealed. The Ninth Circuit first affirmed the District Court on February 6, 2007. Then, on December 11, 2007, the Ninth Circuit issued a

1 The detailed history of the cases covered in this paper was written by Katherine Traverso, summer associate at Goldstein Demchak. The authors thank Ms. Traverso for her comprehensive descriptions of the case histories and holdings of the Supreme Court cases discussed in this paper. The brief perspectives covered in this paper were written by the panelists from the perspective of each panelist’s practice. Publication time constraints (due to the recent timing of the Wal-Mart decision and the ABA deadline for paper submissions to be published on the CD) did not permit the panelists to provide full-blown analyses. The panelists will be prepared at the August 2011 ABVA Annual Conference presentation to provide more detailed analyses of the impact of the decisions covered here.

2 THE IMPACT FUND, (last visited June 22, 2011).

second decision also affirming the District Court, and withdrawing and superseding its prior
decision and denying rehearing. Wal-Mart filed a petition for rehearing en banc in January
2008, which was granted on February 13, 2009. The Ninth Circuit issued its en banc decision on
April 26, 2010, affirming in part and remanding in part. On December 6th, 2011, the Supreme
Court granted certiorari. Oral argument was held on March 29, 2011. The Supreme Court
issued a decision on June 20, 2011.

B. DISTRICT COURT

1. Complaint

The plaintiffs’ Third Amended Complaint was filed on September 12, 2002. They
alleged sex discrimination under Title VII of the Civil Rights Act of 1964. Although their claims
arose in California, the plaintiffs’ argued that discrimination was nationwide because “Wal-Mart
employs uniform employment and personnel policies throughout the United States.”

The plaintiffs’ primary allegations were that “female employees are paid less than male employees
who perform substantially similar work, with similar or lesser skills and experience,” and that
the “pattern of unequal assignments, pay, training, and advancement opportunities . . . is the
result of an on-going and continuous pattern and practice of intentional sex discrimination.”
The plaintiffs sought an “end to Wal-Mart’s discriminatory practices, make whole relief for the
class, and punitive damages.” They did not seek compensatory damages.

2. Class Certification.

On April 28, 2003, plaintiffs’ filed a motion for class certification, stating that (1) Wal-
Mart had paid its female employees less than male employees every year and in every region,
despite their overall higher performance ratings and sonority; and (2) that women at Wal-Mart
receive fewer promotions to in-store management positions than men, and those who are
promoted must wait longer than men to advance. They argued that they properly represented
the class because they were “victims of Wal-Mart’s systematic discriminatory pay and promotion
practices.” In support of this claim, they submitted statistical evidence and expert testimony
proving that the discrimination was systematic. Plaintiffs requested certification of a class
consisting of all women who were employed at a Wal-Mart retail store anytime since December
26, 1998 “who have been or may be subjected to Wal-Mart’s challenged pay and management

5 Id. at ¶ 26.
6 Id. at ¶ 29.
7 Id. at ¶ 29.
8 Plaintiffs’ Motion for Class Certification, at 3.
10 Id.
track promotions policies and practices.”\textsuperscript{11} They requested certification under 23(b)(2), and in the alternative under 23(b)(3).

On June 21, 2001, the District Court granted plaintiffs’ motion in part and denied it in part. The court found that the four Rule 23(a) requirements were satisfied, that the plaintiffs had met their burden under Rule 23(b)(2), and that the plaintiffs’ claim for equal pay was manageable. The District Court denied certification of a class for backpay in regard to lost promotions where objective data did not document an individual’s interest in a promotion. The class certified consisted of all women employed by Wal-Mart at any time after December 26, 1998, as plaintiffs requested.

\textit{Commonality.} The District Court found that common questions of law or fact existed among class members. The court was persuaded that sufficient commonality existed under Rule 23(a) based on the three categories of evidence presented by plaintiffs: “(1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management.”\textsuperscript{12} The District Court concluded that Wal-Mart’s corporate policies and practices were similar in all stores and “provide[] a conduit for gender bias that affects all class members in a similar fashion.”\textsuperscript{13}

\textit{Typicality.} Wal-Mart argued that the named plaintiffs did not represent the class because they had not worked in upper management and therefore could not represent managers, and because their claims were too specific. The District Court disagreed. It found that one of the plaintiffs had been a manager and that several of the class representatives had been passed over for promotions; therefore, they could sufficiently represent the proposed class in regard to the promotion claims. Responding to the argument that the named plaintiffs’ claims were too specific, the court said that the facts need not be identical: “Rather, the court must consider whether the named plaintiffs suffered injury from a specific discriminatory practice of the employer in the same manner that the members of the proposed class did, and whether the named plaintiffs were injured in the same fashion by a general policy of employment discrimination.”\textsuperscript{14}

\textit{Punitive Damages.} The District Court found punitive damages appropriate for class certification under Rule 23(b)(2). It cited Ninth Circuit precedent in \textit{Molski v. Gleich},\textsuperscript{15} which held that monetary damages may be sought under Rule 23(b)(2) if these damages were secondary to the primary claims for relief. To make this determination, the court looked at the plaintiffs’ intent in bringing the lawsuit.\textsuperscript{16} The District Court found that punitive damages were

\textsuperscript{11} \textit{Id.} at 37.
\textsuperscript{12} \textit{Id.} at 145.
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Dukes}, 222 F.R.D. at 167.
\textsuperscript{15} 318 F.3d 937 (9th Cir. 2003).
\textsuperscript{16} \textit{Dukes}, 222 F.R.D. at 170.
“secondary” to the rest of the employees’ claims. With respect to punitive damages, the District Court stated that notice and the opportunity to opt-out must be provided to avoid due process concerns.

**Maintainability Under Rule 23(b)(2).** Wal-Mart first argued that the class was not maintainable under rule 23(b)(2)—or any other subsection—because the size of the class made the case unmanageable. The District Court also rejected this argument and the majority of Wal-Mart’s other claims in regard to manageability. It held that the class was manageable—except for the claim for lost pay in regard to promotions.

In regard to the promotions claim, the court employed the “formula approach,” an approach that the Ninth Circuit had previously employed when “subjective employment practices” make it difficult to determine which plaintiffs would have been given a promotion absent discrimination. The approach involves indentifying a random subset of plaintiffs’ claims in regard to backpay and then employing a formula to calculate a lump sum of backpay to award the class. The District Court held that in making these calculations, employee qualification could be manageably determined through objective data in corporate records. Employee interest, however, could be determined only for those positions for which Wal-Mart had objective applicant data; demonstrating interest for other positions was found unmanageable.

**C. THE NINTH CIRCUIT’S EN BANC DECISION.**

The issue before the Ninth Circuit was whether the District Court properly applied Rule 23. Rule 23 provides that a court may certify a class if it finds the four prerequisites of Rule 23(a) are met, and also meets one of the three requirements of Rule 23(b). Wal-Mart argued that the District Court erred in three ways: (1) by holding that the class met Rule 23(a)’s commonality and typicality requirements, (2) by eliminating Wal-Mart’s ability to respond to individual claims in violation of due process, and (3) by finding that the claims for monetary relief did not predominate over the claims for injunctive or declaratory relief under Rule

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17 Id. at 171.
18 Id. at 173.
19 Id. at 178 (discussing and following *Teamsters v. United States*, 431 U.S. 324 (1977) for the “notion that class members who can demonstrate that they have potentially been discriminated against are eligible to receive backpay”).
20 Id. at 176 (citing the Ninth Circuit’s opinion in *Domingo v. New England Fish Company*, 727 F.2d 1429, 1444 (1984)).
21 *Dukes*, 222 F.R.D. at 44.
22 Id. at 179-80.
23 Id. at 182.
24 Id. at 182-183.
25 The four prerequisites of Rule 23(a) are numerosity, commonality, typicality, and adequacy.
23(b)(2). The plaintiffs’ argued that the District Court had erred in limiting backpay relief for their promotion claims where they lacked objective evidence of interest in a promotion.

In a six to five opinion, the Ninth Circuit affirmed the District Court’s certification of a class of current employees with respect to their claims of injunctive relief, declaratory relief, and backpay. While the Ninth Circuit held that the District Court had not abused its discretion with respect to the commonality and typicality requirements, it found that the District Court had abused its discretion in certifying the plaintiffs’ punitive damages claims. Therefore, the Ninth Circuit remanded to the District Court with two questions: (1) Whether a class seeking punitive damages might be certified under rule 23(b)(2) or (b)(3), and (2) Whether putative class members who no longer worked at Wal-Mart at the time the complaint was filed could be certified as an additional class under rule 23(b)(3).

The Ninth Circuit’s en banc decision first clarified the Ninth Circuit’s standard for meeting Rule 23(a)’s requirements. It then established a new standard for satisfying Rule 23(b)(2), based on the advisory committee notes to that rule. The Ninth Circuit also indicated that backpay is equitable relief, and that there may be standing issues in regard to former employees not employed when the complaint was filed. Finally, the Ninth Circuit made clear that large class actions can be manageable and do not necessarily violate due process.

1. Clarification of Standards Regarding Rule 23(a).

The Ninth Circuit clarified its interpretation of the standards governing Rule 23(a) under the Supreme Court’s decisions in General Telephone Co. of Southwest v. Falcon,26 requiring a “rigorous analysis” at the class-certification stage, and in Eisen v. Carlise & Jacquelin,27 preventing courts from reaching the merits at the class-certification stage. The Ninth Circuit held that District Courts “must[,] perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied,” which will often “require looking behind the pleadings to issues overlapping with the merits of the underlying claims.”28 But the court made clear that district courts may not consider a merits claim that does not overlap with the Rule 23 analysis.29 Further, the Ninth Circuit indicated that “different parts of Rule 23 require different inquiries,” and that under the commonality prong of Rule 23(a)(2) the inquiry is whether plaintiffs establish “common questions of law and fact, and answering those questions is the purpose of the merits inquiry.”30

28 603 F.3d 571, 594 (2010) (en banc) (noting that Gen. Tel. Co. of Sw. v. Falcon provided “straightforward guidance,” and that “every circuit to have considered this issue . . . has reached essentially the same conclusions: Falcon’s central command requires District Courts to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings.”).
29 Id.
30 Id. at 594 (emphasis in the original).
Yet district courts still retain “wide discretion” in certifying classes, such that they may “cut off discovery to avoid a mini-trial on the merits.”\textsuperscript{31} The power to cut off discovery, however, will be invoked differently depending on the subject matter of the case. For example, the court noted that a Title VII case might require circumscribing discovery earlier than in other disputes because the “statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution.”\textsuperscript{32}

**Commonality.**

The Ninth Circuit held that the employees had met their burden under Rule 23(a) in regard to commonality by providing “significant evidence” of company-wide corporate policies and practices, statistical evidence of gender disparities caused by discrimination, and anecdotal evidence of gender bias.

In regard to the plaintiffs’ expert opinion on corporate politics and practices, the Ninth Circuit rejected Wal-Mart’s reliance on \textit{Daubert v. Merrill Dow Pharmaceuticals, Inc.}\textsuperscript{33} in arguing that the expert’s opinion was too “vague and imprecise” to be credited. The Ninth Circuit characterized Wal-Mart’s argument based on \textit{Daubert} as an attack on persuasiveness, rather than methodology, stating that the role of a district court at the class certification stage is to “make factual determinations regarding evidence as it relates to common questions of law or fact but not to decide which parties’ evidence is ultimately more persuasive as to liability.”\textsuperscript{34} The Ninth Circuit did not resolve the issue of whether the \textit{Daubert} analysis has the same application at class certification as at trial because it found that the District Court had analyzed the expert’s testimony under \textit{Daubert}.\textsuperscript{35}

In regard to the plaintiffs’ statistics on discrimination, the Ninth Circuit rejected Wal-Mart’s expert’s view that the statistics should have been examined on a store-by-store, rather than regional, scale. The Ninth Circuit explained that the level at which workforce statistics should be viewed at “depends largely on the similarity of the employment practices and the interchange of employees at various facilities.”\textsuperscript{36} Persuaded instead by the plaintiffs’ expert’s explanation of why a store-by-store analysis would be insufficient\textsuperscript{37} and by the District Court’s analysis of whether aggregation of statistics was proper,\textsuperscript{38} the Ninth Circuit concluded that the District Court had not abused its discretion in crediting the statistics and finding that they

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} 509 U.S. 579, 597 (1993).
\textsuperscript{34} \textit{Dukes}, 603 F.3d at 601-02.
\textsuperscript{35} \textit{Id.} at 603 n. 22.
\textsuperscript{36} \textit{Id.} at 604.
\textsuperscript{37} \textit{Id.} at 605.
\textsuperscript{38} \textit{Id.} at 607.
supported a common core of facts.\textsuperscript{39} The Ninth Circuit explained that the District Court had properly found the statistics “sufficient to create an inference of discrimination” because it had found the methodology and reasoning valid.\textsuperscript{40}

The Ninth Circuit also held that anecdotal evidence can be used to support a contention of commonality and that there is “no authority requiring or even suggesting that a plaintiff class submit a specific number of declarations for such evidence to have any value.”\textsuperscript{41}

Finally, Wal-Mart argued that its policy of allowing managers to use subjectivity in decision-making did not support a commonality finding. The Ninth Circuit rejected this argument, holding that while evidence of subjectivity is insufficient by itself, it is one of several factors that can properly support a finding of commonality.

\textit{Typicality}

The Ninth Circuit rejected Wal-Mart’s arguments that class representatives were insufficiently typical because only one held a management position. The Ninth Circuit held that the lack of a class representative for each management category was inconsequential because “all female employees faced the same alleged discrimination.”\textsuperscript{42}

\textit{Backpay and Manageability}

The Ninth Circuit affirmed the District Court in regard to its finding that backpay for those seeking promotions without objective data would be unmanageable, because “allowing class members to demonstrate post hoc their previous interest in management positions” would be unmanageable.


The Ninth Circuit set forth a new standard for analyzing whether monetary relief precludes class certification under Rule 23(b)(2), based on the advisory committee’s note to the 1966 amendments to Federal Rules of Civil Procedure. Rule 23(b)(2), according to the advisory committee notes, does not “extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”\textsuperscript{43}

The Ninth Circuit explicitly overruled its own “subjective intent” approach to determining whether monetary damages rendered class certification under Rule 23(b)(2) unavailable,\textsuperscript{44} an approach employed by the District Court and announced in \textit{Molski v. Gleich}.\textsuperscript{45}

\textsuperscript{39} \textit{Dukes}, 603 F.3d at 609.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 610-11.

\textsuperscript{42} \textit{Id.} at 614.

\textsuperscript{43} \textit{FED. R. CIV. PRO.} 23 advisory committee’s note.

\textsuperscript{44} \textit{Dukes}, 603 F.3d at 617.
It also rejected the Fifth Circuit’s “incidental damages” approach announced in *Allison v. Citgo Petroleum Group*. The Ninth Circuit held that the incidental damages standard was in “direct conflict” with the advisory committee’s note because the note forbids seeking monetary relief if it is “predominate”—not merely more than incidental.

The Ninth Circuit then articulated a new inquiry for determining whether “monetary relief predominates.” The inquiry is based on, but not limited to, four factors to be applied on a “case-by-case” basis. The four factors are: whether monetary relief (1) determines the “key procedures that will be used,” (2) “whether it introduces new and significant legal and factual issues,” (3) “requires individualized hearings,” and (4) “whether its size and nature – as measured by recovery per class member – raise particular due process and manageability concerns.” No single factor should be dispositive, said the Ninth Circuit. The Ninth Circuit also clarified that looking at the total size of the monetary claim, as Wal-Mart argued, was inappropriate in the “predominance” analysis, because “the predominance test turns on the primary goal and nature of the litigation—not the theoretical or possible size of the total damages award.”

The Ninth Circuit rejected Wal-Mart’s argument that backpay was unavailable under Rule 23(b)(2) and held that “[e]very circuit to have addressed the issue has acknowledged that Rule 23(b)(2) does allow for some claims for monetary relief.” Backpay, the Ninth Circuit held, does not “predominate” because the calculation of backpay does not require complex and individualized factual determinations, and because backpay “is an integral component of Title VII’s make whole remedial scheme.”

The Ninth Circuit remanded the question of class certification for punitive damages to the District Court, holding that the District Court had “abused its direction by certifying the punitive damages claims under Rule 23(b)(2) without first undertaking an analysis of whether certification of the claim for punitive damages rendered the final relief ‘predominantly’ related to monetary damages.” The Ninth Circuit suggested that the District Court consider a hybrid certification, such that punitive damages claims would be certified under Rule 23(b)(3) and claims for injunctive and equitable relief under 23(b)(2).

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45 318 F.3d 937, 955 (9th Cir. 2003).

46 151 F.3d 404, 415 (5th Cir. 1998) (“By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.”).

47 *Dukes*, 603 F.3d at 616.

48 *Dukes*, 603 F.3d at 617.

49 Id.

50 Id. at 617-18.

51 Id. at 618.

52 Id. at 619 (internal quotations and citations omitted).

53 *Dukes*, 603 F.3d at 621.

54 Id.
that notice and an opportunity to opt-out are required for Rule 23(b)(3) punitive damage proceedings.  

3. Former Employees

The Ninth Circuit overturned the District Court in regard to class certification for former employees. The Ninth Circuit held that putative class members who were no longer employees at the time the complaint was filed did not have standing to seek injunctive or declaratory relief; however, they might be able to receive backpay and punitive damages. Therefore, the District Court could choose to certify a separate Rule 23(b)(2) class of former employees for these forms of relief.

4. Manageability and Due Process Concerns

Finally, the Ninth Circuit held that Wal-Mart’s due process rights would not be violated if class were certified because “there are a range of possibilities . . . that would allow this court to proceed in a manner that is both manageable and in accordance with due process, manageability concerns present no bar to class certification here.” The Court identified two possible methods that could be employed to avoid a violation of Wal-Mart’s due process rights, but left the final decision to the District Court.

First, the Ninth Circuit suggested that the method employed in Hilao v. Estate of Marcos, a “large class action” consisting of over 10,000 plaintiffs, would “allow Wal-Mart to present individual defenses” and not compromise their due process rights. The method in Hilao involved a random selection of a subset of all claims that were used to determine the amount of compensatory damages for all claims. Second, the Ninth Circuit noted that a “more limited test case” procedure might be possible, or the “option proposed by the District Court may also remain viable.” The court concluded, “mere size does not render a case unmanageable.”

5. Dissent

Judge Ikuta wrote for the five dissenting judges. Judge Ikuta wrote that plaintiffs’ failed to present “significant proof” of subjective decision-making as required by the Supreme Court in General Telephone Co. of Southwest v. Falcon, and ignored Wal-Mart’s Title VII statutory

55 Id. at 622.
56 Id. at 623-24.
57 Id. at 625.
58 103 F.3d 767 (9th Cir. 1996).
59 Dukes, 603 F.3d at 627, 628 n.56.
60 Id. at 625-26.
61 Id. at 628 n.57.
62 Id. at 628.
63 457 U.S. 147 (1982).
right to assert affirmative defenses for each individual plaintiff. Finally, the Ninth Circuit “failed to undertake a proper analysis of whether the proposed class should be certified under Rule 23(b)(2) or Rule 23(b)(3)” and correctly find the class certification inappropriate because it involved individualized determinations for backpay and punitive damages and raised due process concerns in regard to the absent members in the class.

D. **SUPREME COURT**

1. **Writ of Certiorari and Grant.**

On August 25, 2010 Wal-Mart petitioned for certiorari. They presented two questions: whether claims for monetary relief could be certified under Rule 23(b)(2), and whether the “certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23.” The Supreme Court granted only the first question, posed as “(1) Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances.” The Court then also directed parties “to brief and argue the following question: Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).”

2. **Supreme Court Opinion.**

The Supreme Court’s June 20, 2011 opinion reversed the Ninth Circuit’s grant of class certification. A five member majority held that the class was improperly certified under Rule 23(a), and the court unanimously held that the claims for backpay were improperly certified under Rule 23(b)(2). Justice Scalia wrote for the Court. Justices Ginsburg, Breyer, Sotomayor and Kagan joined parts I and III of the majority’s opinion. Justice Ginsburg wrote separately both concurring and dissenting, and Justices Breyer, Sotomayor and Kagan joined her.

   a. **Majority’s Holding Regarding FRAP Rule 23(a) and Commonality.**

   The majority of the Court held that class certification was improper under Rule 23(a). Stating that the “crux of this case is commonality,” and defining commonality as requiring “the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” the majority held that the employees’ claims did not rest on a common injury that could be satisfied by a “classwide resolution” under subsection (a)(2).

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64 *Dukes*, 603 F.3d at 632-33.


68 *Id.* at 8.

69 *Id.* (citing 457 U.S. 147, 157 (1982)).

70 *Id.* at 9.
The Court reaffirmed General Telephone Co. of Southwest v. Falcon\textsuperscript{71} as the proper approach to commonality.\textsuperscript{72} In Falcon, the Court announced that the commonality question in an employment discrimination case might be met in either of two ways. First, it would be met if an employer used a biased procedure in hiring or promotion.\textsuperscript{73} Second, “significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.”\textsuperscript{74} The majority stated that only the second method was available here, and then held that the employees had not provided “significant proof that Wal-Mart operated under a general policy of discrimination.”\textsuperscript{75} Specifically, the plaintiffs had failed to “prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.”\textsuperscript{76} And the trial court must determine that these facts exist through a “rigorous analysis.”\textsuperscript{77}

In holding that plaintiffs’ lacked “significant proof,” the court challenged all of the evidence presented by the plaintiffs. First, the Court challenged the plaintiffs’ evidence in regard to a company-wide policies and practices. The Court noted that “Wal-Mart’s announced policy forbids sex discrimination and imposes penalties for denials of equal opportunity.”\textsuperscript{78} It continued, “[t]he only evidence of a general policy of discrimination . . . was the testimony of Dr. Bielby,” who testified about Wal-Mart’s strong corporate culture that makes it vulnerable to gender bias.\textsuperscript{79} The majority found troubling that Dr. Bielby could not determine how pervasive stereotypes were in employment decisions, noting that he could not calculate whether “0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.”\textsuperscript{80} The Court also stated that it “doubt[ed]” that the standards for admission for expert testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc.,\textsuperscript{81} were inapplicable at the class certification stage, as the District Court had concluded.\textsuperscript{82} Essentially, the Court reasoned that the sole evidence of a discrimination policy was presented by the expert, and the

\textsuperscript{71} 457 U.S. 147 (1982).
\textsuperscript{72} Wal-Mart Stores, Inc, No. 10-277, slip. op. at 12.
\textsuperscript{73} Id. at 12.
\textsuperscript{74} Id. at 12 (citing Falcon 457 U.S. at 159 n.19.)
\textsuperscript{75} Id. at 13 (internal quotations omitted).
\textsuperscript{76} Id. at 10.
\textsuperscript{77} Wal-Mart Stores, Inc, No. 10-277, slip. op. at 10.
\textsuperscript{78} Id. at 13.
\textsuperscript{79} Id. at 13.
\textsuperscript{80} Id. at 13 (quoting Dr. Bielby in Dukes v. Wal-Mart, 222 F.R.D. 189, 192 (N.D. Cal. 2004)).
\textsuperscript{81} 509 U.S. 579 (1993).
\textsuperscript{82} Wal-Mart Stores, Inc, No. 10-277, slip. op. at 13-14.
expert testimony “does nothing to advance respondent’s case;”\(^{83}\) therefore, the plaintiffs’ failed to identify “a common mode of exercising discretion that pervades the entire company.”\(^{84}\)

The majority also commented that “the only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy’ of allowing discretion by local supervisors.”\(^{85}\) The Court disregarded the weight of this evidence of subjectivity, noting that in a “company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction,” so “the evidence falls well short.”\(^{86}\)

Second, the Court found plaintiffs’ statistical evidence of discrimination unpersuasive. The Court held that it failed to establish that respondent’s theory can be proved on a class-wide basis. The Court cited Judge Ikuta’s dissent in the Ninth Circuit’s en banc opinion for the proposition that statistical evidence of disparities at the regional and national level does not establish disparities at individual store level, nor does it establish a company-wide policy of discrimination.\(^{87}\) Then Court also noted a “more fundamental[] respect in which respondents’ statistical proof fails.”\(^{88}\) It held that a showing of disparate impact in an employment discrimination case was insufficient to meet the “significant proof” standard. Citing its holding in Watson v. Fort Worth Bank & Trust,\(^{89}\) the Court stated that in order to prove liability under Title VII on the basis of disparate impact a plaintiff must challenge a “specific employment practice” – not simply a disparity in impact.\(^{90}\) And pointing to a specific employment practice “is all the more necessary when a class of plaintiffs is sought to be certified.”\(^{91}\) Therefore, because the employees had failed to identify a specific employment practice, “much less one that ties all their 1.5 million claims together,” they failed to establish significant proof of a common question; “[m]erely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.”\(^{92}\)

Third, the Court dismissed the employees’ anecdotal evidence as “too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory.”\(^{93}\) The Court compared the anecdotal evidence offered by the employees with the anecdotal evidence in

\(^{83}\) Id. at 14.

\(^{84}\) Id. at 14.

\(^{85}\) Id. at 14 (emphasis in the original).

\(^{86}\) Id. at 15-16.

\(^{87}\) Wal-Mart Stores, Inc, No. 10-277, slip. op. at 16.

\(^{88}\) Id. at 16-17.

\(^{89}\) 487 U. S. 977 (1988).

\(^{90}\) Wal-Mart Stores, Inc, No. 10-277, slip. op. at 17. (citing Watson, 487 U. S. at 994).

\(^{91}\) Id.

\(^{92}\) Id. at 17.

\(^{93}\) Id. at 17.
Teamsters v. United States. In Teamsters, the plaintiffs produced 40 accounts of discrimination, and “[t]hat number was significant” because “[t]he 40 anecdotes thus represented roughly one account for every eight members of the class” and the “anecdotes came from individuals spread throughout the company.” In contrast, here the employees offered only 1 anecdote for every 12,500 class members and the anecdotes only related to 235 out of 3,400 stores in six states.

In conclusion, the plaintiffs’ failed to provide factual evidence sufficient to meet Rule 23(a)’s commonality requirement because they failed to provide “significant proof that an employer operated under a general policy of discrimination” through their expert’s evidence, statistical evidence, or anecdotal evidence.

b. Court’s Holding Regarding FRAP 23(b)(2) and Backpay.

The Supreme Court unanimously held that the class members’ claims for backpay were improperly certified under Rule 23(b)(2). The Court held that Rule 23(b)(2) “does not authorize class certification when each individual class member would be entitled to an individualized award of monetary damages.” According to the Court, monetary relief cannot be sought under Rule 23(b)(2) “at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.” The Court explicitly did not reach the question of whether monetary claims might ever be certified under Rule 23(b)(2). Finding that backpay calculations here necessitated individualized claims here (see below), the Court concluded that it did not need to reach “that broader question.”

The Court explained that its reading of Rule 23(b)(2) was based both in the history and the structure of the rule. The Court stated that Rules 23(b)(1) and (2) are justified by “traditional justifications” – i.e. that individual adjudications would be impossible and relief would affect the entire class at once. Rule 23(b)(3), however, is a more flexible rule that allows for individualized determinations and therefore requires more procedural protections. Under Rule 23(b)(2), when a class seeks an injunction “benefitting all its members at once” there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute, as required by Rule 23(b)(3). In contrast, “with respect to each class member’s individualized claim for money, that is not so—

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95 Wal-Mart Stores, Inc., No. 10-277, slip. op. at 18 (internal quotations omitted).
96 Id.
97 Id. at 20-21.
98 Id. at 20.
99 Id. at 20.
100 Id.
102 Id.
which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class.”

The Court also stated that only under Rule 23(b)(3) are class members entitled to receive notice and the opportunity to opt-out. Noting that it had previously held in class actions where monetary relief was predominate that the absence of notice and the opportunity to opt-out violated due process, the Court held that the “serious possibility” that monetary claims might predominate in this case was an additional reason not to read Rule 23(b)(2) to include monetary claims.

The Court then rejected the Ninth Circuit’s approach to determining whether the ratio of monetary to other relief was proper under Rule 23(b)(2). First, the Court rejected the Ninth Circuit’s reliance on the advisory committee note because “[o]f course it is the Rule itself, not the Advisory Committees’ description of it, that governs.”

Second, the Court rejected the Ninth Circuit’s conclusion that because the advisory committee note stated that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages,” by negative implication it must apply to cases in which “the appropriate final relief relates only to partially and nonpredominately to money damages.” The Court held that a “mere negative inference does not in our view suffice to establish a disposition with no basis in the Rule’s text, and that does obvious violence to the Rule’s structural features.”

From a policy standpoint, the Court reasoned that “mere ‘predominance’ of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)’s procedural protections” and “creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief.”

The Court cited the initial decision by the plaintiffs not to pursue compensatory damages as an example of a perverse incentive, and it noted that the plaintiffs thus “created the possibility . . . that individual class members’ compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from.” Therefore, claims for backpay should not be certified under Rule 23(b)(2) because under the rule plaintiffs lack the choice to participate.

The Court also rejected the Ninth Circuit’s approach of eliminating employees not employed when the complaint was filed. This solution, said the Court, “ha[d] no logical

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103 Id.
104 Id.
105 Id.
106 Wal-Mart Stores, Inc, No. 10-277, slip. op. at 23.
107 Id. at 23 (quoting the advisory committee notes)(emphasis in the original).
108 Id. at 24.
109 Id. at 24 (explaining that the strategy of including only backpay claims rather than compensation “created the possibility . . . that individual class members’ compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from.”).
110 Id. at 24.
connection to the problem, since those who left their Wal-Mart jobs since the complaint was filed have no more need for prospective relief than those who left beforehand.” 112 Therefore, the answer is “not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.” 113

The Court further rejected as irrelevant the Ninth Circuit’s holding that backpay awards are equitable in nature and therefore appropriate under Rule 23(b)(2). Even if this were true, said the Court, “it is irrelevant” because “[t]he Rule does not speak of ‘equitable’ remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither.” 114

After rejecting the Ninth Circuit’s “preponderance” test, the Court went on to embrace the Fifth Circuit’s “incidental” test in Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998). Yet the Court did not apply the test, noting that respondents neither argued they could nor could indeed satisfy the standard. 115

Finally, the Court held that Wal-Mart was entitled to individualized determinations of each employee’s backpay, as outlined in Title VII’s “detailed remedial scheme.” 116 The Court stated that it has “established procedure for trying patter-or-practice cases that gives effect to these statutory requirements.” 117 The Court then cited Teamsters v. United States 118 for the proposition that a trial court must conduct individualized hearings that would allow Wal-Mart to raise any individual affirmative defenses. Rejecting the Ninth Circuit’s “Trial by Formula” methodology as a “novel project,” the Court held that a formula approach to calculating backpay would abridge Wal-Mart’s substantive rights: “Wal-Mart will not be entitle to litigate its statutory defenses to individual claims.” 119 Reasoning that this individualized litigation would then prevent backpay from being incidental to the injunctive relief, the Court held that even if incidental monetary relief could be awarded to a Rule 23(b)(2) class, monetary relief would not be incidental here. 120 Therefore, backpay could not be sought under Rule 23(b)(2).

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112 Id. at 25 (emphasis in the original).
113 Id.
114 Id. (citing Title VII at 42 U.S.C. §2000e-5(g)(2)(B)(i), (ii)).
115 Id. at 26.
117 Id. at 27.
119 Wal-Mart Stores, Inc, No. 10-277, slip. op. at 27 (noting that “the Rules Enabling Act forbids interpreting Rule 23 to ‘abridge, enlarge, or modify any substantive right,’’” (citing 28 U.S.C § 2072(b)).
120 Id.
3. Concurrence and Dissent

Justice Ginsburg wrote for herself and Justices Breyer, Sotomayor, and Kagan, concurring in part and dissenting in part. She concurred in the Court’s holding that a class could not be certified under Rule 23(b)(2) because the monetary relief sought was more than incidental to any injunctive or declaratory relief. Yet she wrote separately because “[a] putative class of this type may be certifiable under Rule 23(b)(3);” therefore, she “would reserve that matter for consideration and decision on remand.”

Justice Ginsburg dissented from the Court’s holding in regard to Rule 23(a)(2). She disagreed with both the majority’s reasoning in regard to Rule 23(a)(2) and the majority’s conclusions regarding the factual evidence supporting the plaintiffs’ claims.

First, the dissent cited Supreme Court precedent for the plaintiffs’ claims under Rule 23(a)(2). Justice Ginsburg cited the Court’s decision in Watson v. Fort Worth Bank & Trust, certifying a nationwide class with similar factual circumstances and holding that “discretionary employment practices can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results.” She also noted that the “plaintiffs’ allegations resemble those in one of the prototypical cases in this area, Leisner v. New York Tel. Co.,” where supervisors were allowed to make promotion decisions on the basis of whether the person would be successful in business. “It is hardly surprising,” she wrote, “that for many managers, the ideal candidate was someone with characteristics similar to their own.”

Second, she disagreed with the Court’s analysis of Rule 23(a)(2)’s commonality requirement, stating that “the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.” She explained that the “Court 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.” She argued that the Court’s focus on dissimilarities rather than commonalities was “far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met.” The dissent then concluded that a finding that Wal-Mart’s policies violate the law would be the “first step in the usual order of proof for plaintiffs seeking individual remedies for

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121 Id. at 1 (Ginsburg, J., dissenting)
123 Wal-Mart Stores, Inc, No. 10-277, slip. op. at 7 (Ginsburg, J., dissenting) (internal quotations omitted).
125 Wal-Mart Stores, Inc, No. 10-277, slip. op. at 7 (Ginsburg, J., dissenting).
126 Id. at 7.
127 Id. at 2.
128 Id. at 8 (internal citations omitted).
129 Id. at 10.
company-wide discrimination” and therefore a common question of law or fact was presented.\textsuperscript{130} Ginsburg noted that “[a]bsent an error of law or an abuse of discretion, an appellate tribunal has not warrant to upset the District Court’s finding of commonality.”\textsuperscript{131} She concluded that “the District Court’s identification of a common question, whether Wal-Mart’s pay and promotions policies gave rise to unlawful discrimination, was hardly infirm.”\textsuperscript{132}

Third, Justice Ginsburg discussed at length the factual evidence supporting the plaintiffs, stating that “[t]he plaintiffs’ evidence, including class members’ tales of their own experiences, suggests that gender bias suffused Wal-Mart’s company culture.”\textsuperscript{133} Ginsburg countered the majority’s reading of \textit{Teamsters} as requiring a proportional number of anecdotes, stating that “\textit{Teamsters}, the Court acknowledges, instructs that statistical evidence alone may suffice; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.”\textsuperscript{134}

\textbf{EMPLOYER’S PERSPECTIVE}

The Supreme Court’s \textit{Wal-Mart} decision represents a clear and substantial victory for employers. Coupled with the Court’s recent rulings (both discussed below) in \textit{AT&T Mobility LLC v. Concepcion}, 563 U.S. ___, 131 S. Ct. 1740 (2011) and \textit{Stolt-Nielsen S.A. v. Animalfeeds International Corp.}, 559 U.S. _____, 130 S. Ct. 1758 (2010)—where the Court generally upheld individual vs. class arbitrations, it appears the Court is sending a strong signal concerning the limitations on wide-ranging class actions.

The \textit{Wal-Mart} decision raises the bar for class action suits and clarifies the importance of the commonality question. It stresses the importance of the lower courts’ gatekeeping function and the rigorous analysis required at the class certification stage. It is not enough to identify a general common question; rather, plaintiffs need to identify and advance “significant proof” of “a specific employment practice” that “ties” their class together and for which there are “common answers apt to drive the resolution of the litigation.” Following \textit{Wal-Mart}, both lower federal courts and also state courts, many of which pattern their class action practices on Federal Rule 23 and federal court guidance, should significantly limit the number of cases, geographic reach, and sizes of classes that obtain class certifications in the employment arena. That said, employers need to anticipate that there will be real efforts to obtain a Congressional response to \textit{Wal-Mart}, especially if there is a shift in Congress. In the interim, plaintiffs’ counsel will strenuously argue that the \textit{Wal-Mart} decision has limited applicability and does not preclude large (and even nationwide) discrimination class actions where, for example, there is a specific biased testing procedure or a specifically identifiable employment policy that is uniformly applied in the workplace without discretion. Plaintiffs’ counsel will probably pursue smaller

\textsuperscript{130} \textit{Wal-Mart Stores, Inc}, No. 10-277, slip. op. at 11 (Ginsburg, J., dissenting).
\textsuperscript{131} \textit{Id.} at 3.
\textsuperscript{132} \textit{Id.} at 6.
\textsuperscript{133} \textit{Id.} at 3-5, 5.
\textsuperscript{134} \textit{Id.} at 5 n.4. (citing \textit{Teamsters v. United States}, 431 U.S. 324 (1997)).
classes throughout the country, possibly implicating multi-district litigation considerations. Discovery disputes will likely become more prevalent and intense.

*Wal-Mart* essentially settles the circuit split on monetary damages classes and, as a practical matter, requires monetary relief claims to be pursued under Rule 23(b)(3), with its “greater procedural protections.” The *Wal-Mart* decision also invites significant *Daubert* and other challenges at the class certification stage and will call for greater scrutiny of purported expert evidence offered by the putative class. In this vein, *Wal-Mart* casts serious doubt on the use of social framework analyses by expert; minimizes any value of anecdotal evidence; heightens the scrutiny of statistical evidence and the conclusions that can be supported by such evidence; and rejects the use of extrapolation of statistics in an employment litigation setting. Indeed, although much of the Court’s analysis of such evidence was *dicta* or not necessarily controlling to its ultimate decision, the viability of past evidentiary approaches that resulted in certifications of numerous employment class actions is seriously at issue.

Future class certification fights for the defense will thus entail a refocusing of arguments concerning, among other things:

- the insufficiency of the plaintiffs’ identification and proof of a common question and the absence of common answers that would benefit the entire class,
- the significant presence of managerial discretion and the differences from worker to worker, decisionmaker to decisionmaker, and location to location,
- the inadequacy of plaintiffs’ expert evidence including the validity or infirmity of the statistical evidence,
- the insignificance of anecdotal evidence,
- the presence of individualized relief questions and the employer’s right to present its statutory defenses to such individualized inquiries,
- the unmanageability of the proposed class, and
- other “dissimilarities” that will make classwide adjudication difficult.

Although involving a discrimination claim under Title VII, the applicability of *Wal-Mart*’s teachings in the context of FLSA and other class actions should also not be ignored by the defense. Indeed, guidance from the *Wal-Mart* decision may be helpful at the conditional certification stage not only in the employment law field, but in large class actions generally.

Finally, the *Wal-Mart* decision highlights the importance of the creation, maintenance, and enforcement of employer policies against discrimination. Employers taking comfort in the Court’s indication that allowing managerial discretion is “the opposite of a uniform employment practice that would provide the commonality needed for a class action” are, nevertheless, cautioned to train such managers on the proper use of such discretion and discipline improper or ill-advised use of such discretion. Subjectivity challenges are still alive, albeit highly unlikely in a class setting.
EMPLOYEE’S PERSPECTIVE

While the Wal-Mart decision raises the bar on certain certification prerequisites and requirements, it is neither the death knell of employment discrimination class actions nor the parade of horribles as the defense bar portends. Appropriately tailored class cases, including those involving subjective decision making, will continue to be brought and certified. It is not a question of whether; rather, it is a question of how. Post-Wal-Mart employment discrimination class actions challenging testing devices or other companywide policies or procedures and those where there is significant proof of discrimination continue to be viable. The Supreme Court clearly indicated that subjective decision making under the proper factual circumstances remains a basis for liability.

Wal-Mart can be readily distinguished, based on its facts and legal theories, from more narrowly tailored cases. District courts are not hesitating to do just that when called for by the circumstances of a particular case. For example, the Eastern District of New York recently refused to decertify the liability phase class in United States v. The City of New York, C.A. 07-cv-2067, (E.D.N.Y. July 8, 2011), a class action alleging race discrimination by the City of New York in the hiring of firefighters. The court found that Wal-Mart left undisturbed a district court’s ability to order (b)(2) certification under Rule 23(c)(4) as to specific issues when the entire claim does not satisfy (b)(3)’s predominance requirement. Slip. Op. at p. 15. Moreover, the court certified under (b)(3) claims for damages finding superiority and predominance were met. Slip Op. at p. 42. The court stated that although individual proceedings would be necessary to determine eligibility for relief, what relief is available and mitigation efforts, resolution of those individual questions is of relatively minimal significance and resolution of common questions will determine the extent of back pay. Slip Op. at p. 44. See also Cox v. Zurn Pex, Inc., C.A. No. 10-2267 (8th Cir., July 6, 2011) (affirming certification of class of homeowners for warranty and negligence claims in consumer class action); Jasper v. C.R. England, Inc., C.A. No. 2:08-cv-05266, (C.D. Cal., June 30, 2011) (rejecting motion to decertify classes of drivers in wage and hour action under state law); Ramos v. SimplexGrinnell, C.A. No. 07-cv-981 (E.D.N.Y., June 21, 2011) (certifying class of workers alleging violation of prevailing wage law under state law).

Finally, a “legislative fix” is always within the realm of possibility. Because the Court’s decision was grounded in its interpretation of Federal Rule of Civil Procedure 23, Congress could act to restore or even broaden enforcement of the civil rights laws as it did in 1991 when it amended the Civil Rights Act or in 2009 when it passed the Lily Ledbetter Fair Pay Act in response to Supreme Court decisions that narrowed enforcement of Title VII. The Senate Judiciary Committee has already held hearings on the effect of the Wal-Mart decision on the enforcement of Title VII. Senator Patrick Leahy convened the hearing to examine three decisions – Wal-Mart, AT&T v. Concepcion and Janus Capital v. First Derivative Traders – due to his concern that they highlighted the pro-business leanings of the majority of the justices.

II. STOLT-NIELSEN V. ANIMALFEEDS INTERNATIONAL CORP.

One year before ATT Mobility v. Concepcion was decided, a five-member majority of the Supreme Court (the same members of the Court to form the majority in Concepcion) held in Stolt-Nielsen v. AnimalFeeds International that the Federal Arbitration Act (FAA) does not
permit arbitrators to impose class arbitration on parties that have not agreed to class arbitration.  


In Stolt-Nielsen v. AnimalFeeds International, the majority found that the parties had stipulated that the arbitration clause at issue was silent in regard to class arbitration, and that the parties agreed that they had not consented to class arbitration. Despite this, said the Court, the arbitrators had found that the arbitration clause should be construed to permit class arbitration as a matter of public policy. The Court thus held that the arbitrators had exceeded their powers in allowing for class arbitration without the parties consent.

In reaching the conclusion that the parties could not be compelled to participate in class arbitration, the majority reasoned that the primary purpose of the FAA is to “ensure that ‘private agreements to arbitrate are enforced according to their own terms.” The Court noted that like “any other contract, the parties’ intentions control,” and due to the “consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration as they see fit.” Therefore, without an agreement, “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”

While Courts may resolve certain procedural questions by reading a term into an arbitration agreement under the Restatement of Contracts, a Court may not read in a class-arbitration provision. This is because “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” The Court noted several “fundamental” changes in the shift from bilateral to class arbitration.

The dissent argued that the case should have been dismissed as unripe. Yet the dissent also voiced disagreement on the merits. Justice Ginsburg argued that the arbitrators had not abused their power because they had relied on contract and maritime law. She also disagreed with the conclusion that the parties had stipulated that they had not agreed to class arbitration.

136 Id. at 1766.
137 Id. at 1773.
138 Id. at 1774.
139 Id.
140 Id. at 1775.
141 Id. at 1775.
142 Id. at 1776.
III. AT&T MOBILITY V. CONCEPCION

The Concepciones sued AT&T alleging that the company’s offer of a free phone to anyone who signed up for its service was fraudulent because the company charged the customer sales tax. Their suit was consolidated with a class action alleging that AT&T had falsely advertised free phones. The Concepciones’ sales contract had a provision that provided for arbitration of all disputes and required that claims be brought by the consumer individually, not as part of a class action.

In March 2008, AT&T moved to compel arbitration against the Concepciones. The District Court denied the motion because under the California Supreme Court’s Discover Bank decision it found the arbitration provision unconscionable, since it did not allow for class arbitration. Under California law, courts may refuse to enforce any contract found to be unconscionable at the time it was made or may limit the enforcement or an unconscionable clause. In Discover Bank v. Superior Court, the California Supreme Court held that most class-arbitration waivers are unconscionable.

The Ninth Circuit agreed with the District Court and held that the provision was unconscionable under California law in Discover Bank. It also held that the Federal Arbitration Act did not expressly or impliedly the pre-empt Discover Bank rule. In AT&T Mobility v. Concepcion, the Supreme Court reversed the Ninth Circuit and held that the Federal Arbitration Act pre-empts state-law rules “that stand as an obstacle to the accomplishment of the FAA’s objectives” – abrogating Discover Bank. The Court reasoned that although Section 2 of the FAA makes agreements to arbitrate enforceable unless “such grounds as exist at law or in equity for the revocation of any contract,” such as unconscionability, “nothing in [the FAA § 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” Because “requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus...

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145 Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) (holding that a class arbitration waiver in a “consumer contract of adhesion” is unconscionable under “in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” and that the prohibition of a class action waiver in an arbitration agreements is not preempted by the FAA).

146 Easter v. AT & T Mobility LLC, 584 F.3d 849 (9th Cir. 2009) cert. granted, 130 S. Ct. 3322 (U.S. 2010) and rev'd sub nom. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (U.S. 2011).

147 Concepcion, 131 S.Ct. at 1748.

148 9 U.S.C.A. § 2 (West) (“[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

149 Concepcion, 131 S.Ct. at 1748.
creates a scheme inconsistent with the FAA,"150 state laws such as Discover Bank are pre-empted.

Justice Scalia wrote for the majority, which included Justices Kennedy, Thomas, and Alito.151 First, Scalia stated that in Perry v. Thomas,152 “we noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist ‘at law or in equity for the revocation of any contract,’” such as unconscionability.153 Scalia wrote that “a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.”154 He then provided numerous examples of what would occur if a state-law rule regarding unconscionability were allowed pre-empt the FAA, such as requiring the Federal Rules of Evidence in arbitrations, which would compromise the FAAs’ objectives.

Scalia then explained the FAA’s objectives. The “principle purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.”155 And the “point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”156 Applying these principles, the Court concluded that “California’s Discover Bank rule . . . interferes with arbitration.”157 First, “it sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment” since before an arbitrator can reach the merits he or she must first decide whether a class may be certified, for example. Second, it interferes with the parties’ discretion in fashioning contracts since it requires procedural formality.158 Third, it increases the risks to defendant which inhere in informal procedures by compounding them.159 Furthermore, the Court noted that “arbitration is poorly suited to the higher stakes of class litigation.”

In conclusion, the Court rejected the Discover Bank rule – and any other state law – that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”160 Essentially, the Court rejected class arbitration as inconsistent with the majority’s substantive conception of arbitration. The dissent challenged the majority on this conclusion, and argued that the Discover Bank rule was consistent with the language and purpose of the FAA and therefore the FAA did not pre-empt the Discover Bank rule.

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150 Id.
151 Justice Thomas wrote separately, concurring, to explain how he would find a limit to FAA Section 2’s requirement that a defense apply in any contract in the text of the FAA. Id. at 1753-1756.
153 Concepcion, 131 S.Ct. at 1747 (citing Perry, 482 U.S. at 492 n.9).
154 Id. at 1747 (citing Perry, 482 U.S. at 493 n.9).
155 Id. (internal citations omitted).
156 Concepcion, 131 S.Ct. at 1749.
157 Id. at 1750.
158 Id. at 1751.
159 Id. at 1752.
160 Id. at 1753 (citing Hines v. Davidowitz, 312 U.S. 52 (1941)).
Justice Breyer wrote for the dissent, which was joined by Justices Ginsburg, Sotomayor, and Kagan. First, the dissent argued that the “Discover Bank rule is consistent with the federal Acts’ language” because it applies equally to class action waivers in contracts with arbitration provisions and to those without. Thus, the rule falls directly within the language of the Act’s exception permitting courts to refuse to enforce arbitration agreements on the same grounds as contracts.161

Second, the dissent disagreed with the majority that the Discover Bank rule was inconsistent with the purposes of the FAA, arguing that “We have described that purpose as one of ensuring judicial enforcement of arbitration agreements” by placing arbitration agreements on “the same footing as other contracts.” 162

Breyer expressed puzzlement with the majority’s idea that “individual, rather than class, arbitration is a ‘fundamental attribute’ of arbitration,”163 noting that class arbitration is widely employed in California and elsewhere. Breyer then went on to explain why neither history nor present practice suggested that class arbitration was fundamentally incompatible with arbitration, and argued that the majority therefore lacked a basis for its holding that California law was preempted.

Finally, the dissent argued that the majority’s holding violates basic principles of federalism. The dissent argued that the majority had disregarded congressional intentions manifested in the FAA’s language applying contract defenses to arbitration agreements and therefore providing states “an important role incident to agreements to arbitrate.”164 The dissent then noted that “even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States.”165 Therefore, state law should be upheld “so long as the State does not adopt a special rule that disfavors arbitration.”166 But the majority’s decision to strike down a “state statute that treats arbitrations on par with judicial and administrative proceedings” is unprecedented and violates principles of federalism.

Justice Thomas concurred in the majority’s holding, making it clear that he did so “reluctantly,” in order to provide “lower courts guidance from a majority of the Court.”167 Thomas provided a textual analysis of the FAA. He concluded that the FAA allows courts to apply contract defenses to arbitration agreements only when the defense relates to the formation

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161 Concepcion, 131 S.Ct. at 1757. (Breyer, J., dissenting)
162 Id. at 1758 (Breyer, J., dissenting) (internal citations omitted).
163 Id. at 1758-59 (Breyer, J., dissenting) (citing the majority).
164 Id. at 1762 (Breyer, J., dissenting).
165 Id. at 1760 (Breyer, J., dissenting) (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. ----,----, 130 S.Ct. 2772, 2772 (2010)).
166 Id.
167 Concepcion, 131 S.Ct. at 1754.
of the contracts, such as “fraud, duress, or mutual mistake.” According to Thomas, the proper question is whether “California’s Discover Bank rule relates to the making of an agreement. I think it does not.”

**EMPLOYER’S PERSPECTIVE**

The three decisions covered in this paper, *Wal-Mart, Stolt-Nielsen,* and *Concepcion,* will, no doubt, foster much dispute over the coming years regarding the applicability and limitations of the holdings of these decisions. The holdings in *Stolt-Nielsen* and *Concepcion* are consistent with the Supreme Court’s past decisions that broadly enforce the parties’ right to contract to arbitrate, rather than litigate, their disputes. Otherwise stated, *Stolt-Nielsen* and *Concepcion* are simply additional decisions in what is now a long line of Supreme Court precedent that favors arbitration. Both decisions involve factual scenarios that did not arise in the context of employment. But the language of the Court makes clear that the Supreme Court will give full force and effect to the FAA without regard to the setting. Indeed, as Scalia indicated in *Concepcion* when explaining the FAA’s objectives, the “principle purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.” The decisions stand for the premise that if the terms of the parties’ contract provide that there is no class arbitration or are silent on whether class arbitration may transpire, only individual arbitration may proceed and there will be no class arbitration.

Relying on the above-quoted statement and other helpful language from both decisions, employers will assert that the holdings of both *Stolt-Nielsen* and *Concepcion* have broad applicability in the employment arena. Indeed, for example, if the fact scenario in *Concepcion* did not support an unconscionability argument where the amounts in dispute were truly insignificant, employers will assert that employees cannot credibly argue that it is unconscionable to require individual arbitrations of employment disputes where the alleged damages are far more significant. But, as is already apparent from the challenges that have been made since *Stolt-Nielsen* and *Concepcion* were decided, employees will advance many creative arguments to refute the applicability of the holdings in these cases to the employment arena. In the end, it is not unlikely that the dispute over whether the holdings in *Stolt-Nielsen* and *Concepcion* apply in the employment arena will require resolution by the Supreme Court. In the interim, prudent employers will seek competent legal advice as to whether to require employees to submit their disputes to individual arbitration and if so, the language to use in the arbitration agreements to enhance the likelihood of individual vs. class arbitration.

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168 Id. at 1753.
169 Id. at 1755.
170 See note 155.
171 Challenges to date include, but are not limited to arguments that failure to permit class arbitrations would violate federal laws including labor laws and various discrimination statutes that contemplate suit by employees who are “similarly situated.”
**EMPLOYEE’S PERSPECTIVE**

While Concepcion suggested that class arbitration in general is inconsistent with the substantive purposes of arbitration embodied in the FAA, the holding of the case can be read more narrowly. First, the Court noted that the Discover Bank rule is particularly broad and permitted a claim that would otherwise go unresolved in individual arbitration. Further, the Court did not hold that a class-arbitration waiver may not be challenged on grounds of unconscionability, but instead held that a state rule may not interfere with arbitration under the FAA. And the Court did not resolve the question of whether the provision was valid, but instead remanded for further proceedings.

Arthur H. Bryant, the executive director of Public Justice, has commented that “the Court did not hold that the FAA pre-empts state rules of law invalidating class action bans that do not force parties into class arbitration without their consent,” and that “the Court did not hold that the FAA pre-empts state rules of law declaring class action bans unconscionable when the evidence proves that they would effectively preclude consumers from vindicating their rights and immunize defendants from liability. Several states have rules like this.” Arthur H. Bryant, Class Actions Are Not Dead Yet, NATIONAL LAW JOURNAL, June 20, 2011, available at http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202497707930&slreturn=1&hbxlogin=1 (arguing that Concepcion can be limited because “[f]ew states, however, have categorical rules like the Discover Bank rule, and few companies have arbitration clauses like AT&T’s”).

In declaring “California’s Discover Bank rule . . . interferes with arbitration” because it interferes with the FAA’s objectives (as outlined above), the Court noted that “States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action waiver positions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose . . . .”

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172 Arthur H. Bryant, Class Actions Are Not Dead Yet, NATIONAL LAW JOURNAL, June 20, 2011, available at http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202497707930&slreturn=1&hbxlogin=1 (arguing that Concepcion can be limited because “[f]ew states, however, have categorical rules like the Discover Bank rule, and few companies have arbitration clauses like AT&T’s”).

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