Most of the journalistic commentary about the Supreme Court’s decision in *Wal-Mart Stores Inc. v. Dukes*, 2011 U.S. LEXIS 4567 (June 20, 2011), has missed the forest for the trees. The case is extremely significant and will close the courthouse doors to most employment discrimination litigation under Title VII—but not for the reasons most seem to think.

“You Just Can’t Get There From Here”: A Primer on *Wal-Mart v. Dukes*

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The problem is not the Court’s 5-4 decision that Rule 23(a)(2)’s “commonality” requirement was not satisfied (that outcome was widely expected), but rather the Court’s unanimous decision that back pay (and other forms of money damages) could not be awarded in a Rule 23(b)(2) class action.

Most commentary has focused on the issue on which the Court split and ignored the greater significance of the issue on which they agreed. That the Court’s liberals went docilely along with the conservative majority on the Rule 23(b)(2) money damages issue seems surprising and raises a question: Did they really understand the impact of what they were doing?

The simple truth is that employment discrimination litigation cannot normally be certified under Rule 23(b)(3) because of the “predominance” requirement of that Rule, which requires that the common questions of law and fact “predominate” over the individual ones. Even in a far simpler, more streamlined case than Wal-Mart, there will still typically be a host of individual issues that will make it difficult (and usually impossible) to satisfy that predominance standard.

Indeed, recognizing this problem a decade ago, the Second Circuit crafted in response an “ad hoc balancing” approach in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). Under this approach, in a Title VII class action, the class members could seek compensatory damages when “the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though
compensatory or punitive damages are also claimed." Robinson’s test looked to whether “(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought, and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” Id. at 164.

Robinson’s test was indeed ad hoc and arguably a jury-rigged judicial invention with little support in the text of the Rule, but it worked. An invention born of necessity, the Robinson decision was adopted two years later by the Ninth Circuit, which reached the same assessment. See Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003). Other Circuits disagreed, and the resulting split in the Courts had long made a Supreme Court review of this issue seem inevitable, even without the overbreadth, sprawling class that plaintiffs cobbled together in Wal-Mart. Although Robinson employed a narrower, more defensible standard than the Ninth Circuit adopted in its Wal-Mart decision to determine when monetary relief can be awarded under Rule 23(b)(2), both the Second and Ninth Circuits’ decisions have been clearly overruled by Wal-Mart. Yet curiously, nowhere in Wal-Mart is Robinson cited.

This suggests that the liberal wing of the Court may not have recognized how procedurally cut off and trapped employment discrimination victims are if back pay cannot be obtained as a form of “incidental” relief under Rule 23(b)(2). Reinforcing this sense is the casual assertion by Justice Ginsburg in her Wal-Mart dissent that the case should be remanded to the district court for a determination as to whether it could be certified under Rule 23(b)(3). Id. at *51-52. That idea is a non-starter. In all Circuits, the predominance standard has long been the Grim Reaper of putative class actions, and the sprawling character of the Wal-Mart class (with 1.5 million or more class members working in 3,500 stores in 50 states at a broad assortment of jobs) doomed it from the start—if the predominance standard applied.

So what are the issues that survive Wal-Mart or that Wal-Mart raises for the first time? They are numerous:

1. When Can Money Damages Be Awarded Under Rule 23(b)(2)?

Justice Scalia’s majority decision stops short of holding that monetary relief can never be awarded under Rule 23(b)(2) (although he does acknowledge that is “one possible reading” of the text of the rule—Id. at *38-39). Instead, his opinion holds that:

[A]t a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule. Id.

Emphasizing the non-opt-out character of Rule 23(b)(2) and its lack of mandatory notice, he then added:

Permitting the combination of individualized and class wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b)(2). Id. at *40.

When then can damages be obtained in a Rule 23(b)(2) class action? Some federal statutes provide for statutory penalties under which any victim receives an automatic, legislatively specified award. For example, the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq., provides for $1,000 damages per victim for certain privacy violations. Prior to Wal-Mart, the Second Circuit had questioned whether such damages could be awarded in a large class action. After all, $1,000 times 100,000 class members could produce an astronomical recovery, which the Second Circuit reasoned did not seem at all “incidental” to the injunctive relief. See Parker v. Time Warner Entertainment Co., 331 F.3d 13 (2d Cir. 2003). But after Wal-Mart, that “incidental” standard may not survive and the focus may shift to whether the damages are “individualized” or uniform.

Another decision that may survive Wal-Mart is In re Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004). There, in a case involving alleged discrimination against African-Americans in life insurance benefits, the Fifth Circuit found that the differential between the life insurance premiums charged to African-American policyholders and that charged to other policyholders could be calculated objectively from the face of the policy. Thus, the Fifth Circuit upheld class certification because the potential money damages award would not require judicial discretion and thus could be termed “incidental.” After Wal-Mart, if the damages award can be determined under an objective formula (with little discretion in the court), it is possible that this will be seen as uniform and not “individualized” relief. But it is also possible that if there can be significant variations in awards among class members, this would lead to a characterization of the relief as “individualized.” Moreover, even if the damages can be calculated objectively, at some point the damages formula may become sufficiently complicated that the relief also becomes “individualized” and hence unavailable. Time will tell.

2. Can Defenses Preclude Class Certification?

Let us suppose that a Rule 23(b)(3) class is proposed on behalf of the employees of a single plant and the basis for the claim of discrimination is an express rule requiring applicants to obtain a specified score on a standardized exam that cannot be shown to be job-related and whose use has a disparate (and adverse) impact on minorities. Here, there is a strong possibility that the common issues will predominate over the individual issues.

But still problems remain under Wal-Mart. As Justice Scalia noted, Title VII gives the employer an affirmative defense:

[[I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the ‘hiring, reinstatement, or promotion of an individual, as an employee, or the payment to him of any backpay.’ Id. at *49.

Suppose then that the employer alleges that it either failed to promote or discharge minority employees because of poor attendance records, recurrent disputes with customers, or the misstatement or omission of information in their employment application. The defendant further asserts that these individualized defenses (as to which it bears the burden of proof) defeat predominance so that the putative class action may not be certified. Alternatively, this same argument can be stated in terms of the ‘superiority’ requirement of Rule 23(b)(3) on the ground that a class action is not the ‘superior’ means of resolving the dispute because the individual defenses must be heard.
The Ninth Circuit had attempted to sidestep this problem of individual defenses (which would have swamped any district court in a class numbering perhaps 1.5 million class members) by approving a sampling methodology. A statistically valid subset of the class would have been selected; a special master would then determine the validity of these defenses in these sample cases; and the court would project these results upon the class as a whole. Thus, if the defenses were determined to be valid in 10 percent of the cases in the sample, the total class action recovery after trial would be reduced by 10 percent. Calling this approach “Trial by Formula,” Justice Scalia rejected it on the grounds that, under the Rules Enabling Act, a federal rule of procedure, including Rule 23, may not “abridge, enlarge or modify any substantive right.” (Id. at 50). Because of this limitation, he concluded that: “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” (Id.).

But if each claim can be challenged before any judgment can be awarded, a large class simply cannot be certified (indeed, even a class of 10,000 members would drain the time and energy of most district court judges, even if they had a deep supply of magistrates at their disposal). Once again, the result is that the class action cannot be tried (Justice Scalia and the majority do not even address the issue of whether the jury has to hear these affirmative defense disputes or whether they can be handled in a supplemental proceeding). The bottom line appears to be that: “You just can’t get there from here.”

The implications of the Court’s insistence that the employer’s defenses be respected extends beyond employment litigation or the use of a sampling methodology. Suppose in a securities class action that the district court determines at class certification that the relevant market is efficient and thus that the corporate issuer is subject to the “fraud on the market” doctrine. But Basic v. Levinson, 485 U.S. 224 (1988), did say that its presumption of reliance was rebuttable. Assume further then that the defendant seeks at trial to introduce evidence that the claim that 20 percent of the class consists of “indexed” institutional investors who could not have relied on any financial information because they simply hold a diversified portfolio consisting of the stocks of all public companies. Today, the correct answer is that these investors could still say that, even if they did not study this information, they still relied on the market to price these stocks correctly. But, in the future, will the Supreme Court allow defendants to seek to rebut reliance at trial for those investors they think did not rely on the alleged misstatement? The result would be to make individual issues predominate over common issues (and also to make the action unmanageable for purposes of Rule 23(b)(3)). Wal-Mart does not suggest that the Court will go this far. In a footnote, the Court asserts that at trial in a securities class action the plaintiffs “will surely have to prove again at trial [that the market was efficient] in order to make out their case on the merits.” (Id. at *23, n. 6.) At trial, defendants will be able to attack both loss causation and market efficiency, but not individual reliance (at least unless the Court decides to re-consider Basic v. Levinson).

3. Can Sampling Methodology Be Used in Individual Mass Tort Cases?

Assume that several thousand asbestos (or similar mass tort cases involving exposure to a dangerous chemical) have been consolidated before a district court. Rather than try each case, it is seeking to use a sampling methodology under which outcomes reached in a subset of cases will be applied to the entire population. But Justice Scalia denigrated this approach in Wal-Mart, calling it “Trial By Formula.” No doubt that there are risks in using such a procedure in the future after Wal-Mart, but Justice Scalia’s rejection of sampling was based on the Rules Enabling Act (“REA”).

The decision holds that because the REA forbids any interpretation of the federal rules that “abridge, enlarge or modify any substantive right,” Rule 23 cannot be read to permit any eclipsing of defendant’s ability to raise its statutory defenses. But consolidated individual mass tort cases are not governed by any special rule, and that consideration does not apply. Possibly, the Court may in the future find due process problems in use of sampling problems, but that day has not yet arrived.

4. How Will the Commonality Requirement Be Read in Future Cases?

Traditionally, commonality was the easiest requirement to satisfy in Rule 23(a). In some contexts, it will remain easy to satisfy (for example, securities class actions where the common issue is typically whether the defendant made a material misstatement or omission in its public disclosures. But, Wal-Mart’s basic holding on the commonality issue appears to be that plaintiffs must identify “a common mode of exercising discretion that pervades the entire company.” (Id. at 31). This will probably force plaintiffs to reduce the size of proposed classes, limiting them to single plants or job classifications—or at the least to a common supervisor who arguably exercised discretion in a discriminatory fashion. That already was the tendency in most other Circuits. See, e.g., Andersen v. Westinghouse Savannah River Co., 406 F.3d 248 (4th Cir. 2005); Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004); Bacon v. Honda of Am. Mfg. Inc., 370 F.3d 565, 571 (6th Cir. 2004). In general, these cases have disfavored classes that encompass both workers and supervisors or production line workers in different plants with different production capabilities.

In this light, the majority’s refusal in Wal-Mart to certify an extremely sprawling class action, covering 3,500 stores, 50 states and a broadly number of job classifications, was not surprising. Indeed, it is doubtful that even the Second Circuit (or any other Circuit) would have certified Wal-Mart (and the Ninth Circuit did so only by one vote on en banc review).

But if the dissent may protest too much about the majority’s failure to certify a class of Wal-Mart’s scope, they can object more convincingly how the majority construes the commonality requirement. Justice Scalia argues succinctly that:

Without some glue holding the alleged reasons for all these decisions together, it will be impossible to say that examination of all of the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored. (Id. at *24).
The required “glue” here seems to be not only a similar identity on the part of the plaintiffs, but a similar motivation or purpose on the part of the defendant. Relying on General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982), Justice Scalia concludes that the plaintiffs must plead a “common answer” that will satisfy the commonality requirement, either by showing a “biased testing procedure,” or “significant proof that an employer operated under a general policy of discrimination” (id. at 26). But that is what the plaintiffs’ regression statistics arguably showed—not enough to prove the case at trial, but arguably enough to provide the requisite “glue.”

In future cases in which plaintiffs assert a “general policy of discrimination,” it appears likely that they will have to supply a substantial narrative, and a virtual mini-trial may ensue. As redefined, commonality necessarily overlaps with the merits, and Wal-Mart shows the majority unpersuaded by anecdotes, sociological models, or regression equations. But unconscious discrimination will seldom manifest itself in explicit statements, and employers have long ago learned not to rely on standardized testing procedures (at least unless the test has been empirically validated as job related).

In the last analysis, the majority was probably justified in saying that the Wal-Mart class was too sprawling, but less so in requiring a “common answer” that knits together all the examples of discrimination with a common thread. Less damage would have been done if the Court had rejected the proposed class on grounds of typicality or adequacy of representation (i.e., Rules 23(a)(3) or (a)(4)). After all, a shop floor employee on the West Coast really cannot adequately represent administrators on the East Coast (or vice versa), and subclasses might have been properly required. At some point, multiple subclasses might have made the class “unmanageable” under Rule 23(b)(3), but this would have only required multiple class actions to be filed.

Instead, for the future, class certification in cases where a “general policy of discrimination” is alleged will see a long debate over whether a “common answer” linking together all these episodes has been adequately alleged—which debate will then have to be repeated at trial before the jury. Even in a case involving a single plant, this will be a significant obstacle and may require a possible minitrial.

5. What Should Corrective Legislation Do?

If we recognize (as we must) that collective litigation for money damages for employment discrimination is now largely foreclosed, the next question becomes: What type of legislative reform would both work and be feasible? Polarized as the political system is today, the one reform that might pass over the intermediate future is a narrow revision of the procedures applicable to employment discrimination. Conceivably, Republican women might join their Democratic counterparts in supporting such a reform. In contrast, an attempt to rewrite Rule 23 generally to soften its “predominance” requirement would spur the entire business community into frenzied lobbying in opposition. Moreover, reforms addressed to the Court’s revision of the “commonality” requirement are likely to be futile. In the next sprawling class action, the majority might instead seize on the “typicality” or “adequate representation” requirements or some other provision in Rule 23.

But Congress could establish a special collective litigation procedure for employment claims that did not rely on Rule 23. For example, consider a statute that reads:

Proposed Addition to Title VII

(a) One or more person may sue on behalf of themselves and other persons, without complying with Rule 23 of the Federal Rules of Civil Procedure, with respect to [an alleged violation of Title VII] for compensation (including back pay) and related money damages, injunctive, equitable or declaratory relief if:

(1) the individual or individuals bringing suit and their counsel can adequately represent the other persons sought to be represented in the action;

(2) the persons sought to be so represented are reasonably similarly situated in terms of both (i) the allegations pleaded with specificity in the complaint and (ii) their job categories, employment positions and records, or applicant status; and

(3) pursuant to the court’s direction, reasonable notice is given to the other persons sought to be represented and they do not decline such representation.

(b) In determining whether the [violation of Title VII] caused injury or loss to any person, the court may use a reasonable sampling methodology and adjust the total damage award in accordance therewith if, and to the extent that, it determines that individualized hearings with regard to defenses or related factual questions would sufficiently burden the court so as to make a collective proceeding infeasible.

Crude and imperfect as this language is, it seeks to restore an opt-out employment discrimination class action of intermediate scope. It also largely outflanks the limitations imposed by Wal-Mart on Rule 23. As long as Due Process standards are complied with, Congress need not drive all its square pegs into the round hole of Rule 23 (and then watch the current Court frustrate its legislative intent).

The proposed language confers considerable (but not unlimited) discretion upon the district court to determine which job categories or employment positions are “reasonably similarly situated in terms of the allegations pleaded” in order to be grouped within the same collective action. Thus, it does not authorize company-wide sprawling class actions of the same breadth as Wal-Mart presented, but multi-jurisdictional and multi-plant actions would still be possible. This language also allows money damages and injunctive relief to be combined within the functional equivalent of an opt-out class action. Finally, it specifically authorizes sampling procedures (although the Court may yet find a Due Process obstacle in their use).

Ultimately, it is time to recognize that the concept of a collective remedy need not be co-extensive with, or depend upon, the boundaries of Rule 23. This recognition is necessary because the current Court is shrinking
Rule 23’s boundaries and seems likely to continue to do so. At the same time, another sad lesson of Wal-Mart is that when plaintiffs seek to maximize their leverage by suing on a companywide, “mega” basis, they invite judicial reversal. Hubris leads to disaster, and Wal-Mart presents the paradigmatic case of such a train wreck—one that has been coming for several years and now has arrived.