

**CLASS ACTION &  
COMPLEX LITIGATION  
ALERT**

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JUNE 21, 2011

**U.S. SUPREME COURT REVERSES CERTIFICATION  
OF MASSIVE EMPLOYMENT CLASS ACTION FOR  
LACK OF COMMONALITY, HOLDS CERTIFICATION  
OF MONETARY CLAIMS MUST BE ANALYZED  
UNDER RULE 23(B)(3)**

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Yesterday, in an anxiously awaited decision, the U.S. Supreme Court decertified one of the largest employment class actions in history. In *Wal-Mart Stores, Inc. v. Betty Dukes, et al.*, No. 10-277, 2011 WL 2437013 (U.S. June 20, 2011), the Court held that the putative class of 1.5 million current and former female employees alleging employment discrimination failed to satisfy the requirements of Fed. R. Civ. P. 23(a) and (b)(2).

The *Dukes* opinion gives renewed strength to 23(a)'s commonality requirement, which has often been treated by plaintiffs and some courts as a mere speed bump on the road to certification. The Court's majority held that while every case will present some "common" questions of law or fact, Rule 23(a)'s commonality requirement is satisfied only where the *answer* is likely to be common to the class.

A unanimous Court also disapproved certification of plaintiffs' claims for backpay under 23(b)(2), which allows class treatment where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The Court rejected plaintiffs' argument that these monetary claims were properly analyzed and certified under Rule 23(b)(2) rather than 23(b)(3), which imposes additional requirements, because they were equitable in nature and not the "predominant" relief sought. The Court held that Rule 23(b)(2) contains no such carve-out. This could have far-reaching impact, as plaintiffs routinely seek to shoehorn their cases into 23(b)(2), often by characterizing their remedy as equitable and their monetary relief as subordinate to their request for injunctive or declaratory relief.

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SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of these claims requires a comprehensive strategy developed in partnership with our clients.

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Highlights of the Court's opinion include:

- **A confirmation that Rule 23(a)'s commonality requirement is a meaningful hurdle to class certification.** The Court acknowledged that the commonality requirement is often "misread" because every case presents some common question of law or fact. Commonality, however, can be established for purposes of class certification only if the question is likely to generate a common *answer* in a class-wide proceeding. If individual circumstances are likely to produce different answers, then commonality is not satisfied. While plaintiffs framed the common question in *Dukes* as whether the discretion Wal-Mart vested in its local managers to make promotion and salary decisions resulted in discrimination in violation of Title VII, the answer depended on *why* the local managers made the promotion and salary decisions they did as to each class member. As the Court observed, "[D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." The Court determined that the sociological, statistical and anecdotal evidence plaintiffs provided did nothing to remedy the fundamental problem—class members had "little in common but their sex and this lawsuit."
- **A renewed mandate that lower courts rigorously analyze the facts to determine that plaintiff's claims are susceptible to class-wide proof.** Once again, the Court held that a Rule 23 analysis will inevitably require probing behind the pleadings and likely entail some overlap with the merits of plaintiff's claims. To determine whether commonality truly exists, the evidence plaintiff will rely on to prove her case must be analyzed to determine whether such evidence is capable of carrying the day for all class members. The Court again cautioned courts from reading too much into *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), in which the Court held that the merits of the parties' claims could not be taken into account preliminarily to shift the cost of class notice.
- **An acknowledgment that claims for monetary relief must meet the requirements for class certification prescribed by Rule 23(b)(3) and a rejection that merely labeling relief as "equitable" brings the class within the purview of Rule 23(b)(2).** In no uncertain terms, the Court held, "[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)." Rule 23(b)(3) permits certification "in a much wider set of circumstances but with greater procedural protections," such as notice and an opportunity to opt out—protections the Court held should be afforded class members with monetary claims at stake. The Court found nothing in Rule 23(b)(2)'s language that permitted certification of claims for relief other than injunctive or declaratory, even when equitable in nature (such as backpay) or characterized as something lesser than the predominant relief sought. The Court expressed concern that plaintiffs' arguments "create[d] perverse incentives for class representatives to place at risk potentially valid claims for monetary relief" in an effort to secure Rule 23(b)(2) certification.

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The Court rejected the idea that, by requiring certification of monetary claims under Rule 23(b)(3), it was raising the bar for certification of these claims. While Rule 23(b)(2) does not expressly require findings of predominance and superiority—requirements imposed by Rule 23(b)(3)—the Court observed that all class actions properly certified under Rule 23(b)(2) would, by their very nature, meet those requirements.

- **A recognition that *Daubert* likely applies at the class certification stage.** In the trial court, defendant had challenged the admissibility of plaintiff-experts' opinions under *Daubert*. The trial court declined to apply that standard at the class certification stage. While the issue was not squarely presented, the Court noted in passing that it "doubt[ed]" it was true that *Daubert* would not apply at the class certification stage. This may lay to rest debate by some federal courts as to whether *Daubert* should be applied to the opinions of experts offered in support of class certification.

For additional information about this case, please contact SHB Partners [Jennifer Brown](#) or [Kevin Smith](#). ■