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Where 'Wal-Mart' and ERISA Class Actions Meet

All eyes are on Supreme Court determination on standard for certification.

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In ***Wal-Mart Stores Inc. v. Dukes***, No. 10-277, the U.S. Supreme Court will address the standards for class certification in employment discrimination lawsuits. The ruling will likely impact the adjudication of class certification motions in other areas of law as well. It should be of particular interest to ERISA litigators.

Employment discrimination and ERISA lawsuits present similar class certification issues. In both contexts there are common issues that make class certification seem appealing at first glance: in employment cases, whether there is a pattern or practice of discrimination; and in ERISA cases, whether the plan fiduciaries acted imprudently. Yet there are also individual issues of liability and relief in each context that call into question the appropriateness of class treatment. Not surprisingly, therefore, in both the employment and ERISA contexts, courts have divided on the standards for adjudicating class certification motions.

Wal-Mart presents the Supreme Court with the opportunity to formulate uniform class certification standards to govern these types of claims. The Court will review the certification of a nationwide class of women alleging a pattern or practice of discrimination, and seeking declaratory and injunctive relief, as well as billions of dollars in back pay. The Court will address specifically the certification of a class under Federal Rule of Civil Procedure 23(b)(2), which by its terms is limited to claims for "declaratory and injunctive relief," yet has been utilized in employment cases seeking monetary relief as well.

The outcome of this dispute is significant, since employment claims are less likely to be found suitable for certification under the other two Rule 23(b) criteria: Rule 23(b)(1), which is generally limited to "limited fund" cases or situations where there is a risk of inconsistent verdicts[1]; or Rule 23(b)(3), which requires a finding that common questions of law or fact predominate over issues affecting individual members, and that the class device is the superior means for fairly and efficiently resolving the dispute.[2]

Given the similarity of issues presented in employment and ERISA class certification motions, the ERISA litigation bar will likely have much to learn from the Supreme Court's ruling in *Wal-Mart*. But the reverse may be true as well. An evaluation of ERISA class action lawsuits suggests that, as in employment cases, courts have been unduly preoccupied with the nature of the relief demanded. An approach that focuses instead on the individualized aspects of the liability issues may prove to be more practical, easier to administer, and more aligned with the letter and spirit of Rule 23.

'Wal-Mart' Petition

The class certification issues presented in *Wal-Mart* have generated increased attention since the enactment of the Civil Rights Act of 1991 (CRA),[3] which amended Title VII and 42 U.S.C. 1981, among other statutes. Prior to the CRA, courts routinely certified classes under Rule 23(b)(2), notwithstanding the availability of individual back-pay relief, based on the theory that the back pay was tied to the declaratory and injunctive relief and, as such, was rooted in grounds generally applicable to the class.[4] After the CRA's enactment, courts questioned whether, in light of the availability of compensatory and punitive damages and jury trials, class certification of pattern or practice employment discrimination claims was still appropriate.

A leading example of the CRA's impact on class action jurisprudence is the U.S. Court of Appeals for the Fifth Circuit's ruling in ***Allison v. Citgo Petroleum Corp.***[5] The *Allison* court declined to certify a pattern or practice discrimination suit seeking injunctive, declaratory and monetary relief, and punitive damages for alleged discrimination in hiring, promotion, compensation, and training policies at the defendant's manufacturing facilities. In so ruling, the court determined that plaintiffs could not satisfy Rule 23(b)(2) because the monetary relief demanded was not "incidental to [the] requested injunctive or declaratory relief."[6] The court defined incidental damages as those "that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[7]

According to the court, Rule 23(b)(2)'s drafters never intended for the ordinary class certification requirements delineated in Rule 23(b)(3)—i.e., the predominance of common issues and manageability of the class—to be disregarded or

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circumvented in a Title VII case.[8] Rather, it was presumed that these criteria would automatically be satisfied in the typical "pattern or practice" case seeking class-wide injunctive relief.[9] As the court observed, "because of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members."[10] But, "as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases."[11] Thus, the court reasoned, Rule 23(b)(2) certification should be available only where the monetary damages are incidental to the declaratory and injunctive relief.

The Fourth, Sixth, Seventh, and Eleventh circuits have adopted *Allison's* "incidental damages" test.[12] However, in ***Robinson v. Metro-North Commuter Railroad***, the U.S. Court of Appeals for the Second Circuit rejected *Allison's* "incidental damages" test in favor of an "ad hoc balancing" approach.[13] Under that approach, a court must "assess whether (b)(2) certification is appropriate in light of 'the relative importance of the remedies sought, given all of the facts and circumstances of the case,'"[14] and may certify a Rule 23(b)(2) class if it determines that "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."[15]

In ***Wal-Mart***, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, adopted a new standard under which Rule 23(b)(2) certification is available if the monetary relief is not "superior in strength" to the injunctive and declaratory relief sought by the class.[16] Applying this standard, the majority ruled that plaintiffs were entitled to Rule 23(b)(2) certification, notwithstanding plaintiffs' demand for billions of dollars in back pay,[17] because: the calculation of back pay involved "[relatively un]complicated factual determinations and few[] individualized issues,"[18] and back pay was "an integral component of Title VII's 'make whole' remedial scheme."[19]

'Overdelegation' Theory

The debate over Rule 23(b)(2) standards has accompanied a significant evolution in the modern-day pattern or practice claim. Whereas in the past these claims were directed at centralized employment practices, in recent years, as employment decisions have become more decentralized, plaintiffs have proceeded on the theory that the "overdelegation" of decision-making authority to lower-level supervisors with unfettered discretion gives rise to a pattern or practice of discrimination.[20]

That same theory is espoused in *Wal-Mart*. The plaintiffs claim that Wal-Mart maintains a policy of overdelegating unfettered decision-making authority to its individual supervisors in retail stores throughout the country.[21] The Ninth Circuit concluded that plaintiffs' evidence was sufficient "to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies…that may have worked to unlawfully discriminate against them in violation of Title VII,"[22] and that "the absence of a specific discriminatory policy" was not fatal at the certification stage.[23]

Wal-Mart presents the Supreme Court with the opportunity to examine the suitability of the case to class treatment in light of both the relief demanded and the underlying theory of liability. The discussion of ERISA class action litigation that follows suggests that an approach that focuses on the theory of liability, rather than the nature of the monetary relief demanded, may provide the more appropriate framework for resolving these issues.

ERISA Cases

In the ERISA context, class certification issues similar to those in *Wal-Mart* often arise in connection with "communication" cases, i.e., cases in which participants claim to have suffered harm as a result of misleading communications contained in plan documents or made by plan fiduciaries.

In these cases, there is a common issue that could conceivably satisfy Rule 23(a)'s commonality and typicality requirements: whether defendants violated statutory rules governing plan communications or engaged in a breach of fiduciary duty in the form of a material misrepresentation or nondisclosure. However, there are also individualized liability issues, such as whether, and the extent to which, each participant relied to his or her detriment on the allegedly misleading communication or material nondisclosure, or was otherwise harmed or prejudiced by it. As in the employment context, Rule 23(b)(2) may be the lynchpin for class certification, as Rule 23(b)(1) is infrequently an appropriate vehicle for certification of these types of claims and plaintiffs may have a difficult time satisfying Rule 23(b)(3)'s standards.

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In these cases, focusing the class certification inquiry on the relief demanded may be misguided and could lead to bizarre results. Because the relief for ERISA "communication" claims is generally limited to equitable remedies,[24] a "relief-centric" approach would result in these types of claims being considered more suitable for class treatment than investment loss cases, for which damages relief would typically be available.[25] But concluding that investment loss cases are less suitable to class certification than communication claims, simply because of the relief demanded, is illogical.

Because the investment loss cases focus almost exclusively on the prudence of the defendant's investment decision, a finding of liability on this issue could result in relief for every class member who suffered a loss as a result of the imprudent conduct. By contrast, for communication claims, a finding that the plan fiduciaries made a misrepresentation does not necessarily entitle anyone to relief since a participant must not only establish that a misrepresentation was made, but also that he or she was likely prejudiced by, or was detrimentally harmed by, the challenged practice.[26] Depending on the nature of the harm alleged and the evaluation required, the lawsuit could become consumed by individual liability issues.

Accordingly, in ERISA cases the presence or absence of compensatory damages relief should not drive the issue of whether the claim is suitable for class treatment. Rather, the focus should be on the nature of the inquiry that the court need make for purposes of rendering individual liability findings.

Lessons Learned

The conclusions reached from an evaluation of ERISA cases can be applied readily to *Wal-Mart* and other class action employment claims. Although the Supreme Court could refine the Rule 23(b)(2) inquiry based on the type of relief requested, the focus should be on the nature of the liability inquiry and the extent to which it is individualized. For most claims based on the theory that the company overdelegated decision-making authority to individual supervisors, a finding of a pattern or practice of discrimination would merely be the beginning of the analysis. Before providing relief, there would need to be an individualized inquiry, for each individual supervisor, as to whether he abused his discretion, and whether this was manifested in the form of discrimination against the members of the class working for that supervisor.

The Supreme Court should consider whether, in these circumstances, the liability inquiry is too individualized to permit class certification under Rule 23(b)(2); or stated differently, the class is insufficiently cohesive to warrant certification under that rule. Doing so would avoid the need to draw up any black-line rules based on the type of relief demanded.

Conclusion

In both employment discrimination and ERISA lawsuits, courts have for too long been preoccupied with the nature and characterization of the relief demanded in determining the standards for class certification. The focus should be on the nature of the claims and whether they require individual liability assessments.

Where the claim is such that no individual relief can be awarded until there has been an individualized liability determination, class certification is not appropriate, even without regard to the nature of the relief demanded. If the Supreme Court were to embrace these principles in *Wal-Mart*, it could fashion standards for class certification that would more effectively govern future class certification motions, in both employment discrimination and ERISA suits alike.

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Endnotes:
1. "Rule 23(b)(1)(A) 'takes in cases where the party is obliged by law to treat the members of the class alike…or where the party must treat all alike as a matter of practical necessity…. Rule 23(b)(1)(B) includes, for example, 'limited fund' cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims." ***Amchem Prods. Inc. v. Windsor***, 521 U.S. 591, 614 (1997) (citations omitted). See also FED. R. CIV. P. 23(b)(1) advisory committee's notes to 1966 amends.
2. Class certification is also conditioned on satisfying all four of the Rule 23(a) criteria, including: numerosity, commonality, typicality, and adequacy of representation.
3. Pub. L. No. 102-166, 105 Stat. 1071 (1991).
4. See, e.g., ***Pettway v. Am. Cast Iron Pipe Co.***, 494 F.2d 211, 256-58 (5th Cir. 1974).
5. 151 F.3d 402 (5th Cir. 1998).

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6. Id. at 415.
7. Id.
8. See id. at 413 n.6.
9. Id. at 412-14.
10. Id. at 413.
11. Id. (citation omitted).
12. Id. at 415; see also ***Thorn v. Jefferson-Pilot Life Ins. Co.***, 445 F.3d 311, 330 & n.25 (4th Cir. 2006); ***Reeb v. Ohio Dept. of Rehab. & Corr.***, 435 F.3d 639, 649-50 (6th Cir. 2006); ***Cooper v. S. Co.***, 390 F.3d 695, 720 (11th Cir. 2004), overruled on other grounds by ***Ash v. Tyson Foods Inc.***, 546 U.S. 454, 457 (2006) (per curiam); ***Lemon v. Int'l Union of Operating Eng'rs***, 216 F.3d 577, 580-81 (7th Cir. 2000).
13. 267 F.3d 147, 164 (2d Cir. 2001).
14. Id. (quoting *Hoffman v. Honda of Am. Mfg. Inc.*, 191 F.R.D. 530, 536 (S.D. Ohio 1999)).
15. Id. (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)) (alteration in original) (internal quotations omitted).
16. *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571, 616 (9th Cir.) (citation omitted), cert. granted in part, 131 S. Ct. 795 (2010).
17. Id. at 619-20.
18. Id. at 619 (quoting *Thorn*, 445 F.3d at 331-32) (alteration in original) (internal quotations omitted).
19. Id. (quoting *Allison*, 151 F.3d at 415) (internal quotations omitted).
20. See ***Caridad v. Metro-North Commuter R.R.***, 191 F.3d 283, 291-93 (2d Cir. 1999), overruled on other grounds by ***In re IPO Sec. Litig.***, 471 F.3d 24, 39-42 (2d Cir. 2006).
21. *Dukes*, 603 F.3d at 577-78, 600.
22. Id. at 612 (emphasis omitted).
23. Id. at 603.
24. Communication claims are typically brought pursuant to ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), which limits remedies to "other appropriate equitable relief." But see infra n.27.
25. These claims are typically brought pursuant to ERISA Section 502(a)(2), 29 U.S.C. 1132(a)(2), which allows participants to sue for the relief available under ERISA Section 409. Section 409 provides for a broad array of relief, including monetary restitution.
26. The precise standard of proof is a subject of much debate, and may be resolved, at least in part, in *Cigna Corp. v. Amara*, No. 09-804, a suit presently awaiting decision by the Supreme Court. For purposes of this discussion, it is assumed that some showing of individual harm will still be required for all or most types of ERISA communication claims, and thus that there will be a valid question of whether to certify a class in the presence of these individualized issues.

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