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A report to clients and friends of the firm

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Editor's Overview

This month we look at part two of our three part series on Class Actions. In part two, Robert Rachal, Page Griffin and Madeline Chimento Rea address *Wal-Mart's* Rule 23(b) principles, including some defenses to plaintiffs' use of "issue" or "hybrid" certifications to limit or circumvent *Wal-Mart*. Part II also addresses whether *Wal-Mart* may limit certification of ERISA classes under Rule 23(b)(1)(A), and the use of trial plans and subclasses as means to limit or defeat class actions. Part II concludes with a brief discussion of *Wal-Mart* and *Comcast's* possible impact on "collective actions" under the Fair Labor Standards Act and the Age Discrimination in Employment Act.

As always, be sure to review the Rulings, Filings, and Settlements of Interest where we discuss new proper defendants in benefit claims, liability of a claims administrator, the presumption of prudence applicable in employer stock litigation, and reinstatement of erroneous benefit payments.

Labor and Employment and ERISA Class Actions After *Wal-Mart* and *Comcast* — Practice Points for Defendants (Part II-Rule 23(b))*

By Robert Rachal, Page Griffin & Madeline Chimento Rea

Introduction and Overview – Part II

This is the second part of a three-Part Bloomberg BNA Insights article addressing the impact of *Wal-Mart* and *Comcast* on labor and employment and Employee Retirement Income Security Act class actions. As discussed in Part I,

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Wal-Mart's dissimilarities analysis makes commonality a significant screen to eliminate or cabin many types of labor and employment and ERISA class actions (197 PBD, 10/10/13; 40 BPR 2427, 10/15/13). This can be important to labor and employment class actions involving discretionary or complex multi-level or multi-source decision making, to ERISA investment cases in 401(k) and similar plans, and to ERISA (and labor and employment) class actions that depend on allegedly defective or misleading communications. Part I also discussed how the adequacy and typicality requirements are likely heightened in a post-*Wal-Mart* and *Comcast* world.

Part II of this article addresses *Wal-Mart*'s Rule 23(b) principles, including some defenses to plaintiffs' use of "issue" or "hybrid" certifications to limit or circumvent *Wal-Mart*. On a related point, Part II addresses whether *Wal-Mart* may limit certification of ERISA classes under Rule 23(b)(1)(A).

Part II also addresses the use of trial plans and subclasses as means to limit or defeat class actions and ends with a brief discussion of *Wal-Mart* and *Comcast's* possible impact on "collective actions" under the Fair Labor Standards Act and the Age Discrimination in Employment Act.

Rule 23(b)(2) and *Wal-Mart's* Strictures

Wal-Mart substantially tightened class action procedure. This included halting the practice of permitting individualized monetary relief to be joined in Rule 23(b)(2) classes whenever a court could deem injunctive relief "predominant."[1] *Wal-Mart* bars any direct coupling of such monetary claims with Rule 23(b)(2) classes. As discussed below, the structural analysis in *Wal-Mart*, which explained why these monetary claims need Rule 23(b)(3)'s protections, should preclude indirect attempts to do the same.

Rule 23(b)(2) Class and Relief and Former Employees

Plaintiffs often seek to include former employees in Rule 23(b)(2) classes for injunctive or declaratory relief. Rule 23(b)(2), however, limits this type of class to when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[2] First, former employees should not be included in a Rule 23(b)(2) class because they lack standing to seek such prospective relief since it would not help them, *i.e.*, it would not "redress" their injury.[3] These limitations apply with added force to former employees of a defunct company. In

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[1] *See, e.g., Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001).

[2] Fed. R. Civ. P. 23(b)(2).

[3] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) (stating that injunctive or declaratory relief cannot be ordered for former employees as required by Rule 23(b)(2) since there is no *prospective* conduct to enjoin). *See also Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 120-22 (S.D.N.Y. 2012) (applying *Wal-Mart* to hold same).

such a case, there is no prospective conduct to enjoin and no chance of reinstatement.[4]

Second, former employees should not be part of a Rule 23(b)(2) class because a declaration or injunction is not "final" relief as to them.[5] For example, former employees should not be in a class seeking a declaration that the challenged conduct is "unlawful," since what justifies Rule 23(b)(2) certification is enjoining *prospective* conduct that constitutes final relief as to the plaintiff, not a declaration to use as a step on the way to the ultimate relief of a monetary payment.[6] On a related point, former employees should not be part of a Rule 23(b)(2) class because the declaration must be for the class "as a whole." Former employees would not be within the required class-wide declaration for final relief because whether they recover often depends on whether there are defenses to their individual claims for relief.[7]

Finally, it is worth noting that even when a Rule 23(b)(2) class is limited to prospective injunctive relief for current employees, such relief may raise conflicts that defeat or limit classes. For instance, class conflicts may exist if certain class members benefit from or desire the continuation of the challenged practice.[8] Additionally, injunctive relief in Title VII cases that impinges on the rights of employee third parties raises a host of issues, which can limit the scope or nature of such relief.[9] Remedies based on inclusion (*e.g.*, attracting more female applicants through recruitment) are more likely to be acceptable than those based on exclusion (*e.g.*, selecting some candidates rather than others from a

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[4] *E.g.*, *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 478 (E.D.N.Y. 2001) (finding that even under the rejected "predominating" standard, there is no Rule 23(b)(2) certification when the plant where employees worked had been sold because there is no chance of injunctive relief and the case is realistically one for monetary damages).

[5] *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2557, 2560 (stating that injunctive or declaratory relief must be "final relief" and control prospective conduct, which former employees have no standing to pursue).

[6] *See, e.g.*, *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892-93 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 242 (2011) (holding that injunctive relief is not appropriate nor final as required by Rule 23(b)(2) when the ultimate relief sought is monetary and an injunction would only initiate that process); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825- 26 (7th Cir. 2011) (same for Title VII claim—finding that relief is not final when back pay proceedings are still needed to determine any monetary award).

[7] *See, e.g.*, *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) (finding that Rule 23(b)(2) certification is inappropriate in this ERISA misrepresentation case because proving reliance as to the named plaintiff does not prove that other class members would be entitled to relief). *See also Wal-Mart*, 131 S. Ct. at 2557 (stating that injunctive or declaratory relief must be "final relief" for "the class as a whole," and cannot vary based on whether different individuals are entitled to such relief).

[8] *See, e.g.*, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 316 n.28, 318 (5th Cir. 2007) (stating that "[a] few class members cannot hijack litigation 'on behalf of the plan' to pursue their preference at the expense of others," and holding that plan claims cannot proceed without class procedural safeguards in light of the class conflicts); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC,* 504 F.3d 229, 246 (2d Cir. 2007) (finding antagonistic interests and refusing to certify the class where the interests of the class representatives would not advance the interests of class members who participated in self-funded ERISA plan); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.,* 756 F.2d 1274, 1284 (7th Cir. 1985) (affirming the refusal to certify a class when the class members had divergent and antagonistic interests regarding the goals of the lawsuit and benefits sought).

[9] *See, e.g., Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); United States v. Brennan, 650 F.3d 65 (2d Cir. 2011).

pool).[10] Further, Title VII has put in place notice requirements and protections before these absent parties can be bound by such relief.[11]

Practice Pointers:

> Resist attempts to include former employees in a Rule 23(b)(2) class by urging standing, finality and "class as a whole" requirements.

> If any class member benefits from or supports the current practice, use this to show class conflicts that should limit or defeat class certification. Experts may also be helpful to show this.

> In Title VII cases, show that the desired prospective relief impinges on the rights of employee third parties.

Hybrid or Issue Certification Should Not Be Used To Circumvent *Wal-Mart's* Procedural Protections

Rule 23(c)(4) provides that *"[w]hen appropriate,* an action may be brought or maintained as a class action with respect to particular issues."[12] Some courts have read this as a housekeeping Rule for use only when the claim is certified as meeting the class requirements of Rule 23(a) and (b).[13] In other words, they have read "when appropriate" as incorporating the other requirements of Rule 23. Other courts, however, have treated this as a "fourth way" to certify a class action under Rule 23(b). Under this analysis, the Rule 23(b) class includes an "issues class." Similarly, some courts have used this Rule to justify "hybrid certifications," in which only part of a case is certified as one of the class types in Rule 23(b), and then the rest of the case is to be certified in a mix-and-match method as a different type of class, or perhaps as no class at all going forward for case resolution.[14] Procedural Frankensteins come to mind, in which procedures and rights are uncertain and ad hoc. The use of issue classes appears to be on the rise since *Wal-Mart* shut down the overbroad use of Rule 23(b)(2).[15]

There are several arguments against such approaches. First, Rule 23(b) lists only three types of class actions, and the courts are unequivocal that a class action must satisfy at least one of these three types to be certified.[16] Rule 23(b)

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[10] *See, e.g.,* Employment Discrimination Law ch. 32.IX.C (Barbara Lindemann & Paul Grossman eds., BNA 4th ed. 2007).

[11] *See* Title VII §703(n), 42 U.S.C. §2000e-2(n).

[12] Fed. R. Civ. P. 23(c)(4) (emphasis added).

[13] *See, e.g., Castano v. Am. Tobacco Co.,* 84 F.3d 734, 745 n.21 (5th Cir. 1996).

[14] *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 672 F.3d 482, 491-92 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 338 (2012) (certifying part of the case on legality of policy under Rule 23(b)(2), and leaving for a later day whether individual trials on damage claims were needed).

[15] *See* Rebecca Bjork, *Recent Developments in Issue Certification Under Rule 23(c)(4),* BNA Class Action Litigation Report (Aug. 21, 2013).

[16] *E.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011).

also speaks in terms of "class actions" for Rule 23(b)(1) and (b)(3) classes and of "final relief" for "the class as a whole" for Rule (b)(2) classes. "Action" is understood to be the case as a whole, not a piece of it.[17] And nowhere does Rule 23(b) include "issues" classes as an additional category of class action.[18] Rather, reading the "when appropriate" requirement of Rule 23(c) (4) in light of the rest of Rule 23(b) would suggest the case-the action-first must meet the standards to be certified as one of the permitted Rule 23(b) classes *before* this Rule can apply. Second, overbroad use of hybrid and issue certification is inconsistent with *Wal-Mart,* the structure of Rule 23(b) and its underlying principles of Due Process. This applies with added force when the ultimate relief is principally monetary and there will be substantial individualized issues and defenses.[19]

Finally, even if permitted, hybrid or issue certification should be used only in rare circumstances, and not when (i) the ultimate relief sought is predominately monetary, or (ii) the declaratory or injunctive claims are inextricably intertwined with individual issues and there are too many individualized issues left to resolve the claims. *Wal-Mart* supports that attempting to carve up a claim with monetary relief to try to fit part of it within Rule 23(b)(2) is improper, as it infringes on due process protections—notice, opt-out, predominance and superiority—embedded in Rule 23(b)(3) that protect *both* plaintiffs and defendants.[20] Cases such as *McReynolds*, however, have certified hybrid classes that include monetary claims without considering whether this is consistent with *Wal-Mart*.[21]

Accordingly, even if issue or hybrid certification is deemed consistent with Rule 23(b), courts should permit such certification only in limited circumstances. As the Federal Judicial Center's *Manual for Complex Litigation* notes, issue certification should not be used unless

> it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole. If the resolution of an

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[17] *Cf. e.g., Fed. R. Civ. P.* 2 ("There is one form of action – a civil action").

[18] *See Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200-01 n.25 (3d Cir. 2009) (noting circuit split on whether "issue" classes are appropriate under Rule 23(b)).

[19] *Wal-Mart*, 131 S. Ct. at 2557-58 (noting structural reasons why claims for individualized monetary relief needed to be certified under Rule 23(b)(3)). Note that when read in light of the rest of the opinion *Wal-Mart*'s reference to *Teamster*'s pattern-and-practice methodology, supports that a *Teamsters*-type "pattern or practice" claim can be properly certified under Rule 23(b)(3) *if* the claim meets those standards. *Cf. Wal-Mart*, 131 S. Ct. at 2561 (noting that the *Teamsters* approach permits defendants to litigate defenses to claims for individual relief).

[20] *Wal-Mart*, 131 S. Ct. at 2558-59.

[21] *McReynolds*, 672 F.3d at 491-92 (relying on pre *Wal-Mart* Seventh Circuit authority permitting hybrid certification that focused on whether it was judicially efficient to break out issues for class certification; court also noted that an injunction could not resolve any class members' claims, and that resolution may require separate trials); *see also Haddock v. Nationwide Life Ins. Co.*, 2013 U.S. Dist. Lexis 127116 at *42 to *43 (Sept. 6, 2013) (concluding *Wal-Mart* did not preclude hybrid certification of ERISA fiduciary class seeking monetary relief).

issues class leaves a larger number of issues requiring individual decisions, the certification may not meet this test.[22]

Thus, for example, even if there were a claimed common scheme to mislead employees, no issue certification is appropriate if there are numerous individualized issues left on reliance, injury and damages.[23] Likewise, the individualized issues and defenses often attendant on claims for monetary relief should preclude any hybrid or issue certification for injunctive or declaratory relief for those claims.[24]

Finally, hybrid or issue certification presents significant *res judicata* consequences for absent class members. For example, what exactly is being decided in a proposed Rule 23(b)(2) hybrid or issue class proceeding?[25] Plaintiffs can create class conflicts by pursuing such approaches, as they risk claims splitting and *res judicata* impacts on the absent class members.[26] Tellingly, in *Wal-Mart's* rejection of Rule 23(b)(2) certification, the Court noted that absent class members with claims for monetary relief risked having their claims precluded by class rulings seeking to fit the case under Rule 23(b)(2), and thus they needed Rule 23(b)(3) protections.[27]

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[22] Federal Judicial Center, Manual for Complex Litigation §21.24 (4th ed. 2004) (footnote omitted); *see also, e.g.*, *Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598, 609 (D. Kan. 2012) (discussing same).

[23] *Cf., e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (holding, in RICO consumer fraud class action, that issue certification of claimed common scheme to defraud would not materially advance the litigation since numerous individualized issues on reliance, injury and damages would be left).

[24] *See, e.g.*, *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 894-95 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 242 (2011) (in claims challenging how insurer handled hail- damage claims, held that even when hybrid certification is permitted, the Rule 23(b)(2) certification is only permitted for prospective relief, and any claims in which monetary relief is the ultimate remedy must be certified under Rule 23(b)(3)). *See also Yarger v. ING Bank, FSB*, 285 F.R.D. 308, 320-21 (D. Del. 2012) (rejecting hybrid or issue certification under Rule 23(b)(2) in consumer fraud class action since injunction must be same for class "as a whole," and this case would require more than one injunction to enforce right to rate guarantee, of which there were at least two).

[25] *Cf., e.g.,* Fed. R. Civ. P. 23(c)(1)(B) (order certifying a class must define the class and the class claims, issues, or defenses); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.,* 453 F.3d 179, 184-86 (3d Cir. 2006) (applying same).

[26] *See, e.g*., Beyond Knowles: Fairness to Absent Class Members and the Manipulation of Class Action Claims, BNA Class Action Litig. Rep. (Sept. 13, 2013) (discussing conflicts brought about by claims splitting); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 338-40 (S.D.N.Y. 2002) (noting that certifying an injunction only class in this tort case on damage to land would raise claim splitting and res judicata concerns as to any subsequent actions for damages; also noted courts had allowed such claim splitting in civil rights class actions); Restatement (Second) of Judgments §24 (1982) (claim splitting generally prohibited; claim includes all rights to remedies with respect to the transaction or series of transactions out of which the action arose).

[27] *Wal-Mart,* 131 S. Ct. at 2559. *See also, e.g., Zachery v. Texaco Exploration & Prod., Inc.,* 185 F.R.D. 230, 242-45 (W.D. Tex. 1999) (holding, in race discrimination claim, that excluding compensatory damage claims to make a better case for class certification causes class conflicts since if plaintiffs prevailed, class members with strong claims would be unable to seek such relief).

Practice Pointers:

> There are multiple grounds to challenge issue or hybrid certification for claims seeking monetary relief. If the jurisdiction permits such certifications, consider the additional arguments discussed in this section to limit or defeat hybrid or issue certification.

> Consider developing the factual record, including with experts as necessary, to show the individual issues and defenses interposed between any class-wide issue, and any final relief for plaintiffs.

Wal-Mart and Potential Limits on Rule 23(b)(1)(A) Certification

Wal-Mart explained that claims for individualized monetary relief should be brought under Rule 23(b) (3) since the mandatory classes in Rule 23(b)(2) and (b)(1) do not offer proper procedural protections for such claims. Rather, the mandatory classes of Rule 23(b)(1) and (b)(2) should apply only when the class has the unitary and cohesiveness characteristics embodied in those rules. In other words, mandatory classes are permitted only when and because they are unitary and cohesive, and thus do not need the procedural protections of Rule 23(b)(3).[28] These class requirements apply even when monetary relief is denominated "equitable."[29]

Rule 23(b)(1)(A) applies when inconsistent or varying adjudications would establish incompatible standards of conduct for the party opposing the class. Rule 23(b)(1)(A) classes are sometimes asserted in ERISA cases where plaintiffs argue that various obligations in ERISA to treat plan participants the same justify certifying the class under Rule 23(b)(1)(A). Rule 23(b)(1)(A), however, makes sense when applied to *prospective* conduct that must be the same as to all class members.[30] And in many ERISA cases, even when it is at issue, the prospective conduct often involves whether payment is due under plan provisions-which is analogous to a claim for payments due under a contract, a classic Rule 23(b) (3) issue.

Rule 23(b)(1)(A) certification is thus not appropriate when there are individualized issues as to whether any claimant is entitled to relief. [31] Furthermore, Rule 23(b)(1)(A) certification is not appropriate when primarily monetary relief is sought.[32] Finally, Rule 23(b)(1)(A) certification should not be appropriate when

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[28] *See Wal-Mart,* 131 S. Ct. at 2557-59.

[29] *Id.* at 2558, 2560.

[30] *See, e.g., Oakley v. Verizon Comm'ns Inc.,* No. 09 Civ. 9175(CM), 2012 WL 335657, at *11 (S.D.N.Y. Feb. 1, 2012) (holding that when some plaintiffs may recover and others may not, Rule 23(b)(3) protections and opt-out rights must apply).

[31] *See, e.g., Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.,* 654 F.3d 618, 633 (6th Cir. 2011), *cert. denied,* 132 S. Ct. 1757 (2012) (vacating ERISA Rule 23(b)(1)(A) class when defendant could be liable to some participants but not others, even though nondisclosure was uniform for all).

[32] *Wal-Mart,* 131 S. Ct. at 2558 ("[I]ndividualized monetary claims belong in Rule 23(b) (3)."); *Zinser v. Accufix Research Inst, Inc.,* 253 F.3d 1180, 1193-95 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001)

the declaratory relief is merely a step to the final monetary relief. Just like in Rule 23(b)(2) cases, there may be substantial individualized issues between the declaration and any monetary payment that raise the need for Rule 23(b)(3)'s requirements and protections.[33]

Practice Pointers:

> In ERISA cases, is the claim truly about prospective discretionary (typically fiduciary) conduct, or is it about payments allegedly due under a plan? If the latter, then argue it is like any contract claim for payments, and the class should have to meet Rule 23(b)(3) requirements.

> Defenses and facts that are interposed between an injunction or declaration and any final monetary relief provide good grounds to show why the class should not be certified under Rule 23(b)(1)(A).

> Many of the same arguments against hybrid and issue certification under Rule 23(b)(2) apply to attempts to certify parts of ERISA cases as a Rule 23(b)(1)(A) class.

Using Trial Plans and Subclasses to Limit or Defeat Class Certification

Wal-Mart held the Rules Enabling Act [34] prohibits "Trial by Formulas" and other shortcuts to what the substantive law requires as proofs in class actions.[35] *Comcast* makes clear that whether damages can be proved at trial class-wide is part of the class certification analysis, and should end attempts to "muddle through" class certification proof requirements.[36] Of similar import, in 2003, Rule 23 was amended to require that any order certifying a class must define the class and the class claims, issues or defenses.[37] The comments to this amendment explained that a critical issue at class certification "is to determine how the case will be tried" and to test whether the issues are "susceptible of class-wide proof."[38] Requiring plaintiff to create a trial plan on how the proposed

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(same-requests for monetary damages under Rule 23(b)(1)(A) could be certified outside 23(b)(3) only if they were "incidental" to the suit). *See also, e.g., Heffelfinger v. Elec. Data Sys. Corp.,* No. CV 07-00101, 2008 WL 8128621, at *18 (CD. Cal. Jan. 7, 2008), *aff'd and remanded,* 492 F. App'x 710 (9th Cir. 2012) (former employees in overtime wage claim cannot seek classwide prospective injunctive relief, and any restitutionary award they may recover is akin to damages-thus certification under Rule 23(b)(1)(A) is not appropriate).

[33] *Cf., e.g., Jamie S. v. Milwaukee Pub. Sch.,* 668 F.3d 481, 499 (7th Cir. 2012) (holding "declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made."); *Randall v. Rolls-Royce Corp.,* 637 F.3d 818, 825-26 (7th Cir. 2011) (holding that injunctive relief cannot "merely lay an evidentiary foundation for subsequent determinations of liability").

[34] 28 U.S.C. § 2072(b).

[35] *Wal-Mart,* 131 S. Ct. at 2560-61.

[36] *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432-35 (2013).

[37] Fed. R. Civ. P. 23(c)(1)(B); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.,* 453 F.3d 179, 184-86 (3d Cir. 2006) (applying same).

[38] *See Fed. R. Civ. P.* 23 advisory commitee's note to 2003 amends., subdiv. (c), para. (1) (citing Manual for Complex Litigation (Third) §21.213 (1995)); *Ross v. RBS Citizens, N.A.,* 667 F.3d 900 (7th Cir. 2012), *vacated,* 133 S. Ct.

class claims, issues and defenses can be tried on a class basis often exposes whether a case can proceed as a class action.[39]

Thus, for example, in *Espenscheid v. DirectSat USA, LLC*, plaintiffs brought an action on behalf of 2,341 satellite dish technicians alleging various types of "off the clock" unpaid overtime claims.[40] The judge decertified the classes prior to trial because plaintiffs failed to devise a feasible trial plan.[41] The Seventh Circuit affirmed, emphasizing plaintiffs' burden to develop a workable trial plan: piece rate work meant a separate trial would be needed for each plaintiff.[42] The court rejected plaintiffs' proposal to have 42 "representative" individuals testify, as there was no basis to extrapolate from their claims to those of the rest of the proposed class.[43]

Forcing plaintiffs to articulate how a case will be tried also can expose the need to limit the class, or to create subclasses to deal with the different issues, interests and proof requirements revealed by this process. When subclasses are involved, each one must separately meet the requirements for class certification.[44]

When the alleged discriminatory decisions are made at, *e.g.*, the office or supervisor level, defendants have strong arguments that this is the level at which classes or subclasses should be certified. As *Wal-Mart* teaches, it is not appropriate to bundle up and "average out" these decisions.[45] Likewise, courts

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1722 (2013) (finding that there must be a clear trial plan to proceed under Rule 23(c); judgment vacated in light of *Comcast); Ellis v. Costco Wholesale Corp.,* 657 F.3d 970 (9th Cir. 2011) (highlighting the critical need to determine how a case will be tried when deciding class certification); *Hohider v. United Parcel Serv., Inc.,* 574 F.3d 169, 197 (3d Cir. 2009) (quoting Federal Rule of Civil Procedure 23's advisory note statement that " '[a] critical need is to determine how the case will be tried'" and finding that a court must ascertain the proof required to determine whether the claim can proceed as a class claim).

[39] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773-75 (7th Cir. 2013) (Posner, J.) (decertifying the class because proposed trial plan exposed that plaintiffs were trying to improperly extrapolate class proofs from testimony of 42 individuals),

[40] *Id.* at 772-73.

[41] *Id.* at 773.

[42] *Id.* at 774-75.

[43] *Id.* at 774-76.

[44] *See Fed. R. Civ. P.* 23(c)(5) (providing that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under the rule"); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 368-69 (7th Cir. 2012) (stating that each subclass is treated as separate and must meet the requirements to be a Rule 23(b)(2) class).

[45] *See, e.g.*, *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896-98 (7th Cir. 2012) (holding same to refuse to certify broad multi-facility class based on claim that supervisors exercised discretion in discriminatory way); *Gutierrez v. Johnson & Johnson*, 269 F.R.D. 430, 432-33, 438 (D.N.J. 2010) (same—finding that there is no class for race discrimination claims on pay and promotions when the company uses a decentralized management structure and grants local autonomy to its thirty-five American subsidiaries); *Garcia v. Johanns*, 444 F.3d 625, 632-33 (D.C. Cir. 2006) (refusing to certify a nationwide class when decisions were made at the local level, which had substantial autonomy) (collecting cases); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 667-71 (N.D. Ga. 2001) (refusing to certify a multi-facility class in race discrimination case because the facilities and plant managers had discretion over how they implemented corporate policies, and complaints of discrimination related to how first-level managers and supervisors implemented their discretion); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-40

should not certify a class across subsidiaries or divisions if managers have substantial autonomy in the challenged decisions or policies.[46] Further, case law supports that no multi-facility class should be certified when the challenged decisions or policies include discretion exercised at the local level.[47] Finally, subclasses are often required when different policies or systems are in place,[48] or when claims depend on different facts or law.[49]

(W.D. Tex. 1999) (refusing to certify a class where the facilities and business units had varying degrees of autonomy over challenged decisions).

[46] *See, e.g., Gutierrez*, 269 F.R.D. at 432-33, 438 (finding that there is no class for race discrimination claims on pay and promotions when the company uses a decentralized management structure and grants local autonomy to its thirty-five American subsidiaries).

[47] *See, e.g.*, *Garcia*, 444 F.3d at 632-33 (finding that no nationwide class was possible when decisions were made at the local level, which had substantial autonomy in this discrimination case based on government farm loans) (collecting cases); *Reid*, 205 F.R.D. at 667-71 (refusing to certify a multi-facility class in this race discrimination case because managers had discretion in how they implemented corporate policies, and complaints of discrimination related to how first-level managers and supervisors implemented their discretion); *Zachery,* 185 F.R.D. at 238-40 (same-facilities and business units had varying degrees of autonomy over challenged decisions).

[48] *See Briceno v. USI Servs. Grp, Inc.,* No. 09-CV-4252, 2012 WL 4511626, at *6-7 (E.D.N.Y. Sept. 28, 2012) (requiring subclasses in wage and hour claim under state law because there was no "single, uniform policy;" rather, the employer used two different systems for recording time-a paper and then telephonic system); *Meyers v. Crouse Health Sys., Inc.,* 274 F.R.D. 404, 413 (N.D.N.Y. 2011) (holding, in a wage claim case, that it is appropriate to create subclasses because the claims are based on four distinct policies). *See also Guan Ming Lin v. Benihana Nat'l Corp.,* 275 F.R.D. 165, 177 (S.D.N.Y. 2011) (finding that there is no commonality for the proposed class because different rules apply in different ways to each class member).

[49] *See, e.g., Culver v. City of Milwaukee,* 277 F.3d 908, 911 (7th Cir. 2002) (holding, in a failure-to-hire race discrimination claim, that if the class otherwise qualified, two subclasses would be required because of the factual differences in the claims between those denied job applications and those claiming the entrance exam was scored in a discriminatory fashion).

See also, e.g., Weekes-Walker v. Macon Cnty. Greyhound Park, Inc., 281 F.R.D. 520, 525-26 (M.D. Ala. 2012) (finding that to satisfy commonality in this WARN case, subclasses were required for each layoff because each one raised different factual and legal issues).

Practice Pointers:

- Don't overlook the importance of requiring plaintiffs (i) to define the class and the claims, issues, and defenses to be tried, and (ii) to develop the trial plan. This will often expose the flaws or limitations in plaintiffs' class claims.
- Make sure that plaintiffs show that each subclass separately meets the requirements for class certification.
- Know when to push for subclasses to limit the case:
- Subclasses should be created in accordance with the appropriate level of decisional unit, such as office, supervisor, or other.
- Subclasses are often required for employees in different divisions, under different work rules and policies, or at different facilities.
- Subclasses are also often required when claims depend on different facts or law.
- Contest certification across subsidiaries or divisions if managers have substantial autonomy in challenged decisions or policies. Also contest certification across facilities when the challenged decisions or policies include locally exercised discretion.

Wal-Mart and *Comcast's* Potential Salutary Impact on Cabining Collective Actions Under FLSA and ADEA

Unlike class suits under Title VII, the Americans With Disabilities Act, or ERISA, all of which are governed by Rule 23, suits brought under the FLSA and ADEA are brought as "collective actions" under the FLSA. Section 216(b) of the FLSA states that:

An action … may be maintained against any employer … in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[50]

Collective action certification generally occurs in two stages: the notice stage and an optional final stage.[51] The district court first makes a decision whether notice of the action should be given to potential class members. If the court conditionally

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[50] 29 U.S.C. §216(b).

[51] *See, e.g.*, *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 368 (2011) (approving the use of the two-step method for adjudication of motions seeking certification of a collective action under the FLSA and noting that the approach was not required by the terms of the FLSA or the Supreme Court's cases); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240 (11th Cir. 2003) (same); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 2614 (2002) (same).

certifies the class, the putative class members are given notice and an opportunity to opt in. Conditional certification is used to determine (1) the contour and size of the group of employees that may be represented in the action so as to authorize a notice to possible collective members who may want to participate, and (2) if the members as described in the pleadings are similarly situated. Conditional certification must be based on allegations showing there is a common policy that affects all the collective members, *i.e.,* a factual nexus that binds the named plaintiffs and the potential class members together.[52]

After discovery is largely complete, the defendant typically files a motion for decertification, at which time the court makes a second factual determination on the "similarly situated" question. If the claimants are not similarly situated the class is decertified and the opt-in plaintiffs are dismissed without prejudice, but if the claimants are similarly situated, the representative action is allowed to proceed to trial.[53]

Although courts do not apply all of Rule 23's standards to collective actions,[54] some of these concepts can still inform the "similarly situated" analysis. In particular, *Wal-Mart*'s explanation of why a court needs "common answers" to "glue together" and make common the claims of the individuals ought logically to apply to collective actions. Although many courts reject the formal application of *Wal-Mart* to collective actions,[55] it remains true that the "common answer" analysis is a useful mechanism to determine whether and what claims are "similarly situated."[56]

Courts are also applying *Comcast* to wage and hour actions to defeat or limit class on issues such as whether eligibility for overtime can be determined class-

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[52] *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008) ("[P]laintiff has the burden of showing a 'reasonable basis' for his claim that there are other similarly situated employees."); *Heagney v. Eur. Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988).

[53] *See, e.g., Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013); *Frye v. Baptist Mem'l Hosp., Inc*., 495 F. App'x 669 (6th Cir. 2012); *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012).

[54] *See generally Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (noting that in certain respects "Rule 23 actions are fundamentally different from collective actions under the FLSA").

[55] *See, e.g.*, *Winfield v. Citibank, N.A.*, 843 F. Supp. 2d 397 (S.D.N.Y. 2012) (refusing to apply *Wal-Mart* on motions for conditional certification under the FLSA, concluding that the Rule 23 analysis had no place at this stage of the litigation); *Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2012 WL 19379, at *7 (S.D.N.Y. Jan. 3, 2012) (internal quotation marks and citation omitted) (the "similarly situated" standard is "considerably more liberal than class certification under Rule 23"); *Ware v. T–Mobile USA*, 828 F. Supp. 2d 948, 955-56 (M.D. Tenn. 2011) (*Wal-Mart* does not affect its analysis of whether the plaintiffs are similarly situated to employees in the putative class under the FLSA).

[56] *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) (Posner, J.) ("[T]here isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences."); *MacGregor v. Farmers Ins. Exch.*, No. 2:10-CV-03088, 2011 WL 2981466 (D.S.C. July 22, 2011) (recognizing FLSA collective actions are not subject to Rule 23 but applying *Wal-Mart*'s Rule 23 analysis of commonality to the FLSA's "similarly situated" test); *Till v. Saks Inc.*, No. C 11-00504 (N.D. Ca. Sept. 30, 2013) (SBA) (in case challenging exempt status for assistant store managers, court applied Wal-Mart to find lack of commonality on the state law class action, and that these "disparate experiences" defeated a collective action under the FLSA).

wide, and whether there is a class-wide method to prove damages.[57] *Comcast*'s mandate against bifurcating damages and liability applies to the "similarly situated" analysis as it forecloses class treatment where "questions of individual damage calculations … overwhelm questions common to the class."[58] As such, *Comcast* drives home that any damages model must be consistent with the class liability model, and must provide a class-wide method to prove damages, including in wage-and-hour actions.[59]

Practice Pointers:

- *Comcast* provides good grounds to defeat or limit collective actions that involve complex or individualized damage claims.
- Although courts sometimes resist applying *Wal-Mart* directly to collective actions, the principles in *Wal-Mart* can be used to challenge whether the class members are similarly situated.
- Plaintiffs often join state law class action claims to collective actions. As cases like *Espenscheid* demonstrate, in those circumstances, courts will be more inclined to hold collective actions to class action standards.

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[57] *See, e.g., Ross v. RBS Citizens, N.A.,* 667 F.3d 900 (7th Cir. 2012), *vacated,* 133 S. Ct. 1722 (2013) (vacated a wage-and-hour ruling to be reconsidered in light of the Court's ruling in *Comcast*).

[58] *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1433 (2013).

[59] *See, e.g., Leyva v. Medline Indus. Inc.,* 716 F.3d 510 (9th Cir. 2013) (rejecting class certification where plaintiff's damage calculations were insufficient to satisfy class certification under the predominance requirement); *Ealy v. Pinkerton Gov't Servs., Inc.,* No. 12-1252, 2013 WL 980035 (4th Cir. Mar. 14, 2013) (applying *Wal-Mart* to require a more searching inquiry into whether plaintiffs meet Rule 23 criteria of commonality, typicality, and predominance of common issues and vacating class certification of state wage and hour law claims because the district court did not conduct a "rigorous analysis" of whether plaintiffs satisfied Rule 23); *Cowden v. Parker & Assocs., Inc.,* No. 5:09-323-KKC, 2013 WL 2285163 (E.D. Ky. May 22, 2013) (applying *Comcast* and rejecting class certification where individual commission calculations for a purported class of at least 1,800 would overwhelm class-wide commonality); *Wang v. Hearst Corp.,* — F.R.D. —, No. 12 CV 793(HB), 2013 WL 1903787 (S.D.N.Y. May 8, 2013), *interlocutory appeal certified,* 2013 WL 3326650 (S.D.N.Y. June 27, 2013) (denying class certification in wage and hour putative class action where plaintiff could not satisfy *Comcast's* directive that individual damage calculations may not overwhelm questions common to the class); *Forrand v. Fed. Express Corp.,* No. CV 08-1360 DSF (PJWx), 2013 WL 1793951 (CD. Cal. Apr. 25, 2013) (same); *Roach v. T.L. Cannon Corp.,* No. 3:10-CV-0591, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013) (applying *Comcast* to reject class-wide analysis in a putative wage and hour case where plaintiffs offered no manageable way to calculate damages across the entire class, and the individual damages calculations that would be required would inevitably overwhelm any questions common to the entire class).

Rulings, Filings, and Settlements of Interest

"Plan Administrator" vs "Claims Administrator" – Who is the Proper Defendant in ERISA Claim for Benefits?

By Tulio Chirinos

> The issue of who may be a proper defendant in an ERISA claim for benefits has not received consistent treatment in the courts. On the one hand, a federal district court in Minnesota recently concluded that a third party administrator was a proper defendant in a lawsuit seeking benefits on the grounds that Section 502(a)(1)(B), the section of ERISA under which such claims are brought, does not limit the universe of entities that may be sued, and that liability flows from "actual control" over benefit claims. *Nystrom v. AmerisourceBergen Drug Corp.,* 2013 WL 5944254 (D. Minn. Nov. 6, 2013). The First, Fifth, and Ninth Circuits have reached a similar conclusion, according to the court. On the other hand, some courts, including the Second Circuit, have firmly held that only the named plan administrator is a proper defendant in such claims. These courts adhere to a bright-line rule that only an entity formally designated as a ″plan administrator″ under 29 U.S.C. § 1002(16)(A) is a proper defendant in a claim for benefits. See http://www.erisapracticecenter.com/2013/11/25/claims-administrator-not-liable-under-erisa-for-alleged-failure-to-follow-acas-enhanced-benefit-claim-procedures/. The result of the inconsistent decisions among the courts is that plan participants and beneficiaries are likely to continue to name plan administrators as defendants in lawsuits over denied benefits even where those plan administrators have had no involvement in the claims administrative process (because they delegated that authority to a claims administrator or other third-party administrator). As such, in service provider contracts with claims administrators, plans and plan fiduciaries should consider the appropriateness of including a provision that imposes an indemnity or duty to defend obligation on the claims administrator.

Claims Administrator Not Liable under ERISA For Alleged Failure to Follow ACA's Enhanced Benefit Claim Procedures

By Robert Rachal and Brian Neulander

> A federal court in New York appears to have issued the first published decision addressing alleged violations of the enhanced benefit claim procedures arising out of the Affordable Care Act (ACA). The new procedures contain various participant-friendly provisions, such as the right to external review, that alter ERISA's existing benefit claim procedures for non-grandfathered welfare plans. The court dismissed the claims for failure to name the right defendant, but in so ruling made statements as to the appropriate treatment of ERISA's remedial provisions to enforce ACA claims that are likely to provoke further scrutiny.

In *New York State Psychiatric Assoc., Inc. v. UnitedHealth Group*, 2013 WL 5878897 (S.D.N.Y. Oct. 31, 2013), a diverse group of plaintiffs sued UnitedHealth, the claims administrator that exercised its discretion to deny coverage for mental health benefits on behalf of several different self-funded welfare plans. Plaintiffs alleged, among other violations, that UnitedHealth breached its fiduciary duties by failing to follow the new review procedures detailed in the Department of Labor's interim final regulations for benefit claims under ACA. The court dismissed the ACA claims because it found that only "group health plans" or entities "providing health insurance coverage in connection with group health plans" are liable under ACA and plaintiffs failed to name the underlying plans or the plan administrators as defendants. Courts in other jurisdictions, however, may have allowed the case to proceed against the claims administrator under these circumstances. *See* http://www.erisapracticecenter.com/2013/11/25/plan-administrator-vs-claims-administrator-who-is-the-proper-defendant-in-erisa-claim-for-benefits/.

In its ruling, the court noted that ERISA § 715, 29 U.S.C. § 1185d, incorporated by reference ACA's expanded protections for plan participants during the administrative review process, and assumed that ERISA's remedial provisions would allow participants to enforce their ACA rights. The court thus appeared to suggest that, if brought against a proper defendant, a participant could bring a claim under ERISA § 502(a)(1)(B) to conform a plan's benefit claim procedures with ACA's requirements. This aspect of the court's decision is in tension with Amara v. Cigna, 131 S. Ct. 1866 (2011), where the Supreme Court stated that Section 502(a)(1)(B) is limited to enforcing benefit plan terms as written, and that claims for additional relief based on alleged violations of ERISA's disclosure provisions must satisfy the causation and harm conditions for equitable relief under Section 502(a)(3). It remains to be seen whether the reasoning in this decision will be trumpeted by plaintiffs and more widely adopted by other courts. In any event, we can expect defendants to rely on Amara to challenge enforcement of ACA under Section 502(a)(1)(B) of ERISA.

District Court in Tenth Circuit Adopts Presumption of Prudence

By Aaron Feuer

> A district court in the Tenth Circuit adopted the presumption of prudence in dismissing a class action alleging that the defendants violated their fiduciary duties by allowing participants to continue investing in company stock at a time when the employer was allegedly experiencing significant financial difficulties. *In re Chesapeake Energy Corp. 2012 ERISA Class Litig.*, 2013 WL 5596908 (W.D. Okla. Oct. 11, 2013). Although the Tenth Circuit has not yet adopted the presumption, the district court found that the Tenth Circuit would adopt the presumption in cases where the fiduciary is not absolutely required to invest in employer securities but is more than simply permitted to make such investment. The district court also determined that plaintiffs need not show the company was facing impending collapse to overcome the presumption, but that a prudent fiduciary would conclude that continued

adherence to the stock fund no longer conformed with the plan settlor's expectations. Here, based upon the fact the employer's stock price "retained significant value" during the class period, the employer's recent positive income and asset growth figures, and a comparison of the employer's financial condition both before and after the plan's adoption, the court found it "implausible" that the settlor would have expected the plan to divest the employer stock.

Sixth Circuit Rejects Claim for Reinstatement of Erroneous Benefit Payments to Ineligible Retiree

By Justin Alex

> In *Adams v. General Motors Company* (Case No. 12-2084), the Sixth Circuit rejected an ineligible retiree's claim for reinstatement of erroneous benefit payments under her former employer's pension plan. The retiree received benefit payments for twenty-one months before the plan administrator realized that she was ineligible for benefits under the plan and ceased further benefit payments. The retiree was employed by the employer for a few years in the 1970s before she was discharged on disability. The plan covered employees, but specifically excluded temporary employees. Under the terms of the applicable collective bargaining agreement, employees were regarded as temporary employees until their names were placed on the union seniority list. Her name was never added to the union seniority list, yet she received benefit payment until the error was discovered.
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> The plan granted the plan administrator discretion to determine eligibility. As a result, the court reviewed the plan administrator's determination under the "arbitrary and capricious" standard. The plaintiff raised various arguments to assert that she was an eligible employee under the plan, but failed to convince the court that the plan administrator's interpretations of the plan and the applicable collective bargaining agreement were arbitrary and capricious. Among other things, the court rejected the plaintiff's collateral estoppel and res judicata claims that she was an employee for purposes of the plan based on a previous state administrative agency's determination that she was an employee in the 1970s and her employer's failure to deny that she was an employee before a state worker's compensation appeal board. The court rejected both arguments noting that "employee" carries a different meaning under the state worker's compensation statute and that ERISA-covered pension plans are governed by their own terms. The case is also an excellent reminder that plans can overcome estoppel claims and are not under an unconditional obligation to continue to pay erroneous benefits to individuals who are not eligible for benefits in the first instance.

Of course, proper correction for pension overpayments may also involve qualification issues for which the IRS EPCRS correction program may be appropriate. Additionally, there are fiduciary issues to consider as to whether it is necessary or appropriate for the plan to seek recoupment. Plan administrators seeking to correct overpayments should carefully consider their options.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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