FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* periodically to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention.

Defined as a civil action brought by one or more plaintiffs on behalf of a large group of others who have a common interest, the class action lawsuit is both criticized and acclaimed. Critics say that such actions are far too beneficial to the lawyers that bring them; in that the attorney fees in settlements are often in the millions, while the individuals in the represented group receive substantially less. Proponents of the class action lawsuit see them as a mechanism to consolidate and streamline similar actions that would otherwise clog the court system, and as a way to make certain cases attractive to plaintiffs' attorneys.

Future issues of *Class Action Watch* will feature other articles and cases that we feel are of interest to our members and to society. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Dukes, et al. v. Wal-Mart Stores, Inc. Ninth Circuit Affirms Largest Employment Discrimination Class in History

by John Beisner, Evelyn Becker & Karl Thompson

On June 21, 2004, a district court in the Northern District of California certified the largest employment discrimination class in history, consisting of approximately 1.5 *million* women who have been employed at Wal-Mart stores across the country since December 1998.[1] The complaint alleges that the class members have been subjected to a company-wide pattern or practice of gender discrimination that causes women to receive lower pay and fewer promotions than men. A divided panel of the Ninth Circuit affirmed the class certification in February of 2007,[2] then issued a revised opinion in December 2007 which reached the same result.[3] Wal-Mart's petition for rehearing en banc is currently pending.

This case raises a number of important issues central to employment discrimination class actions, including the proper role of statistics and "subjective" employment policies in class certification decisions; the relevance of punitive damages to a Rule 23(b)(2) certification; and the question of whether an employment discrimination class with more than a million members can be successfully managed, consistent with the constitutional, statutory, and employment-law rights of the parties involved.

I. The Complaint

The plaintiffs' complaint, filed on behalf of seven named plaintiffs and a class of similarly situated women, asserts a claim under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*, a statute that prohibits gender and race-based discrimination in the American workplace.[4] The complaint alleges that female employees in Wal-Mart stores suffered gender discrimination in two basic ways. First, female employees were allegedly "paid less than men in comparable positions, despite having higher performance ratings and greater seniority."[5] Second, women allegedly received fewer (and waited longer for) promotions to in-store management positions than men.[6] Wal-Mart operates approximately 3,400 different stores across the country and gives its in-store managers wide discretion to make pay and promotion decisions; the plaintiffs nonetheless asserted that "the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart," and that "the discrimination... is common to all women who work or have worked in Wal-Mart stores."[7] The complaint sought class-wide injunctive and declaratory relief, lost pay, and punitive damages, but did not seek compensatory damages.[8]

Based on these allegations, the plaintiffs moved to certify a nationwide class under Federal Rules of Civil Procedure 23(a) and 23(b)(2), consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be

subjected to Wal-Mart's challenged pay and management track promotions and policies and practices."[9]

II. The District Court's Decision

Following discovery, briefing, and a seven-hour oral argument, the district court certified the proposed class in most respects. It held that the class satisfied the requirements of Rule 23(a), including commonality, typicality, and adequacy of representation. It also held that the plaintiffs' claim for punitive damages, although potentially worth billions of dollars, did not predominate over their injunctive claims. The court further held that, despite the massive size of the class, it could successfully manage a trial of the plaintiffs' equal pay claim as to both liability and all forms of requested relief and a trial as to liability (including liability for punitive damages) and injunctive and declaratory relief on the plaintiffs' promotion claim. With respect to an actual determination of lost pay and punitive damages for the plaintiffs' promotion claims, however, the court held that the class, as proposed, was unmanageable. The plaintiffs could pursue those remedies on a classwide basis, the court held, only where "objective applicant data is available to document class member interest" in the challenged promotion.[10]

A. Commonality: "Excessive Subjectivity" and Statistics

Several aspects of the district court's ruling are worth noting, beginning with its analysis of the Rule 23(a) commonality requirement. The district court concluded that the plaintiffs had successfully raised "an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in

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The Problem of Class Action Tolling in Mass Tort Personal Injury Litigation

by Jessica Davidson Miller & Geoffrey Wyatt

A news story breaks. A drug manufacturer has announced the surprising results of a recent study suggesting a dangerous side effect to a popular drug. Newspapers, television shows, and websites trumpet the story for days, even weeks, and speculation swirls about how many people might already have been affected. The drug is withdrawn from the market or distributed with new labeling. Lawyer advertisements continue the story as the news stories taper off. Within a month, lawsuits have been filed across the country. A mass tort has begun. But when does it end?

Many mass torts end in settlement, but a settlement is typically difficult to reach until there is some certainty about the number of claims. That number, in turn, depends greatly on when it is too late for new plaintiffs to file claims. Thus, statutes of limitations play an important role in mass tort litigation.

Just when a limitation period is over is not a simple calculation to make, however. Two doctrines are particularly important—the discovery rule and so-called *American Pipe* tolling.

In most states, a cause of action for personal injury accrues when a plaintiff discovers his claim—*i.e.,* when he knows, or should know, based on readily available information, that he has suffered an injury potentially attributable to the tortious act of another. This is referred to as the discovery rule. Once a mass tort unfolds, the information most putative plaintiffs need to be on notice of their claims is likely widely available. Such litigation is often accompanied by news reports in various media, and, if nothing else, advertisements by plaintiff lawyers seeking to enroll clients are frequently widespread. Courts often accept arguments that this kind of publicity is enough to begin the limitations clock.

A party defending a mass tort might thus be tempted to believe that the litigation would have a built-in deadline for new claims. Assuming the defendant can point to a seminal moment that triggered mass filings, the defendant could rely on that date as the "discovery" date for all prospective plaintiffs, and calculate filing deadlines in all relevant jurisdictions.

But if someone brought a class action against the defendant before time ran out, the limitations analysis becomes more complicated. That is because of *American Pipe & Construction Co. v. Utah*, a Supreme Court case that is often cited as a basis for tolling limitations periods while a putative class action is pending.[1] Many state courts, as well as federal courts applying state law, have accepted such tolling in the mass-tort context, notwithstanding the very different context in which *American Pipe* itself was decided. The predictable result has been to turn the filing of essentially frivolous class actions in personal injury mass torts into a stock tool for plaintiffs' lawyers to substantially prolong limitations

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a *common* manner."[11] This inference of commonality, in turn, was based mainly on two kinds of evidence: "facts and expert opinion," tending to demonstrate "the existence of company-wide policies and practices," and statistical evidence raising an inference of discrimination.[12]

Strikingly, the most "common" feature of Wal-Mart's "company-wide policies and practices" was its delegation of wide discretion to individual in-store managers to make pay and promotion decisions with relatively little guidance. Wal-Mart argued that this discretion weighed heavily against a finding of commonality, because it meant that the pay and promotion decisions in each store were controlled by different decision-makers. But the district court disagreed, concluding that this delegation of authority constituted a policy of "excessive subjectivity" that actually supported a finding of commonality.[13] The court acknowledged that, in itself, a policy delegating employment decisions to the discretion of in-store managers would not necessarily support a finding of commonality. But in this case, the court reasoned, the plaintiffs had shown a "nexus" between Wal-Mart's "excessive[ly] subjectiv[e]" policies and its alleged gender discrimination by supplying evidence of "gender stereotyping and a corporate culture of uniformity" within Wal-Mart.[14] In light of this additional evidence, the court concluded, the plaintiffs had raised an inference that the subjectivity functioned as a "conduit for gender bias to potentially seep into the system."[15]

The plaintiffs' evidence of Wal-Mart's "culture of uniformity" and "gender stereotyping," however, was inferential. The court concluded that there was ample evidence that Wal-Mart had a "strongly imbued" and centralized corporate culture that functioned to "guide managers in the exercise of their discretion."[16] But the court did not identify which aspect of this culture was sexist or discriminatory. Evidence of "gender stereotyping" was supplied by the plaintiffs' expert sociologist, but he did not actually conclude that Wal-Mart managers were biased. Rather, he testified that Wal-Mart was "vulnerable" to gender bias, because its policy of giving managers relatively unfettered discretion to make employment decisions permitted them to act based on stereotypes.[17] The court expressly acknowledged that the plaintiffs' sociologist could not "definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart."[18] But it nonetheless decided that his testimony about Wal-Mart's vulnerability to such stereotyping was sufficient to "raise[] an inference of corporate uniformity and gender stereotyping that is common to all class members," even if a jury might later decide not to credit his testimony.[19]

The second main basis for the court's commonality conclusion was the plaintiffs' statistical evidence of discrimination. According to the court, the plaintiffs presented "largely uncontested descriptive statistics" showing that "women working in Wal-Mart stores are paid less than men in every region," that "the salary gap widens over time even for men and women hired into the same jobs at the same time," and that "women take longer to enter into management positions."[20] As the court acknowledged, however, the key question in a discrimination case is whether such disparities are due to gender discrimination or something else. The plaintiffs' expert performed a regression analysis for hourly and salaried employees grouped by geographic *region* and concluded that there were statistically significant disparities between men and women that only gender could explain. Wal-Mart, in turn, presented regression analyses conducted at a store-by-store level,[21] which concluded that there was no "broad-based gender differential in pay for hourly employees," and gender disparities only in "limited instances."[22]

The court held that this mixed evidence supported a finding of commonality. It did not hold that Wal-Mart's expert was incorrect or challenge her findings; rather, it focused on the plaintiffs' analysis, concluding that their region-by-region analysis was entitled to weight—despite the fact that actual employment decisions were made at a store-by-store level—because those decisions were made "within parameters and guidelines that are highly uniform, and within a strong corporate culture."[23] The court acknowledged that, in the end, a jury might find store-by-store data more convincing. But, because the plaintiffs' statistical approach was "*a* reasonable" approach, it could constitute evidence in support of class certification.[24]

B. Rule 23(b)(2): Punitive Damages as "Secondary in Nature"

The district court's Rule 23(b)(2) analysis also bears mention. Noting that the plaintiffs' punitive damages claims might reach *billions* of dollars in potential liability, Wal-Mart argued that such damages would "overwhelm"

the plaintiffs' claims for injunctive relief, rendering a 23(b)(2) class inappropriate.[25] The court, however, had "little difficulty" in concluding that despite the potentially massive value of the punitive damages claim, equitable relief predominated.[26] Injunctive and declaratory relief, the court reasoned, would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide."[27] "Against this backdrop," the court asserted, the claim for punitive damages "appears secondary in nature."[28] The court also credited the named the plaintiffs' assertions that their central motivation for the lawsuit was to improve opportunities for women at Wal-Mart.

C. Manageability: Are Employment Discrimination Classes Manageable if Teamsters is "Unworkable on its Face"?

Finally, the district court's analysis of manageability was also significant. The court proposed to try the plaintiffs' claims in a two-stage trial. In Stage I, the plaintiffs would attempt to prove liability, showing that Wal-Mart had "engaged in a pattern and practice of discrimination against the class," and that Wal-Mart was liable for punitive damages because this pattern and practice was "undertaken maliciously or recklessly."[29] This phase of the trial would be manageable, the court concluded, because it would focus on the single issue of whether there was a class-wide pattern or practice of discrimination. In Stage II, the plaintiffs would have to prove that they were entitled to their requested remedies, and (in the case of monetary relief) show the amount to which they were entitled.

The court acknowledged that Stage II presented greater manageability challenges. With respect to the plaintiffs' promotions claims, the court recognized that not every class member could be presumed entitled to relief. Rather, only those plaintiffs who had actually applied for or sought a promotion were entitled to a recovery. Under the Supreme Court's opinion in *International Brotherhood of Teamsters v. United States*, a court generally holds additional hearings to determine each class member's entitlement to relief.[30] At such hearings, individual class members are required to demonstrate that they are entitled to the relief sought (for example, by demonstrating that they have applied for a promotion). The burden then shifts to the employer, who has the opportunity to "prove that the class member[s] w[ere] denied the job or promotion for lawful reasons."[31]

As the court recognized, "holding individual hearings" for 1.5 million class members is "impractical on its face," rendering the "traditional *Teamsters*" approach infeasible.[32] But the court concluded that it could dispense with *Teamsters* hearings, and instead administer a lost pay remedy for the plaintiffs' promotions claim "through the use of a formula approach."[33] The court proposed using a formula to calculate a "lump sum amount that represents the employer's total liability for backpay to the class" and then dividing the lump sum among those class members who were qualified for and interested in the promotion, and thus "at least *potentially* victimized by the employer's discriminatory policy."[34] This approach, the court reasoned, would work for those promotions which had been advertised within Wal-Mart, and for which data regarding the applicants existed. But for class members who were allegedly interested in promotions that were never posted on Wal-Mart's system, the court concluded that administering a class-wide backpay remedy would be impossible, as there was "no objective applicant data" that would enable it to determine whether the class members were interested in and qualified for the promotion.[35]

With respect to the plaintiffs' equal pay claim, the court concluded that it could determine backpay and punitive damages remedies for the entire class "without resort to a formula approach."[36] Using objective data from Wal-Mart's personnel system, the court reasoned, it could identify "the *actual* victims of any proven discriminatory pay policy" by examining data such as "job history, seniority, job review ratings, weeks worked," and other factors.[37] Wal-Mart pointed out that the available data did not include "dozens of factors identified in a survey of Store Managers as being relevant to pay decisions."[38] But the court discounted this argument, reasoning that "'unrealistic exactitude [was] not required'" in determining backpay awards.[39] The court also concluded, as it had for plaintiffs' promotion claim, that it did not have to hold hearings at which the actual decisionmakers could testify about the reasons they made particular employment decisions. Such hearings, the court reasoned, were "simply unnecessary" where both eligibility for and the amount of backpay could be determined from data.[40]

III. The Ninth Circuit's Decision

After the district court certified the class, Wal-Mart appealed and the plaintiffs cross-appealed under Rule 23(f). In a majority opinion written by Judge Pregerson, the Ninth Circuit affirmed the district court, concluding that it had correctly applied the requirements of Rule 23(a) and Rule 23(b)(2), and correctly concluded that trial of the class action would be manageable.[41]

A. Commonality: Centralized Culture as a "Nexus" Between Subjectivity and Statistics

With respect to commonality—the main point of contention under Rule 23(a)—the majority concluded that the plaintiffs had presented at least four kinds of evidence suggesting a common "corporate policy of discrimination": (1) unchallenged "[f]actual [e]vidence" demonstrating that Wal-Mart "operates a highly centralized company that promotes policies common to all stores and maintains a single system of oversight;" (2) expert sociological testimony stating that "gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors;" (3) statistical evidence tending to show gender discrimination on a regional level; and (4) anecdotal evidence reinforcing the inference of discrimination.[42]

The majority acknowledged that the plaintiff's sociologist had "failed to identify a specific discriminatory policy at Wal-Mart," but rejected Wal-Mart's argument that this rendered his opinion regarding Wal-Mart's vulnerability to gender discrimination unreliable.[43] While a jury might "ultimately agree" that, absent a "specific discriminatory policy promulgated by Wal-Mart," the sociologist's conclusion was "hard to believe," that conclusion was nonetheless "properly analyzed" and tended to show a "common question of fact—*i.e.*, does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?"[44]

The majority also acknowledged that the plaintiffs' statistician had conducted his research on the regional, rather than store-by-store, level. But, consistent with the district court, the majority reasoned that the appropriate level of statistical analysis "depends largely on the similarity of the employment practices and the interchange of employees at the various facilities."[45] According to the plaintiffs' statistician, a store-by-store analysis would not capture "the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures," the "dissemination" of these policies as a result of frequent movement of store managers, or Wal-Mart's "strong corporate culture."[46] In light of this explanation, the panel concluded, the district court did not abuse its discretion in crediting this analysis and concluding that it supported the contention that Wal-Mart's corporate structure and policies led to a "pattern or practice" of discrimination.[47]

In a separate section of its opinion, the court specifically discussed the role of "[s]ubjective [d]ecision-[m]aking" in the Rule 23(a) commonality analysis.[48] The court acknowledged that discretionary decision-making *alone* is insufficient to demonstrate commonality. However, the court also suggested that it was "well-established that subjective decision-making is a 'ready mechanism for discrimination.'"[49] Thus, the panel concluded, decentralized, subjective decision-making could—and did—contribute to an inference of discrimination in this case:

> Plaintiffs produced substantial evidence of Wal-Mart's centralized company culture and polices, thus providing a nexus between the subjective decision-making and the considerable statistical evidence demonstrating a pattern of discriminatory pay and promotions for female employees.[50]

In short, even though there was no actual evidence of company-wide discriminatory policies, the statistical evidence of discrimination, coupled with (non-discriminatory) company-wide policies, was sufficient to raise an inference that gender bias might be systematically "seep[ing] into the system" through managers' exercises of discretion.[51] The court also affirmed the district court's conclusions that the named plaintiffs were typical of the class and would represent it adequately.

B. Rule 23(b)(2): Identifying the "Primary Goal" of the Litigation

Turning to Rule 23(b), the court acknowledged that certification under Rule 23(b)(2) was inappropriate in cases where "'the appropriate final relief relates... predominantly to money damages.'"[52] But it rejected the view that the monetary claims necessarily predominated because the case involved billions of dollars in potential liability. "[S]uch a large amount," the panel reasoned, was "principally a function of Wal-Mart's size, and the predominance test turns on the *primary goal* of the litigation—not the theoretical or possible size of the damage award."[53] Those putative class members who were still employed by Wal-Mart, and who therefore had standing to seek injunctive and declaratory relief, would, the court continued, reasonably have brought their claims, absent even the possibility of monetary relief, in order "to put an end to the practices they complain of."[54] The court was therefore "confident" that the primary relief sought by such plaintiffs "remains declaratory and injunctive in nature."[55]

The majority did, however, agree with Wal-Mart that those putative class members who no longer worked at Wal-Mart lacked standing to seek injunctive or declaratory relief. The majority acknowledged that it would be "difficult to say that" such plaintiffs would have sued, absent the possibility of monetary relief.[56] The court therefore remanded to the district court to determine the

"appropriate scope of the class" in light of any evidence regarding which class members were Wal-Mart employees when the lawsuit was filed.[57]

C. Manageability: An Alternative Approach under Hilao

Finally, the panel affirmed the district court's conclusion that trial of most of the class claims was manageable. On appeal, Wal-Mart argued that the district court's trial plan violated the Due Process Clause, Title VII as interpreted in *Teamsters*, and the Rules Enabling Act by denying it the opportunity to present rebuttal evidence in its own defense as to each class member.[58] In its first opinion, the majority expressly rejected these arguments and upheld the district court's trial plan. In its revised opinion, the majority changed course. Expressing "no opinion regarding" Wal-Mart's objections to the district court's "tentative trial plan," it suggested instead that "there are a range of possibilities—which may or may not include the district court's proposed course of action—that would allow this class action to proceed in a manner that is both manageable and in accordance with due process."[59] As a result, it concluded, manageability and due process did not bar class certification.

To illustrate this "range of possibilities," the majority reproduced several pages of block quotes from *Hilao v. Estate of Ferdinand Marcos*, a case in which the Ninth Circuit affirmed a district court's determination of compensatory damages for a class with approximately 10,000 members.[60] The district court in *Hilao* randomly selected 137 individual claims for trial, based on a statistician's testimony that 137 trials would achieve a 95% probability that "'the same percentage [of claims] determined to be valid among the examined claims would be applicable to the totality of claims filed.'"[61] The court held a jury trial on compensatory damages as to the 137 claims, which resulted in judgment for 135 claimants. The court then entered an award for the remaining class members based on the average of these awards. On appeal, the Ninth Circuit held that this procedure comported with due process because it prevented the defendant from having to pay damages for invalid claims, and permitted the plaintiffs to bring what would otherwise have been an unmanageable volume of claims. The *Wal-Mart* majority concluded that a similar procedure could be used in the *Wal-Mart* case. In addition to rendering the trial manageable, such a procedure would, the majority reasoned, "allow Wal-Mart to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or non-promotion was due to something *other* than gender discrimination."[62]

IV. Judge Kleinfeld's Dissent

Judge Kleinfeld dissented, taking issue with nearly all of the majority's conclusions. Initially, he asserted, the purported class did not satisfy any of the Rule 23(a) requirements except numerosity. "The only common question plaintiffs identify with any precision," Judge Kleinfeld suggested, was "whether Wal-Mart's promotion criteria are 'excessively subjective.'"[63] But that common issue had *no* "clear relationship to sex discrimination in pay, promotions, or terminations,"[64] and thus was not a common issue actually relevant to the plaintiffs' claims. Although the plaintiffs' sociologist concluded that subjective pay and promotion systems are "vulnerable" to sex discrimination, merely leaving promotion decisions to the discretion of lower-level supervisors should, "as the Supreme Court recognized in *Watson v. Fort Worth Bank & Trust*[,]" raise "no inference of discriminatory conduct' because '[i]t is self-evident that may jobs... require personal qualities that have never been considered amenable to standardized testing.'"[65]

The only concrete evidence of actual discrimination, Judge Kleinfeld continued, was that "around 2/3 of Wal-Mart employees are female, but only about 1/3 of its managers are female."[66] But "as the Supreme Court [also] recognized in *Watson*, '[i]t is entirely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.'"[67] "Not everybody wants to be a Wal-Mart manager," he observed, and "Plaintiffs' statistics do not purport to compare women who want to managers at Wal-Mart with men who want to be managers at Wal-Mart, just female and male employees, whether they want management jobs or not."[68]

Judge Kleinfeld also concluded that the class lacked typicality. Each of the named plaintiffs, he pointed out, had a different experience at Wal-Mart. Some still worked for the company; others had quit; others had been fired for alleged misfeasance. "Some claim sex discrimination, some claim mixed motive race and sex discrimination, some appear to claim only race discrimination. Some claim retaliation, and some appear to claim unfairness but not discrimination."[69] The defenses to these claims, Judge Kleinfeld continued, were similarly uncommon, ranging from proving that the particular plaintiffs' adverse treatment was based on poor performance or actual misfeasance, to settling claims that appeared to have merit. Thus, "[w]hatever the 'vulnerability' to sex discrimination of the 'corporate culture' of this national corporation with no centralized system for promotion, the

various Plaintiffs' claims and Wal-Mart's defenses against them do not resemble one another."[70]

Judge Kleinfeld also concluded that the named the plaintiffs would not "fairly and adequately protect the interests of the class."[71] "Women who still work at Wal-Mart and who want promotions have an interest in the terms of an injunction;" but to "women who have quit or been fired and do not want to return... compensatory and punitive damages are what matter."[72] Class members who are managers "have interests in preserving their own managerial flexibility under whatever injunction may issue."[73] "Those who face strong defenses, such as if they did indeed steal time or money, have a considerable interest in a fast, mass settlement, while those who have impressive performance records have an interest in pushing their individual cases to trial."[74]

Judge Kleinfeld also concluded that the class did not meet the requirements of Rule 23(b)(2). In Judge Kleinfeld's view, it was "risible" to say that injunctive and declaratory relief predominated, because the claim for punitive damages would likely be in the *billions* of dollars.[75] "For anyone but the richest people in the world," he reasoned, "billions of dollars are going to predominate over words and solemn commands and promises about how to behave in the future. What Wal-Mart cashier or stocker would care much about how the district court told Wal-Mart to run its business after getting enough cash to quit?"[76]

Judge Kleinfeld reserved his sharpest criticism for the proposed trial plans. The district court's plan, he asserted, "violates Wal-Mart's constitutional rights to due process and jury trial."[77] Under the plan, "[t]here will never be an adjudication," let alone by a judge and jury, "to determine whether Wal-Mart owes any particular woman the money it will be required to pay, nor will any particular woman ever get a trial to establish how much she is owed."[78] But "[u]nder both the Seventh Amendment and the statute applicable to punitive damages in Title VII cases, Wal-Mart is entitled to trial by jury of these issues."[79] Further, Judge Kleinfeld pointed out, there was no legitimate way for the jury or court to decide upon a punitive damages award, "since the jury will never make a compensatory damages award," and thus could never calculate the ratio of punitive to compensatory damages, as required by the Supreme Court.[80]

The majority's proposed procedure based on *Hilao*, he asserted, was equally unsatisfactory. Initially, the circumstances that rendered the procedure in *Hilao* necessary were not present here, because unlike the plaintiffs in *Hilao*, the plaintiffs here "can obtain individual counsel where they live and do not face the problems of proving injuries suffered in a foreign country."[81] Moreover, where "*Hilao* included a plan to have a 'random sample of 137 claims' go to jury trial," under the majority's plan, "no individual cases will go to trial."[82]

Judge Kleinfeld also suggested that a class action in this case was wholly unnecessary. Class actions, he observed, need "special justification" because they are an exception to the "'usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[83] They are designed to solve an attorneys' fee problem: the problem that small recoveries do not provide a sufficient inventive for individuals to bring solo actions to uphold their rights. But this problem "does not pertain here."[84] "Much of the bar now earns a living by litigating sex discrimination claims," and such cases offer "good liability, high damages potential, and collectibility."[85] These features "'eliminate financial barriers that might make individual lawsuits unlikely to infeasible,' so [that] women discriminated against by Wal-Mart do not need a class action. They can, with contingent fee agreements, afford to hire their own lawyers and control what the lawyers do for them."[86]

In conclusion, Judge Kleinfeld emphasized that it was not simply Wal-Mart but also "[w]omen employed by Wal-Mart who have suffered sex discrimination" who "stand to lose a lot if this sex discrimination class action goes forward."[87] Even if the plaintiffs win, "[w]omen who have suffered great loss because of sex discrimination will have to share the punitive damages award with many women who did not. Women entitled to considerable compensatory damages in addition to lost pay will be deprived of them. Women who have left Wal-Mart will get injunctive and declaratory relief of no value to them... If the settlement is mostly words for the women and money for the lawyers, a realistic possibility, it will be a pyrrhic victory indeed."[88]

V. Some Key Issues

As Judge Kleinfeld's vehement dissent suggests, the Wal-Mart class action raises serious and unsettled issues. One of these is the proper role of subjective decision-making and statistical evidence in class certification under Rule 23. While this issue is not new, it arises in a particularly acute form in this case. The paradigm instance of a subjective decision-making process resulting in common injury is a wholly subjective decision-making process that affects multiple persons at a single facility, where all the affected persons are subjected to the *same* subjective decision-maker.[89] In *Wal-Mart*, by contrast, the putative class members were not exposed to the subjective

judgments of the same decision-maker but worked under *thousands* of different managers at approximately 3,400 different stores across the country. The Ninth Circuit and the district court acknowledged this difficulty, and pointed out that, in addition to this policy of subjectivity, Wal-Mart had a strong centralized culture. But, as the dissent pointed out, the plaintiffs made *no* showing that this centralized culture was in itself sexist or discriminatory in any way. The holdings discussed above thus appear to employ a relatively permissive definition of "commonality."

The plaintiffs offered their most concrete evidence of discrimination through statistical evidence. But here, too, the opinions discussed adopt a relatively permissive view of the kind of statistical evidence sufficient to turn an allegation of discrimination into an initial showing of class-wide discriminatory treatment. Wal-Mart's analysis indicated that, on a store-by-store basis, there was no statistically significant evidence of discrimination at the large majority of stores. Neither the district court nor the Ninth Circuit held that this analysis was fundamentally flawed or incorrect. Rather, they simply accepted the plaintiffs' regionally aggregated data as sufficient to "create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart."[90] This implies that the presence of a statistical disparity at *some* level of aggregation—even if it is squarely contradicted by affirmative evidence of *non*-discrimination at the level at which decisions are actually made—is sufficient to support a claim of class-wide discriminatory treatment.

If this is correct, it may encourage employers to seek to avoid liability through measures that go beyond simply policing their employment policies and practices for true discrimination. In particular, they may seek to ensure that there is *no* way to produce any kind of statistical case, no matter at what level of aggregation, that their policies have a statistically disparate impact. As a plurality of the Supreme Court has observed (in a passage quoted by Judge Kleinfeld in his dissent),

> [i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.[91]

But an "inevitable focus on statistics" could "put undue pressure on employers to adopt inappropriate prophylactic measures."[92] As the Court plurality also observed,

> [i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.[93]

But, of course, "[p]referential treatment and the use of quotas by public employers can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII."[94]

The *Wal-Mart* case also presses the question of when claims for punitive damages become so predominant that they render inappropriate a Rule 23(b)(2) class. The district court and Ninth Circuit concluded that, consistent with Rule 23(b)(2), the plaintiffs could seek punitive damages and backpay amounting to billions of dollars. But to Judge Kleinfeld, the massive amount of monetary compensation the plaintiffs seek in this case plainly belies any claim that pecuniary claims are "incidental" to their case, or that their requests for injunctive relief are predominant.

Finally, this case raises the question of how, if at all, a class with 1.5 *million* members can be managed consistent with the Constitution, employment law, and the Rules Enabling Act. As suggested above, it is a standard tenet of employment law that, in an employment discrimination lawsuit, employers are entitled to the opportunity to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons."[95] As Judge Kleinfeld observed, however, the decisions in this case would leave Wal-Mart without that opportunity. The district court's trial plan—which the panel continued to characterize as potentially "viable"[96]—gives employers no opportunity at all to "rebut" the plaintiffs' prima facie case. And the panel's alternative procedure, based on *Hilao* and involving trial of a small number of test cases chosen by lottery, would similarly deny Wal-Mart the opportunity in all but a small number of randomly selected test cases. Further litigation in this case will determine whether that limited opportunity is sufficient to satisfy Title VII, *Teamsters*, the Rules Enabling Act, and the requirements of due process.[97]

Endnotes

1 Dukes, et al. v. Wal-Mart Stores, Inc. ("*Dukes I*"), 222 F.R.D. 137, 141-42 (N.D. Cal. 2004).

2 *See* Dukes, et al. v. Wal-Mart Stores, Inc., 474 F.3d 1214 (9th Cir. 2007).

3 *See* Dukes, et al. v. Wal-Mart Stores, Inc. ("Dukes II"), 509 F.3d 1168 (9th Cir. 2007). The Panel issued the revised opinion in response to a Wal-Mart petition for rehearing en banc. *Dukes II* denied the petition for rehearing en banc as moot in light of the new opinion, but expressly gave the parties leave to file new petitions for rehearing. It is Wal-Mart's second petition for rehearing en banc that is now pending.

4 *See Dukes I*, 222 F.R.D. at 141; *see also* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....").

5 *Dukes I*, 222 F.R.D. at 141.

6 *See id*.

7 *Id*.

8 *Id*.

9 *Id*. at 141-42. Federal Rule of Civil Procedure 23(b)(2) permits class certification when the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

10 *Dukes I*, 222 F.R.D. at 183.

11 *Id*. at 166 (emphasis added).

12 *Id*. at 145. The court also relied on a third category of evidence, "anecdotal evidence" of "discriminatory attitudes held or tolerated by management," consisting of declarations from the named plaintiffs and 114 putative class members. *Id*. at 145, 165-66.

13 *Id*. at 149; *see id*. at 149-51.

14 *Id*. at 150.

15 *Id*. at 152.

16 *Id*. at 153.

17 *Id*. at 154.

18 *Id*.

19 *Id*.

20 *Id*. at 155.

21 The district court asserted that Wal-Mart's statistician "ran a separate regression analysis for (a) each of the Specialty Departments within each store, (b) each grocery division within each store, and (c) the remainder of each store." *Id.* at 156. The Court of Appeals accepted this determination, concluding that Wal-Mart's statistician had "reviewed data at the sub-store level." *Dukes II*, 509 F.3d at 1181 n.8. In its first petition for rehearing en banc, however, Wal-Mart indicated that its expert had in fact conducted a store-level analysis, "as plaintiffs' own expert concedes." Petition for Rehearing En Banc, Dukes, et al. v. Wal-Mart, No. 04-16688 (9th Cir. filed Feb. 20, 2007) (internal citations omitted).

22 *Dukes I,* 222 F.R.D. at 156.

23 *Id*. at 157.

24 *Id*. at 159.

25 *Id*. at 170.

26 *Id*. at 171.

27 *Id*.

28 *Id*.

29 *Id*. at 173.

30 431 U.S. 324 (1977).

31 *Dukes I*, 222 F.R.D. at 176.

32 *Id*.

33 *Id*.

34 *Id*. at 177.

35 *Id*. at 182.

36 *Id*. at 183.

37 *Id*. at 184.

38 *Id*.

39 *Id*. (quoting Shipes v. Trinity Indus., 987 F.2d 311, 317 (5th Cir. 1993)).

40 *Id*. at 185.

41 The Court issued its original opinion affirming the district court, with a dissent by Judge Kleinfeld, in February of 2007. As noted above, after Wal-Mart petitioned for rehearing en banc, the Court withdrew its original opinion and issued a new opinion, with Judge Kleinfeld again dissenting.

42 *Dukes II*, 509 F.3d at 1178.

43 *Id*. at 1179.

44 *Id*.

45 *Id*. at 1181.

46 *Id*.

47 *Id*.

48 *Id*. at 1182.

49 *Id*. at 1183 (quoting Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986)).

50 *Id*.

51 *Dukes I*, 222 F.R.D. at 152

52 *Dukes II*, 509 F.3d at 1186 (quoting Fed. R. Civ. P. 23(B)(2), Adv. Comm. Notes to 1966 amend.).

53 *Id*. at 1186.

54 *Id*. at 1189.

55 *Id*.

56 *Id*.

57 *Id*.

58 The Rules Enabling Act, 28 U.S.C. § 2072(a)-(b), provides that "general rules of practice and procedure... shall not abridge, enlarge or modify any substantive right."

59 *Dukes II*, 509 F.3d at 1191.

60 103 F.3d 767 (9th Cir. 1996).

61 *Dukes II,* 509 F.3d at 1191 (quoting *Hilao*, 103 F.3d at 782).

62 *Id*. at 1193 n.22.

63 *Id.* at 1194.

64 *Id.*

65 *Id.* (quoting *Watson*, 487 U.S. 977, 990, 999 (1988)).

66 *Id.*

67 *Id.* (quoting *Watson*, 487 U.S. at 992).

68 *Id.* at 1194-95.

69 *Id.* at 1195-96.

70 *Id.* at 1196.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 1197.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 1198.

82 *Id.*

83 *Id.* at 1199 (quoting Califano v. Yamasaki, 442 US 682, 700-01 (1979)).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *See, e.g.*, Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 151 (single facility), 159 n. 15 (wholly subjective decisionmaking process).

90 *Dukes I*, 222 F.R.D. at 155.

91 *Watson*, 487 U.S. at 992 (plurality op.) (internal quotation marks omitted).

92 *Id.*

93 *Id.* at 992-93 (internal quotation marks and citations omitted).

94 *Id.*

95 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977); *see also* Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 148 (2000).

96 *Dukes II*, 509 F.3d at 1193.

97 *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (due process requires that a defendant have "an opportunity to present every available defense").

Cy Pres Settlements

Continued from page 1

for many class members, "the right to receive a discount [or coupon] will be worthless."[5] The class attorneys then capture the lion's share of the actual settlement. There are countless examples where the nominal or even the predicted values of the coupons that justified a huge attorneys' fee far outstripped the actual redemption rate.[6] In a recent settlement (a nationwide Sears class action in Cook County, Illinois), plaintiffs' attorneys received about $1 million, while the 1.5-million member class redeemed claims at under a 0.1% rate for a total of $2,402.[7] Such settlements benefit defendants in the short run by permitting them to pay off class action attorneys cheaply, but hurt defendants in the long run by creating a mechanism by which class action attorneys can profitably bring weak cases.

The Class Action Fairness Act (CAFA), passed in 2005, has drawn de jure[8] and de facto[9] scrutiny to the issue of coupon settlements by requiring attorneys' fees in coupon settlements to be tied to the actual value of the redeemed coupons. But CAFA does not provide the same scrutiny to cy pres settlements and trial lawyers are shifting to that mechanism to accomplish the same task of maximizing return from weak cases.

Judge Richard Posner has argued that cy pres is a misnomer in the class action context:

> [Cy pres] doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor. In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to judgment) to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy (badly misnamed, but the alternative term—"fluid recovery"—is no less misleading) is purely punitive.[10]

But sometimes cy pres is less a matter of being punitive and more a matter of disguising the true cost of a settlement to the defendant to maximize the share of the actual recovery received by the plaintiffs' attorneys. If the beneficiary is related to the defendant, or the defendant otherwise benefits from the payout, then the contingent attorneys' fee can be exaggerated by claiming that the value to the class is equal to nominal value of the payment