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Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* Rejects Certification of Largest Gender Discrimination, Employment Class Action in the Nation's History, Holds that Plaintiffs Cannot Prove Common Class Claims, Raises Bar for Certification of All Claims

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Executive Summary

Yesterday, the Supreme Court issued its much-anticipated decision in *Wal-Mart Stores, Inc. v. Dukes* (564 U.S. ____ (2011)). In a highly technical decision, all nine justices agreed that "one of the most expansive class actions ever" consisting of 1.5 million female Wal-Mart employees who allegedly were subject to unlawful discrimination in violation of Title VII based on subjective pay and promotion decisions of their managers, could not be certified as a class for back pay under Federal Rule of Civil Procedure 23(b)(2). The Court found the question of awarding monetary relief too individualized for class treatment. A five-justice majority led by Justice Scalia went a step further and held that the class could not even meet the traditionally less rigorous standard of Rule 23(a), which is a prerequisite for any class action in federal court. The majority explained that the plaintiffs "provide no convincing proof of a companywide discriminatory pay and promotion policy" and therefore could not meet Rule 23(a)'s requirement that there be "questions of law or fact common to the class."

The majority swept aside statistical evidence about pay and promotion disparities, anecdotal reports of discrimination, and the controversial testimony of a sociologist about Wal-Mart's culture and personnel practices as basis for proof of a common discriminatory policy. The majority recognized that "'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability," but cautioned that this does not mean "that every employee in a company using such a system has such a claim in common." The majority did not speculate on the evidence that would be needed to prove commonality of such claims, but clearly rejected the possibility on these facts. In so doing, it suggested that the standard to prove commonality of such a claim is very high and would center upon a showing that each class member's injury had a common cause. The majority also made clear that the class certification inquiry may involve an analysis of evidence relating to the merits of the case.

The dissent defended the evidence that subjective delegation of personnel decisions could constitute a common discriminatory policy and noted that the "plaintiffs' evidence, including class members' tales of their own experience, suggests that gender bias suffused Wal-Mart's company culture." The dissent also criticized the majority for deciding the case under Rule 23(a) and suggested that for that reason the decision could have far-reaching implications and preclude certification of claims that are worthy of certification, such as claims for injunctive relief.

The decision is a big victory not only for Wal-Mart, but for all businesses that delegate to supervisors the authority to make subjective personnel decisions about promotions and pay. Following *Wal-Mart*, it is more difficult to bring a class action claiming that subjective delegation of authority can give rise to common discrimination across the board. The decision is a direct

setback for the plaintiffs as it effectively ends a hard-fought, ten-year battle. It is also a setback for class action plaintiffs and their lawyers because it limits the use of a disparate impact analysis to prove class-wide discrimination based on a theory of unchecked subjective decision-making in personnel decisions. Prior to *Wal-Mart*, class action plaintiffs and their lawyers had been using this theory as a major weapon in their arsenal. After today, it is clear that this weapon is available only in very limited situations.

The implications of the decision are, as Justice Ginsburg noted in dissent, "far-reaching." The majority's discussion of Rule 23(a) commonality alone suggests a strong emphasis at the class certification stage of requiring plaintiffs to prove that all class members have suffered the same injury. Lawyers in other cases will seize upon this aspect of *Wal-Mart* to argue against certification of class actions on the grounds of failure to satisfy commonality, which heretofore had been considered rather easy to satisfy. The decision thus may affect many class actions in federal court, not just those involving claims of sexual or racial discrimination.

Background

The *Wal-Mart* action began on June, 21, 2004, when a group of current and former female employees of Wal-Mart filed an action in federal court in San Francisco claiming a right to proceed as nationwide class against Wal-Mart, the nation's largest private employer with more than one million employees working in various positions at more than 3,400 store locations throughout the country. Plaintiffs "claimed that pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised 'in a largely subjective manner.'" Plaintiffs claimed that the exercise of this discretion disproportionately favors men and has a disparate impact on female employees. They also claimed that Wal-Mart's failure to control management's subjective decision-making amounts to disparate treatment in violation of Title VII of the Civil Rights act of 1964. As a result, Plaintiffs sought to certify a class of some 1.5 million members consisting of current and former female Wal-Mart employees who held positions ranging from part-time entry-level hourly employees to salaried managers. Plaintiffs claimed that Wal-Mart's delegation of authority to managers is discriminatory and sought to recover injunctive relief, declaratory relief, punitive damages, and back pay.

Three of the original named plaintiffs were Betty Dukes, a former Wal-Mart greeter; Christine Kwapnoski, a Sam's Club worker who held a number of positions including a supervisory position; and Edith Arana, a Wal-Mart store employee who claims she was denied the opportunity to participate in Wal-Mart's management training program.

At the district court level, plaintiffs moved to certify a class 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 policies and practices." At the certification stage plaintiffs chiefly relied upon three forms of proof to establish commonality under Rule 23(a)(2): "statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart's female employees, and the testimony of sociologist Dr. William Bielby, who conducted a 'social framework analysis' of Wal-Mart's 'culture' and personnel practices, and concluded that the company was 'vulnerable' to gender discrimination." Plaintiffs further argued that their back-pay claims could be included as part of a Rule 23(b)(2) class because they did not predominate over their requests for declaratory and injunctive relief.

The district court granted plaintiffs' certification with respect to the claims for injunctive relief, declaratory relief, and equal pay. With respect to the plaintiffs' promotion claim, the district court certified the class with respect to issues of alleged discrimination (including liability for punitive damages, as well as injunctive and declaratory relief), but refused to certify a class with respect to the recovery of back pay.

On appeal, the Ninth Circuit, sitting *en banc*, issued a 6-5 decision substantially affirming the certification order and finding that the district court did not abuse its discretion in granting the plaintiffs' class certification motion. The Ninth Circuit held that plaintiffs satisfied Rule 23(a)'s requirements, including the requirement of commonality, and that plaintiffs' back pay claims could be certified under Rule 23(b)(2). The Ninth Circuit found that the back pay claims did not predominate over the injunctive and declaratory relief claims and were manageable because plaintiffs could employ a procedure to randomly select a sampling of the back-pay claims to determine their value and then extrapolate "the value of the untested claims from the sample set."

On December 6, 2010, the Supreme Court granted certiorari on only one of the questions Wal-Mart raised: "[w]hether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) – which by its terms is limited to injunc-

tive or corresponding declaratory relief – and, if so, under what circumstances." The Court also requested briefing on "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."

The Majority Opinion on Commonality, the 'Crux of This Case'

In the part of the decision joined by five justices without any of the dissenters, the majority noted that the commonality requirement under Rule 23(a) is the "crux of this case." (Neither the majority nor the dissent addressed whether the class satisfied any of the other requirements of Fed. R. Civ. 23(a), specifically numerosity, typicality, and adequacy.) In language that will surely be quoted again and again in future litigation, Justice Scalia had this to say about proving that there are "questions of law or fact common to the class":

> That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.'" For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways – by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Citing an article by the recently deceased and respected mass tort litigation scholar, Richard Nagareda, the majority amplified the point by noting that "[w]hat matters to class certification ... is not the raising of common 'questions' — even in droves — but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Turning to the general standards for certification, the majority recognized that courts must employ a rigorous analysis to determine if the standards of Rule 23 are met. According to the majority, a party seeking class certification cannot rely simply on pleadings, but must instead "affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."

Following this standard and delving beyond the pleadings, the majority found there was no commonality under Rule 23(a) to justify certifying a class because the case involved "millions of employment decisions" and there was no "glue holding the alleged *reasons* for all those decisions together." Relying on the framework established in *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147 (1982), the majority recognized there are two ways commonality can be established in cases involving millions of employment decisions and an alleged discriminatory practice. First, commonality can be established by showing the employer "used a biased testing procedure to evaluate" employees. Second, commonality can be established if there is "[s]ignificant proof that an employer operated under a general policy of discrimination."

Recognizing that there is no testing or company evaluation method at issue, the majority quickly turned to whether there was "significant proof" that Wal-Mart "operated under a general policy of discrimination." The majority noted that plaintiffs' only proof of a common practice of discrimination was the testimony of their sociological expert, Dr. William Bielby. The majority found Dr. Bielby's testimony about Wal-Mart having a "strong corporate culture" that makes it "'vulnerable'" to "gender bias" insufficient to establish commonality under Rule 23(a). In support of this conclusion, the majority noted that Bielby's testimony about corporate bias failed to establish commonality because, by his own admission, Bielby could not answer the essential question upon which plaintiffs' entire commonality theory depends – what percentage of employment decisions at Wal-Mart were based on stereotypical thinking.

The majority also rejected statistical proof and anecdotal evidence that plaintiffs offered to try to establish a common discriminatory mode in the way managers exercised their discretion. First, the majority noted the paradox in plaintiffs' theory that Wal-Mart has discriminatory corporate policy of *allowing discretion* by local supervisors over employment matters. According to the majority, Wal-Mart's practice of allowing managers to exercise discretion "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices." Second, the majority found the statistical analyses and anecdotal evidence to be insufficient because, among other reasons, individual stories of discrimination or statistical analyses at the regional and national levels, fail to establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." In other words, the plaintiffs failed to identify any specific discriminatory employment practice, "much less one that ties all their 1.5 million claims together" for purposes of establishing the commonality prerequisite under Rule 23(a).

In sum, the majority agreed with Chief Judge Kozinski's dissenting opinion at the Circuit Court level that found that the plaintiffs

> held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. ... Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Nine Justices Reject Certification of Claims for Back Pay under Rule 23(b)(2)

The Supreme Court unanimously agreed that the trial court improperly certified the class plaintiffs' claims under Rule 23(b)(2). Rule 23(b)(2) authorizes class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

While the Court refused to reach the broader question of whether Rule 23(b)(2) applies *only* to claims of injunctive or declaratory relief and does not apply to monetary claims at all, Justice Scalia emphasized that "at a minimum, claims for *individualized* [monetary] relief (like the back pay at issue here) do not satisfy the Rule." Quoting again from the work of Professor Richard Nagareda, the Court explained that Rule 23(b)(2) classes are characterized by "'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" Applying these principles, Justice Scalia concluded that "Rule 23(b)(2) applies only when a single injunction would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of money damages."

Justice Scalia further noted that the Court's interpretation of Rule 23(b)(2) accorded with both the history and structure of the Rule. Historically, Rule 23(b)(2) classes were employed to challenge racial segregation, "conduct that was remedied by a single classwide order," and not instances in which each class member claimed individualized monetary damages. Moreover, none of the cases provided by the Advisory Committee as examples of Rule 23(b)(2)'s antecedents combined claims for individualized relief with classwide injunctions.

The Court also stated that allowing individualized monetary relief under Rule 23(b)(2) would be inconsistent with the structure of Rule 23(b) as a whole. Rule 23(b)(1) and Rule 23(b)(2) classes are mandatory classes, and the Rules do not allow for (b)(1) or (b)(2) class members to opt out and do not require that class members receive notice of the action. Rule 23(b)(3), on the other hand, which is normally the route for certifying claims for money damages, grants certification under wider circumstances, but demands greater procedural protections, specifically mandatory notice and the choice to opt out of the class.

Justice Scalia explained that "[t]he procedural protections attending the (b)(3) class … are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class.* When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute" because predominance and superiority for a class seeking an injunctive or declaratory relief benefiting all its members at once is self-evident. This is not the case when each class member sought individualized money damages. Accordingly, the court concluded that "we think it is clear that individualized monetary claims belong in Rule 23(b)(3)." Justice

Scalia also warned of the "serious possibility" that a class action for money damages without notice and opt-out provisions would violate the Due Process Clause of the Constitution.

The Court next proceeded to refute the plaintiffs' argument that "their claims for back pay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not 'predominate' over their requests for injunctive and declaratory relief." The plaintiffs argued that the Advisory Committee's note indicates that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," and argued that their claim for back pay does neither. The Court refused to apply a predominance test, noting that it would create "perverse incentives" for class representatives to forgo including employees' claims for compensatory damages in their complaints simply to get a class certified, and also would create the risk that individual class members' compensatory damages claims might later be precluded by litigation they did not have the power to opt out of. In the same vein, the Court also rejected plaintiffs' claims that the back pay claims can fall within a Rule 23(b)(2) class because back pay constitutes an equitable remedy. Justice Scalia pointed out that the Rule does not speak of equitable remedies generally, but instead, specifically of injunctions and declaratory judgments.

The Court recognized the Fifth Circuit decision *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (1998), which permits "certification of monetary relief that is 'incidental' to requested injunctive or declaratory relief." Nevertheless, the Court decided that it did not need to determine whether any forms of incidental monetary relief existed in this case, explaining that "[r]espondents do not argue that they can satisfy this standard, and in any event they cannot."

Finally, the Court refused to support the Ninth Circuit's suggested method of making individualized determinations of each class member's eligibility for back pay by referring a subset of claims to a special master for valuation and then extrapolating from the validity and value of the untested claims from the sample test set. The Court derided this approach as "Trial by Formula" and noted that Title VII provides a "detailed remedial scheme" in pattern-or-practice cases that allows defendant companies to raise any individual affirmative defenses they may have to show that an applicant was denied an employment opportunity for lawful reasons. The Court explained that it would not strip Wal-Mart of its right to make its Title VII statutory defenses in individualized proceedings, by using the "Formula" to arrive at complete class recovery.

The Dissent Criticizes the Majority for Deciding the Case under Rule 23(a)

Justice Ginsburg, in an opinion joined by Justices Breyer, Sotomayor, and Kagan, concurred in part and dissented in part. Justice Ginsburg agreed with the majority that the claims for monetary relief should not have been certified under Rule 23(b)(2). But she parted ways with the majority's analysis under Rule 23(a) about the existence of questions of law or fact common to the class, specifically, the district court's "identification of a common question whether Wal-Mart's pay and promotion policies gave rise to unlawful discrimination."

The dissent began by noting that the district court properly recognized that "one significant issue common to the class may be sufficient to warrant certification" and that the district court's finding on that point was subject to correction only for error of law or abuse of discretion. The dissent reviewed the allegations and evidence before the district court and noted there was evidence that supported the plaintiffs' claims, including allegations that Wal-Mart "relies on gender stereotypes in making employment decisions," leaves "pay and promotions in the hands of a nearly all-male managerial workforce using arbitrary and subjective criteria," and puts up other barriers to advancement of female employees, such as a "condition of promotion that employees be willing to relocate," which gives rise to a risk that managers will "act on the familiar assumption that women, because of their services to husband and children, are less mobile than men." It also reviewed the plaintiffs' statistics that women hold 70 percent of the hourly jobs at Wal-Mart but only 33 percent of the management positions, that women "are paid less than men in every region," and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." "The plaintiffs' evidence, including class members' tales of their own experiences, suggest that gender bias suffused Wal-Mart's company culture," the dissent contended. The dissent also noted that the plaintiffs presented expert statistical evidence that pay and promotion disparities at Wal-Mart "can be explained only by gender discrimination and not by neutral variables." Against this factual backdrop, the dissent noted that "t]he practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects."

The dissent relied on the Court's 1988 decision in *Watson v. Fort Worth Bank & Trust*, which held that "the employer's 'undisciplined system of subjective decision-making' was an 'employment practice' that 'may be analyzed under the disparate impact approach.'"

The dissent accused the majority of blending the "threshold" commonality inquiry under Rule 23(a)(2) "with the more demanding criteria of Rule 23(b)(3), and thereby elevat[ing] the (a)(2) inquiry so that is no longer easily satisfied." It contended that the majority's emphasis on differences between class members "mimics the Rule 23(b)(3) inquiry into whether common issues 'predominate' over individual issues." It noted that "Professor Nagareda, whose 'dissimilarities' inquiry the Court endorses, developed his inquiry in the context of Rule 23(b)(3)." The dissent pointed out that the majority's "dissimilarities" position is far-reaching and that individual differences should not bar class under Rule 23(b)(1) or (b)(2), as, for example, a claim seeking injunctive relief by a group of African-American employees alleging race discrimination.

Analysis of the *Wal-Mart* Decision

Wal-Mart represents a significant victory for employers and a significant setback for class action plaintiffs' lawyers. Nine justice rejected the concept that claims for individualized money damages can be certified under Rule 23(b)(2). Five justices went further and held that the class did not even get to first base under Rule 23(a)(2). In other words, Justice Ginsburg and the dissenters will not certify a claim for money damages on these facts; Justice Scalia and the majority will not certify any class on these facts.

To understand the distinction, it is necessary to undergo a quick review of class action law. Recall that Rule 23 sets forth the governing standard in federal court for class actions. The common understanding is that if the plaintiffs can certify a class they can gain serious leverage to force a settlement or win at trial if necessary; whereas if no class is certified the expense and exposure to the company often evaporates. Rule 23 consists of two parts. Every class action must satisfy part (a), which requires proof that the class members are numerous, that the claims of the named plaintiffs are typical of the class claims, that class counsel is adequate, and under subpart (a)(2) that "there are questions of law or fact common to the class." *Wal-Mart* hinged on this requirement of commonality. If a class meets part (a), then it must also fit within part (b), which has three subparts, of which (b)(2) and (b)(3) are the key concerns. Rule 23(b)(2) applies where "injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It does not require that class members receive notice of the class action or the right to opt out of the class. Rule 23(b)(3) applies to claims for money damages. It requires notice and the right to opt out. It has some other exacting requirements, including proof that the that common issues "predominate over any questions affecting only individual members" and that a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy."

Perceiving the difficulty of establishing the right to proceed under Rule 23(b)(3), class plaintiffs who wish to receive some form of monetary compensation have attempted to squeeze their request for class certification into Rule 23(b)(2) by claiming that the requested monetary relief is merely incidental to the injunctive and declaratory relief and does not predominate in the way that a traditional damages claims would. *Wal-Mart* is such a case, and all nine justices agreed to shut down the possibility of any individualized monetary claims under Rule 23(b)(2).

But the majority led by Justice Scalia went farther still, and held that the class could not even get to first base under Rule 23(a). That being the case, there is no longer any basis for the Ninth Circuit's decision to remand the case for any determination about whether a class for punitive damages should be certified under (b)(2) or (b)(3), as there can be no class at all.

The decision is noteworthy not just because of the size of the class and the prominence of the defendant, but because it makes it much harder to bring a large discrimination claim as a class action. *Wal-Mart* bars not only claims for monetary relief under (b)(2) but also it bars any class at all on these facts, absent proof of a common policy of discrimination. This will be very hard to prove, which is why plaintiffs often sought to prove commonality with allegations or proof that the defendants had a policy of delegating unfettered authority to make decisions down to a local level. The unfettered delegation theory, while it may state a claim for liability, can no longer serve as a basis for a class action. This is a big setback for class action plaintiffs.

But the expected impact of the decision does not end there. *Wal-Mart* will make it harder to obtain class certification in virtually all class actions. To begin with, the majority – in a footnote – explicitly rejected the oft-cited proposition that the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974),

precluded an examination of the merits at the class certification stage. Plaintiffs' counsel have often cited *Eisen* as the reason why the Court could not weigh or criticize their evidence at the class certification stage, especially expert evidence. In stark contrast, the majority held that a district court must examine evidentiary issues that go to the merits of the case if their resolution is necessary to rule on class certification. In fact, the majority not only weighed and rejected much of the plaintiffs' evidence of discrimination on the merits, it engaged in a lengthy critique of the plaintiffs' expert evidence and found detailed statistical analyses of purported discrimination by a labor economist to be unpersuasive. The majority even suggested in passing that a district court may be able to exclude expert testimony at the class stage under *Daubert v. Merrell Dow Pharmaceuticals, Inc*. While some lower courts had previously embraced such an expansive view of the district court's ability to weigh evidence on class certification, the majority's opinion makes clear that this heightened evidentiary procedure will now be the practice throughout the country.

The aspect of the decision that has potentially the biggest impact is the approach to commonality. The majority significantly increased the proof required to meet the requirement of Rule 23(a)(2) that "there are questions of law or fact common to the class." In the past, many lower courts had held that this requirement was satisfied if the plaintiff identified only one common issue in the case, an easy task in almost any case. Justice Scalia, writing for the majority, emphasized that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' ... Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Citing an article by Professor Nagareda, the majority amplified the point by noting that "[w]hat matters to class certification ... is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Lawyers for companies facing class actions will surely seize upon this language to argue in other cases that each class member's injury must have a common cause and that the dissimilarities between the claims are fatal to class certification. This approach not only heightens the plaintiffs' burden, but arguably requires strict proof of causation of injury for class certification even in cases in which the underlying causes of action (such as many state consumer protection laws) have far more relaxed standards for causation and injury.

The dissent raises a fair point that the plaintiffs' proof and legal theory were satisfactory under existing law and that the majority's decision, with its emphasis on dissimilarities, will have far-reaching effects. The dissent might have gone further and pointed out that in recognizing that a company can be liable under Title VII for delegation of unfettered decision-making authority that results in a statistical disparity, but setting the bar for class certification of such a claim impossibly high, the majority does violence to the principle that where there is a right there must be a remedy. Proponents of the *Wal-Mart* decision will quickly respond that the remedy is in individual actions or perhaps smaller class actions in which there is actual proof of a discriminatory policy that affects all of the class members.

While the media will surely look for the broader societal implications of the *Wal-Mart* decision, we can only report what seems obvious from the legal front – another big win for business from a pro-business court. Is it earth-shattering? It's not the San Francisco earthquake of 1906. Still, the breadth of the decision is profound and changes the landscape significantly in class action discrimination lawsuits.

And it comes on the heels of the Court's recent decision in *Concepcion v. AT&T Mobility LLC* – another 5-4 split decision – which recognizes that arbitration clauses can be used to preclude class actions without regard to contrary state law. Combined, these decisions can make it much harder to bring class actions against businesses in federal court.