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CERTIFICATION

A New Battleground in Class Actions: Rule 23(a)(2)'s Commonality Requirement



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Prior to *Wal-Mart Stores Inc. v. Dukes*,¹ federal courts generally treated Rule 23(a)(2) commonality as a low threshold requirement that could be satisfied by identifying a single common question of law or fact.² Rule 23(a)(2) requires plaintiffs to estab-

lish that their claims share a common issue of law or fact with the members of the class they seek to represent.³

However, this Rule 23 requirement “‘does not require that all questions of law or fact raised in the litigation be common.’ 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.10, pp. 3-48 to 3-49 (3d ed. 1992); indeed, ‘even a single question of law or fact common to the members of the class will satisfy the commonality requirement,’ Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n. 110 (2003).”⁴

In all manner of class actions filed in federal courts across the country, plaintiffs moving for class certification would routinely identify one or more common questions such as:

- whether the defendant violated a statute;
- whether the defendant misled and/or deceived plaintiffs;
- whether the defendant overcharged plaintiffs;
- whether the defendant breached a contract;
- whether the defendant was unjustly enriched by its improper conduct; and

¹ 131 S. Ct. 2541 (2011).

² See, e.g., *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571, 594 (9th Cir. 2010) (plaintiffs’ burden under Rule 23(a)(2) is lower than that under Rule 23(b)(3)); *Williams v. Mohawk Indus. Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (plaintiffs satisfied the “low hurdle of Rule 23(a)(2)”; *Gariety v. Grant Thornton LLP*,

368 F.3d 356, 366 (4th Cir. 2004) (same as *Dukes*); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (“Because the requirement may be satisfied by a single common issue, it is easily met. . . .”); 7 Wright, Miller & Kane, *Fed. Prac. & Proc.* § 1653.

³ *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156-57 (1982).

⁴ *Wal-Mart*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting).

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■ whether the defendant's unlawful conduct injured plaintiffs and caused damages.

Upon considering such common issues, courts generally would find that plaintiffs had satisfied the relatively simple requirement of identifying at least one common issue of law or fact.⁵ Indeed, defendants would not often seriously challenge "commonality" under Rule 23(a)(2), instead saving their fire for the far more demanding predominance requirement of Rule 23(b)(3).⁶

The Holding of *Wal-Mart* Regarding Rule 23(a)(2)

In *Wal-Mart*, the Supreme Court held that "[c]ommonality 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. . . . Their claims must depend upon a common contention. . . . 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."⁷ This central holding of *Wal-Mart* thus establishes a new precedent that it is not enough for the question to be the same for each class member, but that question must be answerable in one fell swoop.

The Supreme Court also found that plaintiffs have the burden of satisfying the Rule 23 requirements based on "significant proof" that can withstand rigorous analysis, and added that "Rule 23 does not set forth a mere pleading standard."⁸ Plaintiffs brought employment discrimination claims against Wal-Mart and supported their class certification motion by presenting expert testimony, statistical evidence, and certain anecdotal evidence. The Supreme Court, however, rejected the expert testimony as unresponsive of plaintiffs' claims, describing it as "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"⁹

As to the plaintiffs' statistical evidence—regression analyses performed by a statistician and a labor economist—the Supreme Court decided that "[e]ven if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis."¹⁰

Plaintiffs' anecdotal evidence consisted of "some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores. . . . Even

⁵ *Williams*, 568 at 1355-56; *Spann v. AOL Time Warner Inc.*, 219 F.R.D. 307, 316 (S.D.N.Y. 2003).

⁶ The predominance requirement of Rule 23(b)(3), though redolent of the commonality requirement of Rule 23(a), is far more demanding because it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997); *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 396 (C.D. Cal. 2008) (defendant did not dispute that plaintiffs satisfied commonality under Rule 23(a)); *Spann*, 219 F.R.D. at 316 (defendants did not challenge commonality under Rule 23(a)).

⁷ 131 S. Ct. at 2551 (internal citation omitted).

⁸ *Id.*

⁹ *Id.* at 2554.

¹⁰ *Id.* at 2555.

if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination,' which is what respondents must show to certify a companywide class."¹¹ The Supreme Court thus concluded that "[b]ecause respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question."¹²

Future Litigation Will Need to Adapt To *Wal-Mart* Standards for Rule 23(a)(2) Commonality, Rule 23 Compliance

Without question, the holding and reasoning in *Wal-Mart* raised the bar substantially for plaintiffs seeking class certification. Although *Wal-Mart* was an employment discrimination case, the same Rule 23(a)(2) standards apply to all types of class actions. In certain types of class actions, such as consumer fraud, plaintiffs will not necessarily be able to identify a common issue and satisfy Rule 23(a)(2) based on the *Wal-Mart* standard.¹³ Indeed, certifying class actions going forward will require plaintiffs to: consider narrowing the scope of certain class definitions, take substantial discovery, present significant evidence, and possibly participate in mini-trials. This section thus discusses the impact of *Wal-Mart* on each of these components of class action litigation.

A. Class Definition

Plaintiffs will need to reevaluate how they define a class—nationwide or a more tailored, narrowly focused approach. In many but not all cases, plaintiffs might opt for a reduced class size and scope so that they can identify "a common mode of exercising discretion that pervades the entire company."¹⁴ In employment discrimination cases, plaintiffs probably will have to take a targeted approach that limits the class to a single plant or job classification or a common supervisor. In other types of cases, plaintiffs will need to determine the breadth of a class definition that can be certified under *Wal-Mart*.

B. Class Discovery Must Be More Comprehensive

Plaintiffs almost certainly will need to develop a more substantial record than they generally have done in past class actions in light of *Wal-Mart*. Because "Rule 23 does not set forth a mere pleading standard[,] a party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently nu-

¹¹ *Id.* at 2556 (internal citations omitted).

¹² *Id.* at 2556-57.

¹³ *Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 702 (5th Cir. 2011) (affirming denial of class certification, because "there was still no common question capable of class-wide determination."); *Vega v. T-Mobile USA Inc.*, 564 F.3d 1256, 1273 (11th Cir. 2009) (reversing class certification of purported breach of contract claim on several grounds, including that plaintiff failed to satisfy commonality requirement because he did not allege a common contract under which defendant employed all putative class members).

¹⁴ *Wal-Mart*, 131 S. Ct. at 2554-55.

merous parties, common questions of law or fact, etc.”¹⁵

Quite clearly, in order to prove compliance with Rule 23 based on actual facts, plaintiffs must develop a solid, thorough record through discovery. Bifurcating discovery between class and merits might still make sense in certain situations, but plaintiffs now must pursue broader and deeper discovery during the class certification phase of a case than was necessary pre-*Wal-Mart*. Accordingly, the line between class and merits discovery might become less meaningful than it was, because plaintiffs will need to obtain discovery that could very well relate to class and merits issues.

C. ‘Significant Proof’ Required

Plaintiffs must satisfy an evidentiary burden that requires “significant proof” of a common contention that is answerable on a classwide basis. While the quantum and nature of the requisite evidence will be litigated in district courts throughout the country, the Supreme Court has made it very clear that plaintiffs must present substantial proof to satisfy the commonality requirement of Rule 23(a)(2), and the other requirements of Rule 23.

1. *Expert Testimony*: Any expert testimony most likely will need to withstand a *Daubert* hearing.¹⁶ Moreover, even if expert testimony is admissible under *Daubert*, the expert’s conclusions must support the common contention that plaintiffs advance as the basis for a class action.¹⁷

2. *Statistical Evidence*: Class action plaintiffs frequently rely on statistical evidence to demonstrate that a self-selected sample provides a basis to extrapolate to the entire putative class. However, the Supreme Court determined that regional and national data did not by itself establish disparities at individual stores or a companywide policy of discrimination.¹⁸ This finding provides defendants with a strong basis to challenge statistical evidence, though plaintiffs are not foreclosed from using such evidence going forward. The foreseeable battles over statistical evidence will focus on whether it

would satisfy Rule 23(a)(2) commonality, either by itself or in conjunction with other evidence.

3. *Anecdotal Evidence*: Plaintiffs and defendants frequently submit anecdotal evidence in the form of affidavits. This type of evidence can effectively buttress or oppose a motion for class certification. Assuming that affiants have personal knowledge and relevant experience, they can present first-hand accounts of a company policy or practice that is the subject of the litigation. In *Wal-Mart*, the plaintiffs submitted “120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart’s 3,400 stores.”¹⁹ The Supreme Court found this evidence “too weak” and inadequate to support “any inference that all individual, discretionary personnel decisions are discriminatory.”²⁰ The *Wal-Mart* Court contrasted this insufficient evidence with *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324(1977), in which the plaintiff produced significant evidence. In *Teamsters*, the plaintiff (U.S. Government) submitted anecdotal evidence that represented one account for every eight members of the class.²¹ While there are no hard and fast bright-line rules regarding a precise number or ratio that qualifies as sufficient anecdotal evidence, *Wal-Mart* and *Teamsters* at least provide some guideposts concerning what has been determined to be adequate and inadequate. Needless to say, plaintiffs will definitely need to present a substantial quantum of anecdotal evidence for it to be credited as supporting classwide proof.

D. The Need for Mini-Trials?

In light of the heightened evidentiary burden plaintiffs must satisfy, federal courts might decide to conduct mini-trials regarding class certification on a more regular basis than in the past. Plaintiffs now must present “significant” evidence to support class certification. Defendants undoubtedly will contest plaintiffs’ evidence at every turn. While courts might be able to decide such disputes without a mini-trial in some cases, it is not difficult to see that there will be a more frequent need for mini-trials, particularly in cases involving expert testimony. Because developing class action law appears to require a *Daubert* hearing regarding expert testimony, it would provide a ready-made opportunity to expand that hearing to a mini-trial to cover any and all evidentiary issues that require resolution in connection with deciding class certification. And, even in cases without expert testimony, there still could be many disputed evidentiary issues that could require a mini-trial.

¹⁵ *Id.* at 2551.

¹⁶ *Id.* at 2553-54 (noted in dicta that “[t]he district court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. . . .”); see *Am. Honda Motor Corp. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (holding full *Daubert* hearing was required prior to ruling on class certification); *In re Zurn Pex Plumbing Products Liab. Litig.*, — F.3d —, 2011 WL 2623342, No. 10-2267, at *4 (8th Cir. July 6, 2011) (affirming “tailored” *Daubert* hearing at class certification phase).

¹⁷ *Wal-Mart*, 131 S. Ct. at 2554.

¹⁸ *Id.* at 2555.

¹⁹ *Id.* at 2556.

²⁰ *Id.*

²¹ 431 U.S. 324, 337-38 (1977).