The Sprawling Class Action After *Dukes v. Wal-Mart*: Unsettled Questions

by John M. Husband and Bradford J. Williams

This article surveys unsettled questions under the federal class action device on the cusp of one of the most highly anticipated employment law and class action decisions in decades. It suggests how the U.S. Supreme Court may use Dukes v. Wal-Mart *as a vehicle to clarify Rule 23(a) and (b) prerequisites and to address various outstanding evidentiary issues affecting the certification of sprawling class actions.*

In the most anticipated employment case to be reviewed in the past decade, the U.S. Supreme Court soon will determine class action issues that will set the course for the future of high-profile, high-stakes cases brought by thousands (if not millions) of employees against U.S. companies. As employment law practitioners and class action litigators anxiously await this decision, speculation abounds regarding the unsettled questions the Supreme Court may resolve with respect to the Federal Rule of Civil Procedure (Rule) 23 class action device.

This article surveys various unsettled legal questions regarding Rule 23 class certification, and suggests how such questions may intersect with the Ninth Circuit's *en banc* decision currently under review. Following the Supreme Court's decision in *Dukes*—widely anticipated to be handed down by late June 2011—the authors of this article will publish a follow-up article in *The Colorado Lawyer* analyzing the *Dukes* decision and describing its anticipated effects on employers and class action litigators.

Overview

On December 6, 2010, the U.S. Supreme Court granted a petition for *certiorari* in *Dukes v. Wal-Mart*, a case portending the largest-ever employee class to be certified against a private employer.[1] Originally filed in 2001, *Dukes* is a sprawling sex discrimination lawsuit brought by current and former Wal-Mart employees, alleging that the company pays women less than men in comparable positions and engages in discriminatory training, assignment, and promotion practices.[2] As most recently endorsed by the Ninth Circuit, the *Dukes* class comprises between 500,000 and 2 million current and former Wal-Mart employees, and could expose the company to billions of dollars in potential damages.[3]

Dukes both reflects and magnifies a growing trend toward high-profile, high-stakes employment class actions brought against large U.S. companies. Indeed, just one week before the Supreme Court granted *certiorari* in the case, a federal district court in New York approved a $175 million settlement in a sex discrimination class action filed against Novartis Pharmaceuticals.[4] This settlement followed an earlier jury verdict awarding a quarter billion dollars in punitive damages.[5]

In fact, the list of private employers recently settling employment class actions in the tens—or even hundreds—of millions of dollars reads like a who's who of Fortune 500 companies: Coca-Cola ($192.5 million);[6] Texaco ($176 million);[7] Microsoft ($96.9 million);[8] Smith Barney ($98 million);[9] Abercrombie & Fitch ($50 million);[10] Home Depot ($65 million);[11] Staples ($38 million);[12] Morgan Stanley ($46 million);[13] Sprint/Nextel ($57 million);[14] IBM ($65 million);[15] UPS ($87 million);[16] and Albertsons ($53.5 million).[17] Whether such enormous employment class actions actually satisfy Rule 23's strict procedural requirements is the central question at the heart of the *Dukes v. Wal-Mart* litigation.

Coordinating Editor

John M. Husband, Denver, of Holland & Hart LLP—(303) 295-8228, jhusband@hollandhart.com

About the Authors

John M. Husband is the Chair of Holland & Hart, LLP's Management Committee. He is a Fellow of the College of Labor and Employment Lawyers, and has a nationally recognized practice and extensive experience in nationwide class and collective actions. Bradford J. Williams is an associate in Holland & Hart, LLP's Denver office. He is a member of the firm's Labor and Employment Practice Group, and has extensive experience counseling employers and assisting in labor and employment litigation.

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Rule 23 Class Actions

Rule 23 outlines various requirements that must be satisfied before a court may certify a plaintiff class.[18] Plaintiffs pursuing certification must satisfy each requirement in Rule 23(a), and must show that their case falls within one of three categories provided in Rule 23(b).[19]

Rule 23(a) Prerequisites

Rule 23(a) provides that one or more members of a class may sue as representatives of the class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[20] These four requirements are commonly referred to as numerosity, commonality, typicality, and adequate representation.

*Pre-*Dukes *Application of Rule 23(a)*

Before *Dukes*, the Supreme Court and many federal circuit courts stressed the importance of strict compliance with Rule 23(a) prerequisites, even in large-scale employment class actions. For instance, in *General Telephone Company of the Southwest v. Falcon*, the Court held that a class action alleging employment discrimination, "like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[21] The Court further emphasized that simply alleging a discriminatory employment practice will not satisfy Rule 23(a) requirements.[22] Instead, as the Court noted, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action."[23]

Numerous circuit courts have echoed this belief, finding large-scale employment class actions too unwieldy to satisfy the Rule 23(a) prerequisites of commonality and typicality. For instance, in *Reeb v. Ohio Department of Rehabilitation and Correction*, the Sixth Circuit reversed the district court's certification of a class of more than 100 female corrections officers raising allegations of disparate treatment.[24] Quoting *Falcon*, the court stated that plaintiffs raising Title VII sex discrimination claims must present "significant proof" that their employer operated under a general policy of gender discrimination that manifested itself in the same general way as to the types of discrimination alleged.[25] As such, the court noted that a "general policy of discrimination is not sufficient to allow a court to find commonality or typicality."[26]

Similarly, in *Cooper v. Southern Company*, the Eleventh Circuit affirmed a district court's denial of certification to a class of 2,400 power company employees from four states alleging racial discrimination.[27] In affirming this denial, the court focused on typicality and commonality, noting that:

> the compensation and promotion decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and performance in interviews, among other factors.[28]

The court also noted that in cases involving "employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes."[29]

Finally, in *Hohider v. United Parcel Service, Inc.*, the Third Circuit recently reversed a lower court's certification of a class of approximately 36,000 employees claiming that alleged denial of employment opportunities following return from medical leave violated the Americans with Disabilities Act (ADA).[30] With respect to commonality and typicality, the court noted:

> establishing the unlawful discrimination alleged by plaintiffs would require determining whether class members are "qualified" under the ADA, an assessment that encompasses inquiries . . . too individualized and divergent with respect to this class to warrant certification under Rule 23(a).[31]

Rule 23(a) and Dukes

As discussed below, the Ninth Circuit's *en banc* decision in *Dukes* affirmed class certification based, in part, on a finding of commonality linked to the subjective decision making of thousands of individual supervisors and managers. This certification arguably conflicts with the trend in recent Rule 23(a) case law as described above. In its order granting *certiorari*, the Supreme Court asked the parties to brief whether the class certification was "consistent with Rule 23(a)."[32] As such, the Supreme Court might be preparing to clarify the commonality and typicality requirements of Rule 23(a), and specifically whether such requirements may be satisfied in a sprawling class action involving the alleged disparate treatment of potentially millions of individual plaintiffs.

Rule 23(b) Types of Class Actions

In addition to satisfying the prerequisites of Rule 23(a), prospective class representatives also must demonstrate that their proposed action falls within one of three categories provided in Rule 23(b).[33] These categories are discussed below.

Rule 23(b) Categories

Rule 23(b)(1) permits class certification where pursuing individual actions would risk inconsistent or varying results, or might practically impede class members' ability to protect their interests.[34] A typical example is a limited fund action, in which multiple plaintiffs seek to divide a finite settlement amongst themselves.[35]

Rule 23(b)(2) permits class certification where a defendant:

> 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.[36]

Historical antecedents to such actions include cases attempting to desegregate public accommodations through injunctive or declaratory relief.[37] Notably, class plaintiffs' primary objective in a Rule 23(b)(2) class action must be injunctive relief.[38]

Finally, Rule 23(b)(3) permits class certification where common legal or factual questions predominate over questions affecting individual class members, and where the class action device is superior to other methods of adjudicating the controversy.[39] Unlike class actions certified under Rule 23(b)(2), Rule 23(b)(3) class actions focus on nonequitable relief or monetary damages, and require that individual notice be given to all reasonably identifiable class members.[40]

Rule 23(b)(2) and Title VII

Before the Civil Rights Act of 1991 (CRA), Rule 23(b)(2) class actions provided a natural fit for many—if not most—employee class actions, because Title VII permitted only equitable relief.[41] Equitable relief, moreover, generally was understood to include back pay, which constituted the bulk of many plaintiffs' economic damages.[42] Interestingly, Wal-Mart now challenges the long-entrenched view that back pay is an equitable remedy.[43]

With passage of the CRA in 1991, compensatory and punitive damages also became available under Title VII, thereby raising the question of whether plaintiffs pursuing such remedies still could maintain a Rule 23(b)(2) class action, which requires that the primary objective be equitable rather than monetary relief.[44] The CRA's new remedies also raised the related question of whether prospective class representatives simply could forego claims for compensatory or punitive damages to obtain Rule 23(b)(2) certification. Some courts answering this latter question in the negative suggested that certifying such classes might unlawfully deprive absent class members of their right to compensatory or punitive damages given the generally binding nature of class action judgments, and the fact that plaintiffs are not required to provide notice of opt-out rights to absent class members in a Rule 23(b)(2) action.[45]

Rule 23(b)(2) and Monetary Relief

With respect to the broader question of when—if ever—prospective class members may pursue monetary relief in a Rule 23(b)(2) class action, the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corporation* is the leading authority.[46] In *Allison*, the

plaintiffs challenged Citgo's hiring, promotion, training, and compensation practices, seeking declaratory, injunctive, and equitable relief, as well as compensatory and punitive damages.[47] The Fifth Circuit denied certification under Rule 23(b)(2) after finding that the individual damages sought—including compensatory and punitive damages—predominated over the equitable relief.[48] In essence, the court held that for a class to be certified under Rule 23(b)(2), any monetary relief sought must be merely "incidental" to the requested injunctive or declaratory relief.[49] In other words, the damages must flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief, and the damages must be capable of computation by means of objective, class-wide standards.[50]

Since *Allison*, federal circuit courts have split over whether Rule 23(b)(2) classes may be certified in cases in which plaintiffs seek monetary relief. Some courts, including the Sixth, Seventh, and Eleventh Circuits, have adopted the Fifth Circuit's incidental damages test.[51] The Second Circuit, by contrast, has focused on the "relative importance of the remedies sought" in determining whether class certification is appropriate.[52] In other words, the Second Circuit considers whether reasonable plaintiffs would bring the suit to obtain the desired injunctive or declaratory relief in the absence of any potential monetary recovery, and whether the desired injunctive or declaratory relief would be reasonably necessary and appropriate if the plaintiffs were to succeed on the merits.[53]

Rule 23(b)(2) and Dukes

In April 2010, the Ninth Circuit broke with both lines of authority—as well as with its own previous precedent adopting the Second Circuit's approach[54]—by creating yet another test for determining when a Rule 23(b)(2) class may be certified in cases in which plaintiffs seek monetary relief. Specifically, in its *en banc* decision in *Dukes*, the Ninth Circuit announced that "a class action must seek only monetary damages that are not 'superior in strength, influence, or authority' to injunctive and declaratory relief."[55] Factors relevant to this analysis include: (1) whether the monetary relief sought determines the key procedures that will be used; (2) whether it introduces new and significant legal and factual issues; (3) whether it requires individualized hearings; and (4) whether its size and nature raise particular due process or manageability concerns.[56] Although courts have not yet had much occasion to apply this new test, *Dukes* itself illustrates that the test is satisfied where plaintiffs seek back pay relief in a Rule 23(b)(2) class action.[57]

In short, the circuit courts are now split three ways over the proper test for Rule 23(b)(2) class certification. In granting Wal-Mart's petition for *certiorari* in the *Dukes* case, the Supreme Court agreed to resolve this split, specifically agreeing to answer Wal-Mart's proffered question:

> Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.[58]

If the Court answers this question narrowly, its decision might force many (if not most) employment class actions to proceed under Rule 23(b)(3). This requires proving that the class claims predominate over questions affecting individual class members, and that a class action is superior to other methods of adjudicating

the dispute.[59] Plaintiffs proceeding under this subsection also would have to shoulder the significant (and sometimes prohibitive) expense of notifying absent class members of their rights, including their right to opt out of the plaintiff class.[60]

Significantly, many circuit courts considering certification of employee classes under Rule 23(b)(3) have emphasized the difficulty of establishing the predominance and superiority requirements where plaintiffs challenge a number of individual employment decisions. For example, in *Allison*, the Fifth Circuit held that resolution of the plaintiffs' claims would necessarily turn on "the special circumstances of each individual's case." The court further held that the case would be unwieldy because it involved:

> more than a thousand potential plaintiffs spread across two separate facilities, represented by six different unions, working in seven different departments, and alleging discrimination over a period of twenty years.[61]

If the Supreme Court now narrowly defines the monetary remedies available in Rule 23(b)(2) class actions, decisions similar to *Allison* might be expected to proliferate.

Rule 23 Evidentiary Issues

Beyond the Rule 23(a) prerequisites of commonality and typicality, and the Rule 23(b)(2) requirement that prospective class representatives pursue injunctive relief, the Supreme Court also might take occasion in *Dukes* to resolve various outstanding Rule 23 evidentiary issues. For instance, numerous circuit courts in recent years have begun addressing the specific evidentiary standards required for Rule 23 class certification. Such cases increasingly hold that district courts must conduct a searching inquiry into the Rule 23 prerequisites, even where such inquiry overlaps with the merits of the underlying suit.

Rule 23 Evidentiary Standard

For example, in 2006, the Second Circuit determined in *In re Initial Public Offerings Securities Litigation* (*IPO*) that plaintiffs must provide enough evidence to establish that "each Rule 23 requirement has been met."[62] In 2009, the Third Circuit held even more explicitly in *In re Hydrogen Peroxide Antitrust Litigation* (*Hydrogen Peroxide*) that "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence."[63] The Class Action Fairness Act of 2005 (CAFA) facilitates such searching inquiries by requiring that class certification decisions be made "at an early practicable time," as opposed to the previous "[a]s soon as practicable after the commencement of an action brought as a class action."[64] Put simply, after CAFA, courts are increasingly likely to entertain discovery before resolving class certification issues.

On their face, cases like *IPO* and *Hydrogen Peroxide* purport to resolve an apparent tension in Supreme Court jurisprudence regarding the proper evidentiary standard for class certification. For example, in *Eisen v. Carlisle and Jacquelin*, the Supreme Court stated that:

> nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.[65]

By contrast, in *Falcon*, the Court stated that a class action may be certified only after a "rigorous analysis" establishing that the Rule 23(a) prerequisites have been satisfied.[66] The *Falcon* Court also recited—albeit in an ambiguous footnote—that plaintiffs raising Title VII sex discrimination claims must present "significant proof" that their employer operated under a general policy of gender discrimination.[67] The proper interpretation and scope of this footnote is now hotly contested in the *Dukes* litigation.[68]

Rule 23 Evidentiary Standard and Dukes

Although purporting to follow the Second and Third Circuits' approaches to resolving the apparent tension within Supreme Court jurisprudence, the Ninth Circuit in *Dukes* ironically carved out a narrow exception for employment class actions largely reliant on statistical data to prove discrimination.[69] In fact, in declining to resolve a key factual dispute regarding the appropriate level at which statistical data should be aggregated—as relevant to the Rule 23(a) commonality requirement—the Ninth Circuit recited that "the plaintiffs' statistical evidence does not *overlap* with the merits, it largely *is* the merits."[70] As such, the court refused to resolve this critical issue, instead concluding that "[w]e are *not* to reexamine the relative strength or persuasiveness of the commonality evidence ourselves."[71]

The Ninth Circuit's refusal to resolve a key factual issue arguably conflicts with the emerging trend requiring a searching inquiry at the class certification stage. This refusal also arguably conflicts with other circuit court decisions requiring that *Daubert* challenges to expert testimony be resolved at the certification stage. For instance, in 2010, the Seventh Circuit held in *American Honda Motor Co. v. Allen* that district courts must "conclusively rule" on all material

challenges to experts' qualifications or submissions in deciding class certification.[72] In contrast, the *Dukes* court expressly declined to determine the scope of an appropriate *Daubert* inquiry at the class certification stage.[73]

In sum, by asking the parties to brief whether the class certification in *Dukes* was "consistent with Rule 23(a)," the Supreme Court may be laying the groundwork for resolving the proper scope of a class certification inquiry.[74] At a minimum, if the Supreme Court were to explain and resolve the apparent tension in its prior jurisprudence, it could banish any residual notion that plaintiffs may establish the class certification elements through the bare allegations in their complaint.

The Sprawling Class Action

As stated above, Wal-Mart has been litigating its potentially massive class action since 2001. *Dukes* involves the claims of current and former Wal-Mart employees who allege that the company pays women less than men in comparable positions and engages in discriminatory training, assignment, and promotion practices. Specifically, the plaintiffs claim that Wal-Mart fosters gender stereotyping and discrimination through a strong, centralized corporate structure, including the delegation of substantial discretion to individual managers. Remarkably, plaintiffs seek to certify a class of more than 2 million[75] current and former employees working in 3,400 retail stores in 41 regions, including hourly and salaried employees, and employees working in 170 retail job classifications.[76]

District Court's Certification

In 2004, the district court certified the plaintiffs' class under Rule 23(b)(2), permitting a lawsuit involving approximately 1.5 million employees seeking injunctive relief, back pay, and punitive damages, to go forward.[77] Plaintiffs did not request compensatory damages.[78] The district court limited the availability of back pay remedies with respect to some class members' promotion claims, and permitted class members to opt out of the punitive damage portion of the class action.[79] At the time of this certification, the district court judge noted that the case "dwarf[ed] other employment discrimination cases that came before it."[80]

Ninth Circuit's Decisions

In February 2007, a Ninth Circuit panel affirmed the district court's class certification.[81] In December 2007, the panel issued a slightly revised decision again largely upholding the certification, but remanding on the question of whether some 200,000 former employees should be dropped from the class on technical standing grounds.[82] Given the magnitude of the case, the entire Ninth Circuit agreed to rehear the certification issue *en banc* in February 2009.[83]

In April 2010, the full Ninth Circuit issued its long-awaited *en banc* decision, again affirming certification of plaintiffs' sprawling class action.[84] In affirming the certification, the Ninth Circuit stated that the plaintiffs did not have to show a common policy of proven discrimination at the class certification stage, but merely "a

common policy *alleged* to be discriminatory."[85] In its Rule 23(a) analysis, the Ninth Circuit focused on the commonality requirement, and found that the plaintiffs' evidence of: (1) company-wide policies that, at least partially through their subjectivity, provided a "potential conduit for discrimination"; (2) expert opinions suggesting the existence of company-wide policies, including a culture of gender stereotyping; (3) expert statistical evidence of company-wide gender disparities attributable to discrimination; and (4) anecdotal evidence of discriminatory attitudes held or tolerated by management, all supported class certification.[86] By accepting the plaintiffs' argument that decentralized, subjective decision making in an alleged corporate culture of uniformity and gender stereotyping could provide a "ready mechanism [] for discrimination," the Ninth Circuit found that commonality exists in the disparate managerial decisions of thousands of individual supervisors and managers.[87]

In its Rule 23(b)(2) analysis, the court found that plaintiffs' request for back pay—even assuming it might amount to billions of dollars—did not undermine their claim that the injunctive and declaratory relief sought predominated over monetary relief.[88] Instead, the Ninth Circuit simply observed that the "large amount [of back pay damages] was principally a function of Wal-Mart's size."[89] As such, the court affirmed certification under Rule 23(b)(2), albeit using the new test described above.

Finally, the Ninth Circuit remanded for consideration of whether plaintiffs' bifurcated punitive damages claims rendered Rule 23(b)(2) certification improper by causing monetary relief to predominate.[90] The court directed the district court to decide whether such bifurcated claims instead should be certified under Rule 23(b)(3).[91] The court also found that class members who no longer were employed by Wal-Mart at the time the complaint was filed lacked standing to pursue declaratory and injunctive relief.[92] As such, the court remanded for consideration of whether such individuals also instead should be certified under Rule 23(b)(3).[93] This latter ruling promoted the court to speculate that the ultimate class size in the lawsuit may be reduced by as much as two-thirds.[94] Nonetheless, the dissent wryly noted that "the reasons this class cannot be certified apply with equal force regardless of whether the class represents 1.5 million individuals or the class of 500,000 envisioned by the majority."[95]

U.S. Supreme Court Review

In August 2010, Wal-Mart filed a petition for a writ of *certiorari* to the U.S. Supreme Court, seeking further review of the Ninth Circuit's decision.[96] Although alleging multiple errors in the Ninth Circuit's analysis, the petition primarily asked the Supreme Court to decide: (1) whether claims for monetary relief may be certified under Rule 23(b)(2) and, if so, under what circumstances; and (2) whether certification of the *Dukes* class deprived Wal-Mart of various substantive and constitutional rights, including the right to individualized hearings to assess Title VII affirmative defenses.[97] After response and reply briefing, the Supreme Court agreed on December 6, 2010, to consider the first question presented in Wal-Mart's petition, but not the second.[98] The Court also directed the parties to brief "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[99] Given the ambiguity of this direction, the Supreme Court may be preparing to address any number of outstanding issues it deems worthy of review.

Conclusion

Dukes v. Wal-Mart provides a virtually blank slate on which the U.S. Supreme Court could write the future of the Rule 23 class action device. Beyond narrowly determining whether—and, if so, under what circumstances—prospective class members may pursue monetary relief in a Rule 23(b)(2) class action, the Court also could strengthen the Rule 23(a) prerequisites of commonality and typicality, and even resolve various outstanding evidentiary issues regarding the proper scope of a class certification inquiry.

Notes

1. *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (*en banc*). The U.S. Supreme Court granted *certiorari* in __ S. Ct. __, 79 U.S.L.W. 3128 (Dec. 6, 2010) (No. 10-277) (*Dukes* Cert. Order).
2. *See generally Dukes, supra* note 1.
3. *See id.* at 578 n.3. *See also* BNA, "Divided Ninth Circuit OKs Class Certification in Massive Sex Bias Case Against Wal-Mart," *Daily Labor Report* (Feb. 7, 2007).
4. *See* BNA, "Court Finalizes Approval of Novartis Settlement," *Daily Labor Report* (Dec. 1, 2010).
5. *See id.*
6. *See* BNA, "Court Approves $192.5 Million Settlement in Race Bias Class Action Against Coca-Cola," *Daily Labor Report* (July 3, 2001).
7. *See* Rosenwasser, "Employment Discrimination Class Actions: The Importance of Case Selection," *BNA Class Action Litigation Report* 852 (Dec. 14, 2001).
8. *See id.*
9. *See* BNA, "Smith Barney to Pay $98 Million to Settle Wage Claims by Brokers," *Workplace Law Report* (May 29, 2006).
10. *See* BNA, "Abercrombie & Fitch Settles Race, Sex Bias Lawsuits," *Workplace Law Report* (Nov. 22, 2004).
11. *See* Rosenwasser, *supra* note 7 at 852.
12. *See* BNA, "Staples to Pay $38 Million to Settle Overtime Claims by Assistant Managers," *Daily Labor Report* (Nov. 6, 2007).
13. *See* BNA, "Court Gives Final Nod to $46 Million Pact in Morgan Stanley Sex Discrimination Claims," *Daily Labor Report* (Nov. 1, 2007).
14. *See* BNA, "Federal Judge Approves $57 Million Sprint/Nextel Age Discrimination Settlement," *Daily Labor Report* (Sept. 12, 2007).
15. *See* BNA, "Court Gives Final Approval to $65 Million IBM Settlement," *Daily Labor Report* (July 20, 2007).
16. *See* BNA, "California Court OKs $87 Million Settlement of UPS Drivers' Suit Alleging Missed Breaks," *Daily Labor Report* (April 19, 2007).
17. *See* BNA, "Federal Judge OKs $53.3 Million Settlement With Albertsons Over 'Off-the-Clock' Claims," *Daily Labor Report* (March 26, 2007).
18. *See* F.R.C.P. 23(a) and (b).
19. *See id.*
20. *See* F.R.C.P. 23(a)(1) to (4).
21. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).
22. *See id.* at 157-58.
23. *Id.* at 159.
24. *Reeb v. Ohio Dep't of Rehabilitation and Correction*, 435 F.3d 639 (6th Cir. 2006).
25. *Id.* at 644, *quoting Falcon, supra* note 21 at 159 n.15.
26. *Id.* at 645.
27. *Cooper v. Southern Company*, 390 F.3d 695 (11th Cir. 2004), *overruled on other grounds, Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006).
28. *Id.* at 714-15.
29. *Id.* at 715.
30. *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009).
31. *Id.* at 186.

32. *See Dukes* Cert. Order, *supra* note 1.
33. *See* F.R.C.P. 23(b)(1) to (3).
34. *See* F.R.C.P. 23(b)(1).
35. *See Ortiz v. Fireboard Corp.*, 527 U.S. 815, 838-41 (1999).
36. F.R.C.P. 23(b)(2).
37. *See, e.g., Dukes, supra* note 1 at 646 (Ikuta, J., dissenting).
38. *See* F.R.C.P. 23(b)(2).
39. *See* F.R.C.P. 23(b)(3).
40. *Compare* F.R.C.P. 23(b)(2), *with* F.R.C.P. 23(b)(3). *See also* F.R.C.P. 23(c)(2)(B)(i) to (vii).
41. *See, e.g., Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 896 (7th Cir. 1999).
42. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n.19 (5th Cir. 1998).
43. *See* Petition for a Writ of *Certiorari* at 15-16, *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S. Aug. 25, 2010) (Wal-Mart Cert. Petition).
44. *See, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 685 (N.D.Ga. 2001).
45. *See, e.g., McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 283 (5th Cir. 2008); *Jefferson, supra* note 41 at 897.
46. *See Allison, supra* note 42.
47. *See id.* at 407.
48. *See id.* at 416-18.
49. *See id.* at 415.
50. *See id.*
51. *See, e.g., Reeb, supra* note 24; *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577 (7th Cir. 2000).
52. *Robinson v. Metro-North Commuter RR Co.*, 267 F.3d 147, 164 (2d Cir. 2001).
53. *See id.* at 164.
54. *See Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) (adopting Second Circuit's *ad hoc* approach to Rule 23(b)(2) certification).
55. *Dukes, supra* note 1 at 616, *quoting* the *Merriam-Webster's Collegiate Dictionary* definition of "predominant."
56. *See id.* at 617.
57. *See id.* ("[T]he district court's decision to include claims for back pay in a class action under Rule 23(b)(2) was not an abuse of discretion.").
58. *See Dukes* Cert. Order, *supra* note 1; Wal-Mart Cert. Petition, *supra* note 43 at i.
59. *See* F.R.C.P. 23(b)(3).
60. *See, e.g.*, F.R.C.P. 23(c)(2)(B)(v).
61. *Allison, supra* note 42 at 419-20.
62. *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 41 (2d Cir. 2006).
63. *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2009).
64. F.R.C.P. 23(c)(1)(A).
65. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 157-58 (1974).
66. *Falcon, supra* note 21 at 161.
67. *Id.* at 159 n.15.
68. *See, e.g.*, Wal-Mart Cert. Petition, *supra* note 43 at 20-21.
69. *Dukes, supra* note 1 at 590-94.
70. *Id.* at 591 (emphasis in original).
71. *Id.* at 608 (emphasis in original).
72. *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). *See also Reed v. Advocate Health Care*, No. 06 C 3337, 2009 WL 3146999 at *20-21 (N.D.Ill. Sept. 28, 2009).
73. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 603 n.22 (1993).
74. *See Dukes* Cert. Order, *supra* note 1.
75. *See* BNA, *supra* note 3 (plaintiffs' attorney estimating a class "substantially larger than 2 million women").
76. *See Dukes, supra* note 1 at 629 (Ikuta, J., dissenting).
77. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D.Cal. 2004).
78. *See id.* at 141.
79. *See id.* at 143, 173.
80. *See* Press Release, "Federal Judge Orders Wal-Mart Stores, Inc., the Nation's Largest Private Employer, To Stand Trial for Company-Wide Sex Discrimination," June 22, 2004, available at www.walmartclass.com/staticdata/press_releases/classcertpressrelease06222004.html.
81. *See Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007).
82. *See Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007).
83. *See Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009).
84. *See Dukes, supra* note 1.
85. *Id.* at 596 (emphasis in original).
86. *See id.* at 600-12.
87. *See id.* at 612 (citation omitted).
88. *See id.* at 617-20.
89. *Id.* at 618.
90. *See id.* at 620-23.
91. *See id.*
92. *See id.* at 623-24.
93. *See id.*
94. S*ee id.* at 578 n.3.
95. *See id.* at 630 n.5 (Ikuta, J., dissenting).
96. *See* Wal-Mart Cert. Petition, *supra* note 43.
97. *See id.* at i.
98. *See Dukes* Cert. Order, *supra* note 1.
99. *Id.* ■