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CERTIFICATION

SUPREME COURT

# The 'Next Wave' of Class Certification Issues

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The 2012 Supreme Court Term promises further developments with respect to the law of class certification. Last Term, in *Wal-Mart Stores v. Dukes*,[1] the Court adopted a rigorous interpretation of Rule 23(a)(2)'s commonality requirement and limited the availability of monetary relief in classes certified under Rule 23(b)(2). Lower federal courts have readily applied the new standard, and several state courts have relied on *Wal-Mart* in resolving questions of state class action procedure. This Term, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[2] *Comcast Corp. v. Behrend*,[3] and *Standard Fire Insurance Co. v. Knowles*,[4] the Court is expected to address several questions that *Wal-Mart* did not resolve, such as *Wal-Mart*'s applicability in the context of securities class actions, the admissibility of expert testimony at the class certification stage, and the scope of the federal Class Action Fairness Act.[5] These cases mark the beginning of the next wave of the development of the law of class certification.

## The *Wal-Mart* Decision

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court considered ''one of the most expansive class actions

[1] 131 S. Ct. 2541 (2011).
[2] 660 F.3d 871 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 2742 (June 11, 2012).
[3] 655 F.3d 182 (3d Cir. 2011), *cert. granted*, No. 11-864 (U.S. June 5, 2012).
[4] No. 11-1450 (U.S. Aug. 30, 2012) (granting certiorari).
[5] 28 U.S.C. §§ 1332(d), 1453, 1711-1715.

 ISSN 1529-0115

ever.''[6] The plaintiffs, purportedly representing 1.5 million female employees, alleged that Wal-Mart supervisors had exercised their discretion over employment decisions in a discriminatory manner and therefore in violation of Title VII of the Civil Rights Act of 1964.[7] The Court reversed the Ninth Circuit's substantial affirmance of the order granting certification, and in the process significantly clarified and altered the landscape of class certification law.

The Court first held that plaintiffs had failed to satisfy the commonality requirement of Federal Rule of Civil Procedure 23(a)(2), which requires plaintiffs to establish ''questions of law or fact common to the class.'' The Court clarified that this requires a ''common contention'' that, if adjudicated, ''will resolve an issue that is central to the validity of each one of the claims in one stroke.''[8] This analysis ''[f]requently . . . will entail some overlap with the merits of the plaintiff[s'] underlying claim.''[9] The proposed class in *Wal-Mart* did not meet this standard, because the plaintiffs could not identify any '' 'specific employment practice' ''[10] that would ''tie[] all their 1.5 million claims together.''[11]

The Court also held that certification of the plaintiffs' claims for backpay under Federal Rule of Civil Procedure 23(b)(2) was inappropriate. Rule 23(b)(2) allows for certification 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 reserving judgment as to whether injunctive and declaratory relief are the *exclusive* forms of relief consistent with Rule 23(b)(2), the Court concluded that, ''at a minimum, claims for individualized'' or ''no[n-]incidental'' monetary ''relief do not satisfy the Rule.''[12]

Finally, the Court unanimously rejected the Ninth Circuit's ''novel project'' of avoiding individual determinations through the use of statistical sampling and alteration of substantive law.[13] Awarding classwide damages on the basis of sampling would '' 'abridge, enlarge or modify' '' the substantive rights at issue by preventing Wal-Mart from ''litigat[ing] its statutory defenses to individual claims.''[14] For this reason, the Court held that the Ninth Circuit's ''Trial by Formula'' transgressed due process principles that animate Rule 23 and guide courts in its interpretation.[15] The Court's unanimous holding applies well beyond the Rule 23(b)(2) and Title VII contexts—whenever individualized determinations are called for to determine liability or damages under the underlying substantive law, *Wal-Mart* constrains the ability of litigants to use statistical or other shortcuts to avoid such determinations and maintain a class action.

[6] *Wal-Mart*, 131 S. Ct. at 2546.
[7] 78 Stat. 241 (1964).
[8] *Wal-Mart*, 131 S. Ct. at 2546.
[9] *Id.* (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).
[10] *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).
[11] *Id.* at 2555-56.
[12] *Id.* at 2557.
[13] *Id.* at 2561.
[14] *Id.* (quoting 28 U.S.C. § 2072(b)).
[15] *Id.*

## *Wal-Mart's* Effect in Federal and State Courts

### Federal Courts

Federal courts have readily applied the commonality standard, frequently employing it to defeat class certification.[16] Defendants have even sought to expand on the holding, arguing that the prospect of individualized defenses may alone suffice to defeat commonality. No Circuit has fully embraced this theory,[17] but under appropriate circumstances it seems consistent with the rigorous commonality inquiry envisioned in *Wal-Mart*.

Federal courts have also revisited the specific issue of grants of discretion to lower-level managers as a basis for finding the commonality requirement to be satisfied. A notable treatment of the issue following *Wal-Mart*

[16] This commonality standard requires that plaintiffs allege more than just injuries similar in kind. *See, e.g.*, *Brown v. Kerkhoff*, 279 F.R.D. 479, 493 (S.D. Iowa 2012) (''The mere fact that all Plaintiffs allege unjust enrichment 'gives no cause to believe that all their claims can productively be litigated at once.' '') (quoting *Wal-Mart*, 131 S. Ct. at 2551). Similarly, an allegation that plaintiffs' injuries result from a common type of misconduct will not suffice. *See, e.g.*, *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 497 (7th Cir. 2012) (''That all the class members have 'suffered' as a result of disparate individual IDEA child-find violations is not enough [to establish commonality]''). Even where plaintiffs allege a similar type of injury as a result of an alleged pattern of misconduct, courts may not find commonality if the specific nature of the alleged injuries varies case by case. *See, e.g.*, *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646, 654 (W.D. Okla. 2011) (finding no commonality where nature of alleged injuries resulting from, for example, deprivation of royalty payments contingent upon ''varying terms of the hundreds of leases''). Perhaps most significantly, because ''[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' '' *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157), at least one federal court has observed that commonality is established only where the inquiry ''critical'' to establishing liability does not ''require[] individualized determination.'' *Corwin v. Lawyers Title Ins. Co.*, 276 F.R.D. 484, 490 (E.D. Mich. 2011).

[17] In *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1019 (9th Cir. 2012), an indebted plaintiff brought a class action against a law firm engaged in debt collection, alleging that the firm had contacted her and other debtors at their places of business and therefore in violation of the Fair Debt Collection Practices Act. The law firm challenged commonality, arguing *inter alia* that it had an individualized defense—some class members might have consented to workplace contact. *See id.* at 1030. The court rejected this argument as a ''red herring,'' because there was ''nothing on the record'' to suggest that consent was ''an issue in the case.'' *Id.* The *Evon* Court thus found commonality in its case, but the decision might imply that evidence of viable individualized defenses could threaten commonality under other circumstances.

The Sixth Circuit has also confronted the issue. In *Young v. Nationwide Mutual Insurance Co.*, Nos. 11-5015, 11-5016, 11-5018, 11-5019, 11-5020 (6th Cir. Sept. 5, 2012), the defendants in an insurance overbilling suit contended that the commonality requirement could not be satisfied given the individualized defenses that they had. Relying on pre-*Wal-Mart* Circuit precedent, the court rejected the argument. Because a single course of conduct and a single theory of liability gave rise to the claims of each class member, the existence of individualized defenses did not, in the Sixth Circuit's view, prevent a finding of commonality. *Id.* (citing *Sterling v. Velsicol Chem. Corp*, 855 F.2d 1188, 1197 (6th Cir. 1988)).

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came in *Bennett v. Nucor Corp.*,[18] where the Eighth Circuit considered a Title VII action for race discrimination brought by six current and former African-American employees against their employer. The court, in affirming the district court's denial of class certification, held that plaintiffs seeking to predicate commonality on the use of discretion ''must do more than show that an employer used some degree of subjective evaluation.''[19] Rather, plaintiffs ''must demonstrate that the employer had a policy of allowing discretion by lower-level supervisors over employment matters—that is, 'a policy against having uniform employment practices.' ''[20]

In contrast to *Bennett*, the Seventh Circuit in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[21] reversed a denial of certification in a strikingly similar case. Writing for the panel, Judge Posner distinguished the case from *Wal-Mart*: While Wal-Mart had left employment decisions to the discretion of regional and store managers, Merrill Lynch had created a companywide policy allowing individual employees to decide whether and with whom to form brokerage teams.[22] Because the latter reflected ''an employment decision by top management,'' rather than an exercise of discretion by local managers, *Wal-Mart* actually supported certification according to the court in *McReynolds*.[23]

Yet another Seventh Circuit ''discretion'' case was decided differently. Reversing class certification in *Bolden v. Walsh Construction Co.*,[24] Judge Easterbrook distinguished the ''single national policy'' in *McReynolds* from the condition of ''local variability'' created by the kind of discretion extant in *Wal-Mart*.[25] The case confirmed that, following *Wal-Mart*, ''local discretion cannot support a company-wide class.''[26]

On the question (left open in *Wal-Mart*) ''whether there are any forms of 'incidental' monetary relief that are consistent with the [proffered] interpretation of Rule 23(b)(2) . . . and that comply with the Due Process Clause,''[27] federal courts have provided little guidance.[28] Those that have been forced to reach the issue have allowed incidental monetary relief,[29] in some cases allowing monetary relief where its dispensation would be ''automatic[],''[30] or ''mechanical,''[31] but not where it requires the sort of individualized determinations necessary to award backpay.[32]

## State Court Developments

The impact of the Supreme Court's decision in *Wal-Mart* has extended well beyond the federal courts. State courts have looked to the Court's interpretation of Federal Rule of Civil Procedure 23 for guidance in interpreting state procedural rules,[33] and *Wal-Mart*'s holding is grounded in part in the federal due process principles safeguarded by Rule 23—federal due process protections that obviously bind all state courts.[34]

Several state courts have followed *Wal-Mart* in imposing higher bars for plaintiffs seeking to establish commonality and predominance.[35] For example, the Louisiana Supreme Court applied *Wal-Mart* in holding

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[18] 656 F.3d 802 (8th Cir.), *cert. denied*, 132 S. Ct. 1861 (2011).

[19] *Id.* at 815.

[20] *Id.* (quoting *Wal-Mart*, 131 S. Ct. at 2554).

[21] 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 132 S. Ct. 1861 (2012).

[22] *See id.* at 488–90.

[23] *Id.* at 489.

[24] 688 F.3d 893 (7th Cir. 2012).

[25] *Id.* at 898.

[26] *Id.*

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

[28] For instance, in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), the Ninth Circuit acknowledged that the availability of incidental monetary relief under Rule 23(b)(2) ''has been called into doubt by the Supreme Court.'' *Id.* at 987 (citing *Wal-Mart*, 131 S. Ct. at 2560). Rather than decide the issue, however, the court remanded the case to the district court to determine whether the particular form of monetary relief sought—punitive damages—was ''consistent with [*Wal-Mart*'s] interpretation of 23(b)(2).'' *Id.* On remand, the district court certified two separate classes: an ''injunctive relief class'' under 23(b)(2) and a ''monetary and individual equitable relief'' class under 23(b)(3). *Ellis v. Costco Wholesale Corp.*, No. C-04-3341 EMC (N.D. Cal. Sept. 25, 2012); *see also Gates v. Rohm & Haas Co.*, 655 F.3d 255, 263 (3d Cir. 2011) (acknowledging that availability of incidental monetary relief under 23(b)(2) was ''left open'' by *Wal-Mart*, but leaving unaddressed the compatibility of the monetary relief sought with *Wal-Mart*'s interpretation of the Rule because denial of class certification was appropriate on other grounds).

[29] *See, e.g.*, *Cholakyan v. Mercedes-Benz USA, LLC*, No. CV 10-05944 MMM JCX (C.D. Cal. Mar. 28, 2012) (relying on pre-*Wal-Mart* Circuit precedent to find that claims for ''incidental'' monetary relief are consistent with Rule 23(b)(2)).

[30] *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 682 (S.D. Fla. 2012).

[31] *Bauer v. Kraft Foods Global, Inc.*, 277 F.R.D. 558, 562 (W.D. Wis. 2012).

[32] *See, e.g.*, *Aho v. Americredit Fin. Servs., Inc.*, 277 F.R.D. 609, 618 (S.D. Cal. 2011) (citing *Wal-Mart*, 131 S. Ct. at 2560).

[33] *See, e.g.*, *Rite Aid, Inc. v. Peacock*, No. A11A2133 (Ga. Ct. App. Mar. 22, 2012) (''When necessary, we look to federal as well as [state] case law for guidance concerning the propriety of a class certification.''); *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635, 637 n. 4 (Pa. Super. Ct. 1985) (''Where Pennsylvania's class action rules are fashioned upon or taken verbatim from the Federal Rule then federal case law is particularly instructive but not binding.'').

[34] *See, e.g.*, Mark. A. Perry, *Due Process Limitations on Aggregating Claims Under State Procedural Law* (forthcoming 2012); Christopher Chorba & Blaine H. Evanson, *Other Due Process Challenges to the Class Device*, in *A Practitioner's Guide to Class Actions* 737 (Marcy Hogan Greer ed., 2010) (noting that ''[m]any of the requirements . . . of Rule 23 . . . are both based in and required by constitutional due process'').

[35] *See also BThrifty, LLC v. Comcast Spotlight, LLC*, No. X07CV10601 (Conn. Super. Ct. Feb. 16, 2012) (concluding that the predominance requirement was not met because factual issues concerning liability and damages were ''not likely to be determined with 'one stroke' ''); *Tire Kingdom, Inc. v. Dishkin*, 81 So. 3d 437, 447 (Fla. Ct. App. 2011) (citing *Wal-Mart* in holding that ''[a]n incantation of ultimate legal issues, however variously and creatively they might be couched, does not suffice to meet the commonality element''); *Schirmer v. Citizens Prop. Ins. Co.*, No. 05-3974-CI (Fla. Cir. Ct. Mar. 2, 2012) (referencing *Wal-Mart* in concluding commonality satisfied because ''the answers to the putative 'common' questions identified by [plaintiff] would depend on the individual facts of each individual's claim''); *Smith v. Mo. Highways & Trans. Comm'n*, No. SD 31590 (Mo. Ct. App. May 21, 2012) (citing *Wal-Mart* and stating that common issues did not predominate because resolving plaintiffs' claims would require individual causation assessments); *Perme v. Union Escrow Co.*, Nos. 97368, 97381 (Ohio Ct. App. May 31, 2012) (reasoning that plaintiffs failed to ''affirmatively demonstrate their compliance'' with the predominance requirement, as *Wal-Mart* demands, because an individualized inquiry into each claim was necessary); *Cullen v. State Farm Mut. Auto. Ins. Co.*, 970 N.E.2d 1043, 1056 (Ohio Ct. App. 2011) (discussing *Wal-Mart*

that a putative class in an environmental contamination case did not satisfy the commonality or predominance requirements of Louisiana Code of Civil Procedure Article 591(a) and (b).[36]

The California Court of Appeal's decision in *Duran v. U.S. Bank National Association*[37] exemplifies *Wal-Mart*'s potential effect in state courts. The trial court certified a wage and hour class action brought by bank employees,[38] and followed a trial management plan that permitted plaintiffs to prove both classwide liability and damages using a randomly selected sample of 21 plaintiffs.[39] By limiting the trial to the sample, the trial court excluded evidence challenging the claims of non-selected class members.[40]

The Court of Appeal reversed the trial court's judgment, held that the trial plan violated due process, and decertified the class. The trial plan was ''fatally flawed'' because by ''limiting the presentation of evidence of liability to the testifying [employees] only,'' the trial court ''exceeded acceptable due process parameters.''[41] Thus, ''[t]he same type of 'Trial by Formula' that the U.S. Supreme Court disapproved of in [*Wal-Mart*] . . . essentially . . . occurred in this case.''[42] The court went on to decertify the class, because without the option of a ''Trial by Formula,'' individual issues predominated.[43]

The California Supreme Court has granted review of *Duran*; thus, whether the decision's reasoning and robust due process protections will survive remains to be seen.[44] In the meantime, other state courts are wrestling with similar issues.[45] In all of these cases, questions of state procedural law are intricately entwined with ones of state and federal constitutional law: Courts will have to tread carefully to avoid confusion among potential rules for decision.[46]

## The Next Wave of Class Certification Issues

While *Wal-Mart* clarified the Rule 23(a) commonality standard and cabined the reach of Rule 23(b)(2), it left unanswered several important questions of class action procedure. The Court will address three of these questions in the new Term, while others remain ripe for review.

### Standard of Admissibility for Expert Testimony at the Class Certification Stage

*Comcast v. Behrend*[47] presents the Supreme Court with the opportunity to resolve, among other things, the disagreement among the courts of appeals over the proper standard for evaluating expert testimony at the class certification stage. The Seventh Circuit held in *American Honda Motor Co. v. Allen*[48] that ''when an expert's report or testimony is critical to class certification,'' the district court ''must perform a full *Daubert* analysis before certifying the class if the situation warrants.'' The Third Circuit in *Comcast*, however, held that a *Daubert* analysis was unnecessary at the class certification stage because ''it need not turn class certification into a mini-trial.''

Although the *Wal-Mart* decision does not squarely address this issue, it supports the Seventh Circuit's view, as the Supreme Court expressed its ''doubt that'' ''*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings.''[49] Several other circuits have also suggested, without expressly holding, that *Daubert* applies at class certification.[50]

### The Fraud-on-the-Market Presumption

*Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*[51] presents the questions whether plaintiffs must prove ''materiality'' in a putative securities class action at the class certification stage in order to avail themselves of the fraud-on-the-market presumption, and whether the defendant must be allowed to rebut that presumption at the class certification stage.[52] Last

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and concluding that insureds' claims ''encompassed too many theories of recovery . . . to present a unified class'').

[36] *See Price v. Martin*, 79 So. 3d 960 (La. 2011). In *Price*, neighbors of a wood treatment facility filed a class action alleging damages resulting from operations at the facility. In the commonality determination, the court held that ''far too many individual liability issues'' existed for the class action to ''resolve an issue that [was] central to the validity of each one of the claims in one stroke.'' *Id.* at 969. Regarding predominance, ''the logical corollary to [the lack-of-commonality finding]'' was that ''substantive questions of law and fact common to the class [would] not predominate.'' *Id.* at 976. These holdings fully embraced *Wal-Mart*'s rigorous commonality standard.

[37] 137 Cal. Rptr. 3d 391 (Cal. Ct. App. 2012), *review granted and opinion superseded*, 275 P.3d 1266 (Cal. 2012).

[38] *Id.* at 395.

[39] *Id.* at 420.

[40] *Id.*

[41] *Id.* at 425.

[42] *Id.* at 429.

[43] *Id.* at 442–43.

[44] *Duran v. U.S. Nat'l Bank Ass'n*, 275 P.3d 1266 (Cal. 2012).

[45] *See, e.g.*, *Hummel v. Wal-Mart Stores, Inc.*, Nos. 551 EAL 2011, 552 EAL 2011 (Pa. July 2, 2012) (per curiam) (granting review on the question ''[w]hether, in a purported class action tried to verdict, it violates Pennsylvania law . . . to subject Wal-Mart to a 'Trial by Formula' that relieves Plaintiffs of their burden to produce class-wide 'common' evidence on key elements of their claims.'').

[46] *Wal-Mart* has also influenced how state courts analyze whether class opt-out rights are required. Two state courts have recently addressed the issue in the context of shareholder class actions. *See In re Celera Corp. S'holder Litig.*, No. 6304-VCP (Del. Ch. Mar. 23, 2012); *Ehrenhaus v. Baker*, 717 S.E.2d 9, 23–25 (N.C. Ct. App. 2011). Neither court ruled that opt-out rights were required, but one opinion recognized that *Wal-Mart* ''indicates courts must be careful—more careful than they have previously been—to protect class members' due process rights when monetary claims are involved.'' *Ehrenhaus*, 717 S.E.2d at 25.

[47] 655 F.3d 182, 204 n.13 (3d Cir. 2011), *cert. granted*, No. 11-864 (U.S. June 5, 2012).

[48] 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam).

[49] *Wal-Mart*, 131 S. Ct. at 2554.

[50] *See Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (''a careful certification inquiry is required and findings [that Rule 23 is satisfied] must be made based on adequate *admissible* evidence to justify class certification'') (emphasis added); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2009) (''[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis''). Further, a class certification hearing is a ''proceeding[] before'' a ''United States District Judge'' (or magistrate judge), Fed. R. Evid. 1101(a), and it appears to fall under none of the exceptions to the scope of the Federal Rules of Evidence enumerated in Rule 1101(d). Because the *Daubert* standard interprets and implements Rule 702, it should apply whenever other rules governing admissibility do.

[51] 660 F.3d 1170 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 2742 (June 11, 2012).

[52] *Id.*

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Term, in *Erica P. John Fund, Inc. v. Halliburton Co.*,[53] the Supreme Court avoided the question of which elements must be proven in order to certify a securities class action under the fraud-on-the-market presumption. And the courts of appeals have been divided on the question.[54]

Here again, *Wal-Mart* gives insight into how the issue may be resolved, as the Court suggested that plaintiffs must prove that the presumption applies at the class certification stage.[55] The Court described the fraud-on-the-market presumption as the proposition that ''all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements,'' and explained that ''[t]o invoke [the fraud-on-the-market presumption], the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, an issue they will surely have to prove again at trial in order to make out their case on the merits.''[56]

## Stipulations Avoiding the CAFA Jurisdictional Amount

Though not strictly a ''class certification'' issue, the way the Supreme Court decides *Standard Fire Insurance Co. v. Knowles*,[57] will shape the way class actions are certified by articulating the limits on the scope of federal court jurisdiction over putative class actions. The Class Action Fairness Act (CAFA)[58] grants federal district courts jurisdiction over class actions in which the amount in controversy exceeds five million dollars and minimal diversity of citizenship exists.[59] *Knowles* presents the question whether a plaintiff may stipulate that he will ''seek damages for the class'' that do not exceed five million dollars and therefore prevent removal to federal court.[60]

The plaintiffs' strategy in the case raises serious due process concerns. Named plaintiffs should not be allowed to bind potential class members to a stipulation before a class is certified. If they were, class members with valid claims might find their opportunity for ultimate recovery severely limited, even before they are first informed of the existence of their lawsuit. These potential plaintiffs would have to decide early in the case whether to trade away their right to full recovery. And in return, they would receive merely a forum preferable to the named plaintiffs and class action attorneys. These due process issues, as well as Congress's intent in enacting CAFA and courts' interest in policing circumvention of the statute, should prevent stipulations limiting potential recovery from defeating federal jurisdiction over otherwise removable class actions.

## Issue Classes under Rule 23(c)(4)

In response to *Wal-Mart*'s reinvigoration of Rule 23(a)'s commonality requirement, many plaintiffs' counsel have sought certification under Federal Rule of Civil Procedure 23(c)(4), and argued that that provision allows certification of ''particular issues'' in circumstances in which certification of an entire action would be inappropriate under Rule 23(b). This issue has sparked significant disagreement in the lower courts, even though the more expansive interpretations of 23(c)(4) seem to conflict with the Court's reaffirmation in *Wal-Mart* that ''the party seeking certification must demonstrate . . . [that] the proposed class . . . satisf[ies] at least one of the three requirements listed in Rule 23(b).''[61] The Supreme Court's position finds support in the text and structure of Rule 23: Rule 23(b) allows a class to be ''maintained if Rule 23(a) is satisfied *and* if'' the conditions of Rule 23(b)(1), (2) or (3) are met.[62]

As interpreted by the Fifth Circuit, Rule 23(c)(4) provides trial courts flexibility in shaping class proceedings only after an action has first been deemed certifiable under Rule 23(b)(1), (2) or (3). Rule 23(c)(4) ''is a housekeeping rule that allows courts to sever the common issues for a class trial,'' not a device that trial courts may ''nimbl[y]'' deploy to ''manufacture'' compliance with the requirements of the applicable subsection of Rule 23(b).[63]

The Seventh Circuit has adopted a more permissive approach. In a series of opinions by Judge Posner, that Circuit has interpreted Rule 23(c)(4) to permit certification of less than an entire case so long as this limited certification ''would be a more efficient procedure than litigating the class-wide issue . . . anew in . . . separate lawsuits.''[64] However, trial courts must take caution to ''not divide issues between separate trials in such a way that the same issue is reexamined by different juries.''[65]

Even those Circuits that have followed Judge Posner's more expansive interpretation of Rule 23(c)(4) disagree about the range of options that the rule grants district courts.[66] The compounded circuit split on issue certification calls for Supreme Court review.

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[53] 131 S. Ct. 2179, 2185 (2011).

[54] *Compare Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (holding that materiality need not be proven at the class certification stage to invoke the fraud-on-the-market presumption), *and In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 631 (3d Cir. 2011) (same), *with In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) (requiring proof of materiality at the class certification stage as an element of the fraud-on-the-market presumption), *and Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 264 (5th Cir. 2007) (same).

[55] *See Wal-Mart*, 131 S. Ct. at 2552 n.6.

[56] *Id.*

[57] No. 11-1450 (U.S. Aug. 30, 2012) (granting certiorari).

[58] 28 U.S.C. § 1332(d) (2012).

[59] *Id.* § 1332(d)(2).

[60] *Knowles v. Standard Fire Ins. Co.*, No. 4:11-CV-04044 (W.D. Ark. Dec. 2, 2011).

[61] *Wal-Mart*, 131 S. Ct. at 2549.

[62] Fed. R. Civ. P. 23(b) (emphasis added).

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

[64] *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005).

[65] *Id.* at 1303.

[66] For example, the First, Seventh, and Eleventh Circuits seem to allow (c)(4) certification only for broad issues such as liability. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (suggesting that excessive division of a lawsuit should not be allowed because the necessity of such division indicates the impropriety of class treatment); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (deeming ''question whether the defendants violated RICO'' appropriate for class treatment), *cert. denied*, *H&R Block, Inc. v. Carnegie*, 543 U.S. 1051 (2005); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) (suggesting that liability may be certified as a common issue even where damages are subject to individual determinations). By contrast, the Fourth and Ninth Circuits have suggested that classes may be certified on questions even *within* the overall issue of liability. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434 (4th Cir. 2003) (affirming certification of ''mismanagement'' question against particular de-

## Class Member Standing

Another issue that continues to divide the Circuits is the question whether a class can be certified where absent class members lack standing. In *Denney v. Deutsche Bank AG*,[67] the Second Circuit held that ''no class may be certified that contains members lacking Article III standing,'' reasoning that because standing is a constitutional requirement, it may not be relaxed or modified by procedural rules.[68] In contrast, in *Kohen v. Pacific Investment Management Co.*,[69] the Seventh Circuit held that only one named plaintiff needs standing.[70] Judge Posner concluded that determining whether every class member has standing at the class certification stage would ''[put] the cart before the horse [in a way that] would vitiate the economies of class action procedure.''[71]

Some commentators suggest that the proper rule may be somewhere in between: While both the named plaintiffs and all class members must have suffered some injury for a class to be certified, the ''requisite of an injury [should not] be applied too restrictively.''[72] Like the question of issue certification, the problem of class member standing remains ripe for resolution by the Supreme Court.

## Conclusion

*Wal-Mart* significantly clarified and strengthened one of the fundamental requirements for class certification, and it may be only the first step. The decision's effect may be magnified as courts apply it to inform constitutional and state procedural analysis.

Moreover, in the coming Term the Court will hear *Amgen*, *Comcast* and *Knowles*, three cases raising important questions that *Wal-Mart* left unanswered. However these cases are resolved, the next wave of class action decisions has the potential to bring needed clarity and predictability to this increasingly important area of the law.

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fendant), *cert. denied*, 542 U.S. 915 (2004); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (remarking, in dictum, that Rule (c)(4) ''authorizes the district court . . . to isolate common issues . . . and proceed with class treatment of these particular issues'').

[67] 443 F.3d 253 (2d Cir. 2006).

[68] *Id.* at 263.

[69] 571 F.3d 672 (7th Cir. 2009).

[70] *Id.* at 677.

[71] *Id.* at 676.

[72] 7*AA Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure* § 1785.1 (3d ed. 2005) (citing *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967) (threat of future injury adequate to establish standing for class of African-American plaintiffs seeking to enjoin race-conscious hospital room assignment policy)).

  CLASS ISSN 1529-0115