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## U.S. Supreme Court Agrees to Review Class Certification Decision in *Wal-Mart*

On December 6, 2010, the United States Supreme Court granted Wal-Mart Stores, Inc.'s *certiorari* petition in *Dukes, et al. v. Wal-Mart*. The Court agreed to hear two questions: (1) whether Federal Rule of Civil Procedure 23(b)(2)—which is limited by its terms to injunctive or declaratory relief—permits certification of claims for monetary relief and, if so, under what circumstances; and (2) whether the class certification ordered under Rule 23(b)(2) in *Wal-Mart* comports with the requirements of Rule 23(a).

The lawsuit has been closely watched because of its potential implications for the future of class action litigation. On April 26, 2010, the Ninth Circuit sitting *en banc* issued a sharply divided 6-5 opinion affirming the district court's certification of a nationwide class of current female employees of Wal-Mart with respect to their claims for injunctive and declaratory relief and back pay.

The class asserts claims against Wal-Mart for gender discrimination under Title VII of the 1964 Civil Rights Act on behalf of every female employee who has worked in any U.S. Wal-Mart store since December 26, 1998. As Wal-Mart is the largest private employer in the world, that class is estimated to include more than 1.5 million members. Plaintiffs' central theory is that Wal-Mart vests its managers with discretion to make excessively subjective decisions regarding compensation and promotion. Plaintiffs allege that this excessive subjectivity results in a pattern and practice of discrimination against Wal-Mart's female employees. In particular, plaintiffs claim that Wal-Mart pays its female employees less than comparable males, and awards them fewer and less frequent promotions. Billions of dollars potentially hang in the balance.

In granting *certiorari*, the Supreme Court re-wrote the second issue that Wal-Mart presented in its petition, limiting its focus to the requirements of Rule 23(a) certification. This second question may nonetheless serve as the Court's platform to clarify the legal standards for class certification and, in particular, the application of these standards in the employment discrimination context. Wal-Mart's petition presents an amalgam of critical issues about the proper scope of the class action device, many of which have divided the Courts of Appeals. The Supreme Court's decision thus may resolve questions that have split the lower courts for years, such as (i) whether a Title VII disparate treatment claim may be premised on a claim of "excessive subjectivity," rather than on a specific discriminatory policy; (ii) what level of inquiry into the merits is required to resolve factual and legal disputes relevant to certification; and (iii) what level of inquiry into the reliability of experts' opinions is necessary at the class certification stage. In addition, the Court may address the mammoth manageability concerns presented in classes as large and complex as the *Wal-Mart* class.

Moreover, the Supreme Court's grant of review of Wal-Mart's first question signals that the Court will likely clarify the standard for determining whether and how claims for monetary relief, including claims for back pay, can be certified as a class action under Federal Rule of

Civil Procedure 23(b)(2). The Ninth Circuit's majority *en banc* opinion created a three-way circuit split in this regard. The majority devised a new test for determining when certification under Rule 23(b)(2) is impermissible because monetary relief "predominates" over declaratory and injunctive relief. The Ninth Circuit ruled that certification under Rule 23(b)(2) is inappropriate if monetary damages are "superior [in] strength, influence, or authority" to injunctive and declaratory relief. The majority held that a district court should consider, on a case-by-case basis, the objective "effect of the relief sought" on the litigation, including (i) whether the monetary relief sought determines the key procedures that will be used, (ii) whether it introduces new and significant legal and factual issues, (iii) whether it requires individualized hearings, and (iv) whether its size and nature raise particular due process and manageability concerns. In adopting this test, the majority both overruled the previous Ninth Circuit standard and departed from the standard followed by several other circuits.

The *Wal-Mart* case has been viewed as testing the outer limits of class litigation. Given the questions certified for review, the Supreme Court's ultimate ruling in *Wal-Mart* could shape the future of class action litigation in the United States. A ruling is likely by June 2011.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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