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CLASS ACTIONS

While the U.S. Supreme Court's recent high-profile decisions in *Wal-Mart*, *Concepcion*, and *Amara* affecting employment class actions may appear to signal change in employers' favor, these BNA Insights authors advise caution.

Despite some early predictions by legal commentators, employment class actions have not been rendered extinct by this trilogy of decisions, according to David W. Garland, Michael S. Kun, Frank C. Morris, Jr., John Houston Pope and Allen Roberts of Epstein Becker Green. They add that the three decisions have left ample room for interpretation, and the plaintiffs' bar is certain to issue new challenges that will require the lower courts to interpret these decisions for years to come.

Supreme Court Trilogy May Not Be Class Action Trifecta for Employers: An Examination of *Wal-Mart*, *Concepcion*, and *Amara*

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In the closing months of its 2010 session, the U.S. Supreme Court issued three highly publicized opinions affecting employment class actions: *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (118 DLR AA-1, 6/20/11); *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011) (81 DLR AA-1, 4/27/11); and *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011) (94 DLR AA-1, 5/16/11). Individually, each gave employers good reason to cheer, and taken together, they have led to virtual celebrations. Their collective impact, however, should not

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be overstated, as they do not sound the death knell for employment class actions.

For more than a decade, class actions challenging wage-hour practices and benefits programs have besieged employers, the *in terrorem* effect alone frequently led to sizeable settlements. The specter of a new wave of discrimination class actions hung in the air as well; Supreme Court approval of class certification in a nationwide sex discrimination lawsuit against Wal-Mart with a class exceeding 1.5 million members could only result in more—and larger—discrimination class actions.

The first two of the decisions issued by the court, addressing benefits and arbitration, changed the employment class action landscape. The third may be the most significant employment class action decision in a quarter century. However, despite some early predictions by legal commentators, employment class actions have not been rendered extinct by this trilogy of decisions. The three Supreme Court decisions have left ample room for interpretation, and the plaintiffs' bar is certain to issue new challenges that will require the courts to interpret these decisions for years to come.

Wal-Mart: Emphasis on Full Compliance With Rule 23 Class Requirements.

An analysis of the *Wal-Mart* opinion reveals that it is an evolutionary, not revolutionary, step in the development of employment class action law. But at the very least, it is a forceful rebuke to courts that had dispensed with requiring a putative class to comply with both Rule 23(a) and one or more subdivisions of Rule 23(b).

The U.S. Court of Appeals for the Ninth Circuit had approved the granting of a motion for certification brought by three female Wal-Mart employees who sought to represent a nationwide class of approximately 1.5 million female employees on claims of gender bias in pay and promotions. It permitted this enormous class even though Wal-Mart had 3,400 stores and the decisions being challenged were generally committed to the local managers' broad discretion. The plaintiffs succeeded in obtaining certification through opinion testimony by a sociologist that the decentralized managerial discretion permitted ''unconscious bias'' by store managers despite the company's promulgation of express policies prohibiting gender bias in employment decisions. The plaintiffs' only other evidence in support of class certification was a statistical analysis and approximately 120 anecdotal affidavits from Wal-Mart employees.

Had the Supreme Court affirmed the Ninth Circuit, it is likely that a wave of large discrimination class actions affecting employers in every industry would have followed. And with Supreme Court approval of the certification of a nationwide class with more than 1.5 million members, it is not difficult to imagine how frequently plaintiffs' counsel would rely upon such a decision in arguing that their classes met Rule 23 muster.

But the Supreme Court reversed and established a new standard for class certification of employment cases that at the very least should forestall the type of class action brought against Wal-Mart and make it more difficult for plaintiffs to certify classes on employment claims without ''significant proof'' of unlawful conduct affecting the class.

In a 5-4 majority opinion written by Justice Scalia, the court first addressed whether the plaintiffs' putative class met the commonality requirement of Rule 23(a). Justice Scalia noted that it was not enough to claim that a Title VII injury was a class-based injury. Rather, putative class plaintiffs must show that their claims ''depend upon a common contention,'' such as the assertion of discriminatory bias on the part of the same supervisor. Moreover, that ''common contention . . . must be of such 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 [class] claims in one stroke.'' *Wal-Mart*, Slip Op. at 3.

Because there was no general testing or company evaluation method at issue, the majority analyzed whether the plaintiffs had adduced ''significant proof'' that the company ''operated under a general policy of discrimination.'' The plaintiffs' sociologist, however, failed to answer the essential question underpinning the plaintiffs' commonality claim—what percentage of employment decisions was allegedly based on sex stereotypical thinking that he allegedly identified. The majority also rejected the plaintiffs' statistical and anecdotal evidence, noting the fatal paradox in the plaintiffs' claims of a discriminatory corporate policy of excess local discretion.

As the majority observed, local managerial 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.'' *Id.* at 14. The plaintiffs' regional and national statistical analysis could not establish ''the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.'' *Id*. at 16. The plaintiffs simply could not satisfy the requirement to show the ''glue'' or nexus of a specific common alleged discriminatory practice to tie ''all their 1.5 million claims together'' as required by Rule 23(a). *Id*. at 12.

While the court divided 5-4 on the commonality issue, the court unanimously reversed the Ninth Circuit opinion as it related to back pay. The plaintiffs sought not only injunctive relief, but also individual monetary awards for the approximately 1.5 million class members. The court rejected the claims for individualized monetary relief under Rule 23 (b)(2) stating that ''it does not authorize class certification when each class member would be entitled to an individualized award of money damages.'' *Id.* at 20-21.

The court also noted that the usual basis for class monetary damage claims is Rule 23(b)(3), which provides additional procedural protections are not necessary ''[w]hen a class seeks an indivisible injunction benefitting all members at once'' under Rule 23(b)(2). *Id*. at 22. In such circumstances, there is no need to inquire if class issues predominate because the predominance of class issues and superiority of the class device for relief ''benefitting all its members at once is self evident. This is not the case when each class member sought individualized damages.'' *Id*. at 22-23. The court also rejected the Ninth Circuit's ''Trial by Formula,'' which would have: (a) referred a small subset of claims to a special master for establishing damages, and then (b) extrapolated both the validity and value of the unadjudicated claims from the sample data. The court noted that the ''Formula'' approach would improperly deny

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Wal-Mart the right to assert its Title VII defenses in individualized proceedings. *Id*. at 27.

A close analysis of the Supreme Court's chain of class action decisions provides a clear foundation for the *Wal-Mart* majority. In *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403 (1977), the court held that ''a class representative must be part of the class and possess the same interest and suffer the same injury'' as putative class members. In *General Tel. Co. of Northwest v. EEOC*, 446 U.S. 318, 330 (1980), the court noted that to maintain a Title VII class action, private litigants must meet Rule 23(a)'s ''prerequisites of numerosity, commonality, typicality and adequacy of representation.'' These requirements serve to ''limit the class claims to those fairly encompassed by the named plaintiff's claims.'' *Id*.

Wal-Mart will surely be cited by employers in opposing certification not only in discrimination class actions, but in wage-hour class actions, including collective actions under the Fair Labor Standards Act.

What the Ninth Circuit majority disregarded was the admonition of the Supreme Court that while discrimination under Title VII can be class-based, an unquestioning certification of ''across the board'' discrimination claims ignores the requirement that ''careful attention'' to *all* the criteria of Rule 23 ''remains nonetheless indispensable.'' *Rodriguez,* 431 U.S. at 405-406. Further, as the court held in *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982), while racial (or sexual) discrimination may be class discrimination, ''the allegations that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified.''

Importantly, the majority also noted the weakness of the plaintiffs' opinion testimony. The decision strongly suggests that the district court failed to conduct the necessary ''gatekeeper'' analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 61 USLW 4805 (1993), before relying on what appears to be the pseudo-scientific musings of the plaintiffs' sociologist.

The *Wal-Mart* decision also implicitly relies on the court's recent jurisprudence that claims must be plausible. Otherwise, there is no basis for imposing the heavy burden of class litigation in the age of e-discovery and providing undue leverage to plaintiffs. In assessing whether a putative class plaintiff has a plausible claim, the *Wal-Mart* decision is both faithful to Rule 23 and to settled jurisprudence that plaintiffs must show they truly have claims common to and typical of the class they seek to represent and that there is a common policy or practice to provide the ''glue'' to make such a claim class appropriate.

Wal-Mart will surely be cited by employers in opposing certification not only in discrimination class actions, but in wage-hour class actions, including collective actions under the Fair Labor Standards Act. But *Wal-Mart* does not forestall any and all such actions. Already, plaintiffs' counsel have signaled that they intend to file regional or statewide class actions, rather than nationwide ones. While nothing in *Wal-Mart* suggests that it is limited to nationwide actions, only time will tell whether the courts find *Wal-Mart*'s commonality requirements satisfied in cases having lesser geographical reach and more ''glue.''

Concepcion: Class Action With Employment Law Impact

A charge of $30.22 for sales tax based on the retail value of ''free'' phones gave rise to *Concepcion*. Plaintiffs Vincent and Liz Concepcion purchased AT&T Mobility cellular service, which AT&T advertised as including free cell phones. While AT&T provided the phones for free, it charged the plaintiffs $30.22 in sales tax based on the phones' retail value. At the time of the purchase, the plaintiffs signed a contract that provided for arbitration of all disputes between them and AT&T, but required that the claims be brought in the plaintiffs' ''individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'' *Id.* at 1744.

Upset with the $30.22 charge, the Concepcions filed a lawsuit in the United States District Court for the Southern District of California, which was consolidated with a putative class action alleging that AT&T had engaged in false advertising and fraud by charging sales tax on phones it had advertised as free.

AT&T moved to compel arbitration under the contract signed by the plaintiffs. The court denied the motion. Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. The Ninth Circuit affirmed on the same basis, and also found that the *Discover Bank* rule was not preempted by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (FAA).

As in *Wal-Mart*, Justice Scalia wrote for the 5-4 majority of the court reversing the Ninth Circuit's decision. In holding that the FAA preempted the *Discover Bank* rule, Justice Scalia observed that ''[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'' *Concepcion*, 131 S. Ct. at 1748. For example, ''the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'' *Id.* at 1751. Justice Scalia also wrote that arbitration ''is poorly suited to the higher stakes of class litigation,'' as it deprives the defendant the opportunity to appeal a certification decision on an interlocutory basis and to appeal from a final judgment. *Id.* at 1752. The court, he stated, ''find[s] it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.'' *Id.*

Before implementing an arbitration program with a class action waiver and risking potentially costly and time-consuming challenges, employers may want to take a deliberative approach, particularly if they do not have a culture of litigiousness among their employees.

Although a consumer class action, *Concepcion* provides the basis for employers to enter into arbitration agreements that contain class action waivers—if properly drafted. Indeed, the initial reaction among some has been to hail *Concepcion* as yet another decision that spells the end of class action employment litigation.

But as with *Wal-Mart*, only time will tell the import of *Concepcion*. It is doubtful that employers should race to have their employees sign arbitration agreements merely because of the risks of class actions. Arbitration continues to offer the benefits of private resolution of disputes, avoiding the risk of potentially runaway juries, and sometimes less expensive litigation. Those benefits, however, must be weighed against costly challenges to the arbitration program, which may result if the program design does not meet the standards of the AT&T agreement. Arbitration also comes at the expense of forgoing strict adherence to the evidence rules, motions to dismiss on purely legal grounds and meaningful appellate procedures—not to mention that the employer generally must foot the arbitration bill. And, by its recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress has invalidated pre-dispute agreements calling for arbitration of whistleblower claims brought under the Sarbanes-Oxley Act, the Commodity Exchange Act, and the new Consumer Financial Protection Act.

Employers must also consider the potential regulatory response to *Concepcion* by the National Labor Relations Board. Last year, before the *Concepcion* decision, the NLRB issued complaints against companies that had placed class action waivers in pre-dispute arbitration agreements, claiming that these agreements interfered with the employees' right under the National Labor Relations Act to engage in concerted activity. Before implementing an arbitration program with a class action waiver and risking potentially costly and time-consuming challenges, employers may want to take a deliberative approach, particularly if they do not have a culture of litigiousness among their employees.

Amara: Uncertainty in Benefits Class Actions

When the Supreme Court granted certiorari in *Amara*, the case appeared poised to resolve a split among the circuits regarding an issue that could make or break the use of class actions for some types of Employee Retirement Income Security Act (ERISA) claims. In the end, the court left at least as much unanswered as it answered.

The *Amara* plaintiffs sued over the impact that they suffered in the conversion of CIGNA's traditional defined benefit pension plan to a ''cash balance'' retirement plan. They claimed—and the district court found at trial—that CIGNA's description of the effect of the changes set forth in a summary plan description (SPD) intentionally misled them. CIGNA wanted a smooth transition from one plan to another, but reportedly feared protests and complaints if the SPD described many of the effects of the conversion; CIGNA sacrificed accuracy for expediency, the district court found.

At the time, most courts treated the SPD—one of the few ERISA documents that a plan must distribute to its participants without request—as a document that could trump the plan if the terms of the two were in conflict. Many courts considered the SPD to be on par with the plan due to the SPD's special status as the device by which the terms of the plan are communicated to participants. To secure relief based on a variance in favor of an SPD over a plan, courts required a participant to show reliance on the terms set forth in the SPD or prejudice suffered as a result of the contradictory or misleading SPD language.

Many courts insisted that each plaintiff should set forth individualized proof of his or her purported reliance or alleged prejudice. This individualized approach inhibited class treatment of claims. The lower court in *Amara*, however, developed a ''likely harm'' test, whereby prejudice would be presumed if plaintiffs could show that the SPD suffered a fault for which harm seemed reasonably likely to follow—with the burden placed on defendants to disprove reliance or prejudice by any particular individual. Such a presumption created a class-friendly approach.

The Supreme Court blazed a different path. It explained that an SPD could not alter the terms of a plan. A plan could not be amended, other than by the formal plan amendment process. *Amara*, 131 S. Ct. at 1877. SPDs, the court observed, exist to simplify and summarize the more complicated set of terms in the plan. *Id.* at 1877-78. Variations, and potential contradictions, inevitably will occur. Courts must tolerate variation to allow SPDs to accomplish their congressionally mandated purpose, to explain the more complicated plan terms to participants. This means that the provision of ERISA that authorizes suits for benefits or declarations regarding entitlement to benefits (Section 502(a)(1)(B)) grants relief solely based on the terms of the plan, unmodified by the SPD. It does not remedy the circumstances arising in Amara.

Had the court stopped its analysis at this point, it would have been an unqualified victory for plans and plan sponsors. The court, however, turned its attention to the equitable relief provision of ERISA Section 502(a)(3). That section, the court noted, can be used to reform or modify a plan based on grounds recognized in equity. *Id.* at 1879-80. As such, an SPD may not actually ''amend'' a plan, but a misleading SPD that constitutes part of an effort to intentionally mislead participants may constitute evidence that supports an equitable basis to reform the plan.

In this way, *Amara* introduces new uncertainty into ERISA litigation because the court intimated that some equitable remedies may require proof of individualized, prejudicial reliance, while others may not. The court mentioned estoppel claims as ones traditionally requiring detrimental reliance; class actions for such claims

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effectively may be dead. But the court separately identified the equitable remedy of ''surcharge''—an equitable remedy invoked for breach of trust or to avoid a trustee's unjust enrichment—as not requiring detrimental reliance; only breach of duty, harm, and causation must be shown. *Amara*, 131 S. Ct. at 1881. It likewise commented that ''reformation''—reshaping a contract to reflect the mutual understanding of the parties—did not require detrimental reliance. *Id.*

The *Amara* court thus invited lower courts to explore an entire area of equity jurisprudence while offering little guidance. It remains to be seen how this invitation to experiment will play out.

The court thus invited lower courts to explore an entire area of equity jurisprudence while offering little guidance. It remains to be seen how this invitation to experiment will play out. For example, in an early post-*Amara* decision, *Engers v. AT&T, Inc.*, the Third Circuit declined to depart from its prior precedent that required a showing of ''extraordinary circumstances'' to invoke equitable estoppel under ERISA. *Amara,* in the Third Circuit's view, did not change the equities involved in an estoppel claim enough to abandon this important element (122 DLR A-5, 6/24/11).

Amara helps to highlight the difference between the role of injunctive and equitable relief in discrimination suits, considered in *Wal-Mart*, and the role that such relief plays in ERISA actions.

Although discrimination remedies such as back pay and front pay may be classified as equitable, they represent an end in and of themselves and they constitute monetary claims with an individual focus. Under *Wal-Mart*, this should disqualify most discrimination suits from certification under Rule 23(a)(1) or (a)(2). Under *Amara*, ERISA suits seeking additional benefits based in equity must proceed through two steps: reformation of the plan, a quintessential equitable enterprise; consider revising and then computation of the benefits based on the modified plan. (This second step may, in fact, involve a remand to the plan administrator to apply the plan as reformed.)

In contrast to *Wal-Mart*, the *Amara* remedies in ERISA cases primarily involve resolving an entitlement to equitable, injunctive relief (surcharge, reformation), with monetary relief (the payment of additional benefits) incidental to the injunctive relief. When Amara remedies are appropriate, and individualized reliance issues do not dominate, class action prerequisites under Rule 23(a)(1) and (a)(2) likely will be satisfied.

Conclusion

Wal-Mart, *Concepcion*, and *Amara*, do not signal the end of employment class actions. Plaintiffs' counsel will certainly try to circumvent *Wal-Mart* through different types of claims and different types of proof. Putative classes that are narrowed by geography or positions are highly likely.

Employers would be wise to force plaintiffs to establish early and clearly that each putative class member is affected by the same unlawful employer practice or policy regardless of the definition of the proposed class. Employers also should seek to have the district court determine if any of the plaintiffs' opinion testimony satisfies *Daubert's* reliability threshold. Additionally, employers should consider discovery as to the merits of the named plaintiffs' claims that can be used to show lack of commonality and typicality.

Concepcion may only impact employment class actions for those employers choosing mandatory arbitration. Even those who do require employees to enter into arbitration agreements as a condition of employment have no guarantees those agreements will be deemed enforceable.

And *Amara* leaves much uncertainty and much room for argument. Each case is bound to yield further judicial interpretation by the lower courts for years to come. While employers may have new and strong arguments to present as a result of this trilogy of decisions, and perhaps more leverage than ever to try to resolve cases favorably, employment class actions will continue to be filed and tested under the principles in the *Wal-Mart*, *Concepcion* and *Amara* triology.