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"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"

June 29, 2011

Thank you for giving me the opportunity to join you at this hearing today. The testimony I am offering here draws on my work as a scholar and teacher of civil procedure, Supreme Court decisionmaking and employment discrimination.

This year, a narrow five-Justice majority on the United States Supreme Court continued its recent trend of interpreting the law in ways that limit people's access to the court system and close important avenues for holding corporations accountable for misconduct.

Last week in *Wal-Mart v. Dukes*, the Court's majority decided that women who alleged significant company-wide discrimination in pay and promotion decisions could not pursue their claims together in a class action suit.[1] Despite the obvious efficiencies of allowing the women to litigate discrimination claims in a collective action rather than in potentially millions of individual suits, the Court decided in effect that Wal-Mart was too big to sue.

Earlier this spring, the same five Justices concluded in *AT&T v. Concepcion* that a company could prohibit consumers from arbitrating small claims in a collective action despite state law finding such a prohibition to be unconscionable. Essentially the Court concluded that a company that had defrauded huge numbers of consumers through the same misconduct could avoid having to face those consumers as a group. And the Court held that states could not adopt rules to protect consumers from this barrier to redress.

Neither decision was compelled by any statute or rule. To the contrary, as the dissenting opinions in both cases observed, the Court's decisions in these cases are not supported by the language of the relevant rules. These two decisions show a remarkable willingness to close the doors to people seeking redress for substantial injuries. This denial of access means the people who have been harmed are highly unlikely to recover for those harms. And it means that those who caused those injuries will not be held accountable.

Wal-Mart v. Dukes

In a broadly written opinion, five Justices concluded that a class of female employees of big-box giant Wal-Mart who alleged systematic discrimination in pay and promotion decisions had failed to present a "common question" sufficient to permit them to bring their suit as a class action.[2] The decision presents real risks to effective enforcement of federal civil rights laws

[1] While part of the Court's decision in *Wal-Mart* was unanimous, the portion of Justice Scalia's opinion that most significantly limited the ability of employees to pursue class action litigation was joined only by Chief Justice Roberts, Justice Alito, Justice Thomas and Justice Kennedy.

[2] Federal Rule of Civil Procedure 23(a) requires plaintiffs seeking to pursue a class action lawsuit to demonstrate that their proposed class meets the requirements of numerosity, commonality, typicality and adequacy of representation. All of these requirements are designed to help the district court evaluate whether the case should proceed as a class action. The commonality requirement has, since the passage of the modern Rule 23 in 1966, been understood as a "simple, low level" requirement that there be either one significant common issue or several common issues. It is a standard that has traditionally been understood as "relatively easy to satisfy." Arthur R. Miller, *Overview of Class Actions: Past, Present and Future* 25 (1977). The Court's opinion in *Wal-Mart* departs

because it makes it difficult for employees suffering similar harms to proceed together in challenging workplace discrimination. By making class action litigation of employment discrimination claims less likely, the *Wal-Mart* decision also takes pressure off of employers to adopt the best internal practices for ensuring that workplace decisions are made fairly and without illegal stereotyping and bias.

The named plaintiffs had sued on behalf of current and former female employees of Wal-Mart, alleging that women at Wal-Mart stores had been paid less than their similarly situated male counterparts every year and in every Wal-Mart region.[3] The employees' evidence showed that women in hourly positions made, on average, $1,100 per year less than men in similar positions. In salaried management positions, the average difference was $14,500.[4] This inequity had developed even though the women had, on average, greater seniority and higher performance ratings.[5] The differences, moreover, were found in each of the 41 regions in which Wal-Mart does business and in a majority of the stores around the country. The plaintiffs had also alleged that Wal-Mart's female employees had been promoted to management less often than comparable male employees, and that those women who were promoted had to wait nearly twice as long for promotion as did their male peers.[6] The evidence they presented showed that, in 2001, 67 percent of all hourly workers and 78 percent of all hourly department managers were women.[7] By contrast, only 35.7 percent of assistant managers, 14.3 percent of store managers and 9.8 percent of district managers were female.[8] The explanation for these company-wide inequalities, plaintiffs argued, was that Wal-Mart had adopted a system for pay and promotion decisions that permitted bias to infect the process.

In addition to the statistical evidence of significant gender disparities at stores around the country, the plaintiffs presented numerous specific examples of sexist language and behavior at every level of the company and expert testimony showing that other large retail stores did not have the same gender disparities in pay and promotion. They also offered testimony from social psychologist Dr. William Bielby, who undertook an extensive review of Wal-Mart's policies, the statements of its managerial staff and statistical information about the company.[9] Professor

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from this settled understanding and breaks with earlier precedent characterizing the 23(a) inquiry as a "threshold" evaluation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

[3] *See* Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities, at 1, *Dukes*, 222 F.R.D. 137 (Apr. 28, 2003) (No. C-01-2252 MJJ).

[4] *Id.* at 25.

[5] *See* Dukes, 222 F.R.D. at 141.

[6] *Id*. at 141, 146.

[7] Plaintiff's Motion for Certification at 7.

[8] *Dukes*, 222 F.R.D. at 146.

[9] *See* Melissa Hart and Paul Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 56-57 (2009). Justice Scalia is sharply critical of Professor Bielby's conclusions, but he misconstrues what they were offered to show. Social science testimony of the sort offered by Professor Bielby has been used in many class certification arguments to explain to a fact finder how corporate structures might permit or limit stereotyping and bias—not to demonstrate how much discrimination did operate in the workplace. *See generally* Brief for American Sociological Association and The Law and Society Association as Amici Curiae Supporting Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 2011 WL 2437013 (2011) (No. 10-277), 2011 WL 757408.

Bielby explained how Wal-Mart's policy of giving largely unguided discretion to lower-level managers for setting pay and promotion could very likely result in gender disparities in hiring and retention at the company.[10]

All of this evidence had been presented to the district court not so that the judge would conclude that Wal-Mart had in fact discriminated (that was a question for later in the proceedings), but solely to convince the court that the case should proceed as a class action. The plaintiffs argued that their case met the requirements of Federal Rule of Procedure 23 and that they should have the opportunity to litigate the merits of their discrimination claims together as a group rather than having to proceed in separate, repetitive suits brought in theory by the nearly 1.5 million individual female employees who suffered from these workplace disparities.

The district court evaluated this evidence and concluded that the plaintiffs' claims shared several common questions of law and fact. First, they shared the central common question as to whether a highly discretionary pay and promotion policy permitted gender stereotypes communicated through a strong corporate culture to influence pay and promotion decisions. Second, they shared the related question whether Wal-Mart's culture—the "Wal-Mart Way"—was indeed pervaded by stereotypes. The proposed class claims for pay discrimination presented the common question whether the company's pay decisions led to impermissible gender disparities. And their promotion claims raised the common question whether promotion opportunities at Wal-Mart were in fact distributed in a manner impermissibly tainted with discrimination.

The district court engaged in a careful and thorough review of the evidence and the requirements of Rule 23 and concluded that each of these questions was common to the class and could be litigated on the merits in a class proceeding. In reaching this conclusion, the judge was not taking an unusual step.[11] Many class actions with similar facts had been certified in the past.[12] But throughout the litigation the courts, the defendant and commentators focused on how big Wal-Mart was, and consequently how big the plaintiffs' class was. Essentially, they argued, Wal-Mart is too big to sue. The *Wal-Mart* majority seems to have accepted this argument.

But federal anti-discrimination laws do not include an exception for companies that are especially large. And Wal-Mart's multi-facility structure, which Justice Scalia suggested should insulate the company from systemic litigation, is in many ways quite typical of the modern

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[10] *Id.*

[11] One of the distressing elements of the Supreme Court's decision is its complete disregard for the appropriate standard of appellate review. A district court's decision on class certification is entitled to deference on appellate review. The Court never acknowledged this standard in reversing the lower courts' decisions. This dismissive attitude toward the procedural rules that operate to constrain appellate courts—including the Supreme Court—is not unique to *Wal-Mart*. *See generally* Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMPLOYEE RTS. & EMP. POL'Y J. 253 (2009).

[12] *See, e.g.*, Palmer v. Combined Ins. Co., 217 F.R.D. 430 (N.D. Ill. 2003); Beckmann v. CBS, 192 F.R.D. 608, 614 (D. Minn. 2000); Butler v. Home Depot, Inc., 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996); Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992); Ellis v. Costco Wholesale Corp., No. 3:04cv03341 (N.D. Cal. Aug. 17, 2004); *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 682-87 (2003) (describing a number of similar cases).

workplace. As companies grow, and multi-state—even multi-national—service-industry businesses typify the workplaces that most Americans inhabit, the notion that class action suits cannot reach misconduct at precisely this type of workplace is especially troubling. Title VII and other antidiscrimination laws are written broadly to reach a broad range of discriminatory behavior. And yet *Wal-Mart* risks insulating these workplace structures from legal scrutiny.

The idea of class action litigation is in many respects precisely that it can provide efficient resolution of disputes like the one presented here. The class action is an indispensible procedural device because it facilitates access to the courts for large numbers of litigants with meritorious but low-value claims and avoids costly repetition and relitigation of issues that would be required in the absence of class litigation.

Not only is a class action efficient in a case like Wal-Mart, it is also more likely to vindicate the rights of employees than a hypothetical 1.5 million individual lawsuits. Class action suits have been a fundamental piece of employment discrimination law for nearly 40 years. Class litigation has long played an essential role in promoting Title VII's goal of eradicating discrimination in the workplace because cases brought by a class of workers present a more complete picture of the employer's conduct than individual suits. Class actions also enable better-informed and more effective company-wide reforms that can address company-wide problems of discrimination.

The Supreme Court's decision ignores both the efficiency and the fairness that class litigation can offer. In a break with past precedent and with the language of Rule 23(a), the Court requires not only that plaintiffs prove that they share a "common question of law or fact" (*i.e.*, what the Rule itself requires) but also that they provide evidence that whatever differences their stories might have are less than the similarities in their claims. As Justice Ginsburg's dissenting opinion observes,[13] this analysis effectively rewrites the language of Rule 23. The requirement that common questions "predominate" over individual questions is part of Rule 23(b)(3). That section of the class action rule was not at issue in *Wal-Mart.* The Court's analysis of the Rule 23(a) commonality requirement, however, effectively takes the higher 23(b)(3) standard and imposes it onto 23(a).

The Court's decision erects barriers for class certification that are actually more demanding than the hurdles plaintiffs must jump to prove liability under antidiscrimination laws. In *Teamsters v. United States*,[14] a case cited with approval by the Court in *Wal-Mart*, the employer was found liable for violating Title VII where the plaintiffs were challenging the use of subjective decisionmaking in a multi-facility company. That is precisely the type of challenge brought by the employees in *Wal-Mart*, but the Court in *Wal-Mart* threw the case out without any evaluation of the underlying merits of the claims. Similarly, in *Watson v. Fort Worth Bank & Trust* (another case cited with apparent approval by the majority), the Court held that Title VII liability could flow from the use of excessive subjectivity.[15] In *Wal-Mart*, however, the majority concluded that similar allegations of excessive subjectivity did not present a "common question" for the class. Class certification is supposed to be a low bar, a threshold question that precedes

[13] Dissenting opinion at pp. 8-10.
[14] 431 U.S. 324 (1977).
[15] 487 U.S. 977, 988 (1988).

the higher bar set for the merits analysis. By setting a high bar for class certification, the *Wal-Mart* majority turns that notion on its head.

It is hard to tell precisely what the contours of this decision will turn out to be as it is interpreted in other cases. The majority is much clearer about what it disapproves in this particular case than it is about what it will permit going forward. What is clear is that in the future every employment discrimination class action will be evaluated in light of the current Court's hostility to class litigation. The decision will thus have a significant chilling effect on the collective adjudication of civil rights claims that has been an essential aspect of full enforcement of the law.

Moreover, by making class action employment challenges significantly harder to pursue, the Court's decision takes pressure off of employers to monitor their own employment practices. Laws prohibiting discrimination are only as effective as the means available to enforce those laws. If systemic discrimination claims of the sort presented in *Wal-Mart* are no longer permitted, employers' incentives to adopt strong internal systems for preventing discriminatory decisionmaking are considerably diminished. One of the important successes of the *Wal-Mart* case itself is instructive: in the years since the suit was first filed, Wal-Mart has changed many of the practices that the plaintiffs pointed to as causes of gender disparities at the company.[16] The litigation prompted Wal-Mart to better legal compliance.

The ultimate goal of federal antidiscrimination laws is arguably "not to provide redress but to avoid harm."[17] Without the possibility of redressing harm, however, the likelihood of avoiding harm is substantially diminished. For this reason, legislatures that enacted landmark civil rights legislation anticipated that collective suits—whether brought by the EEOC or by private litigants—would play an important role in enforcing the law. The *Wal-Mart* decision marks a break from that commitment.

AT&T v. Concepcion

When Vincent and Liza Concepcion signed up for cell phone service with AT&T, they were told that the phone came free with the service contract. Slip op. at 2. On receiving their first bill, they discovered that they had in fact been charged $30.22 in sales tax on the phone. The Concepcions were among the thousands of consumers who complained that AT&T had engaged in fraud and false advertising by marketing the phones as free while billing customers for significant sales tax.

The contract for service that all of these consumers had signed provided for arbitration of any claims arising out of the agreement and specified that any claim must be brought in a party's "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Thus, consumers were barred from seeking redress through the court

[16] *See, e.g., Wal-Mart Didn't Act on Internal Sex-Bias Alert, Documents Show*, BLOOMBERG.COM, July 15, 2005, http://www.bloomberg.com/apps/news?pid=71000001&refer=us&sid=aGS8a.3TSjRQ.

[17] Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).

system and, within the context of arbitration, each individual person would have to pursue his own claim for himself.

The Concepcions pointed out that this restrictive provision ran afoul of state law designed to protect consumers. Under California state law, a contract that forbids collective action without providing an equally effective alternative for vindicating consumer rights is unconscionable and therefore unenforceable. As the California Supreme Court explained the state rule:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[18]

A cell phone service agreement is exactly the kind of adhesion contract that consumers sign without the opportunity to individually negotiate. Moreover, disputes under these contracts, like the one at issue here, are typically for low-dollar amounts. When a company violates consumer rights under these and similar agreements, few consumers will ever learn that their rights have been violated. Given the low sums involved, fewer still will seek redress.

If companies can get away with it, prohibiting collective arbitration is an easy way to avoid liability for misconduct. The economic realities of this type of litigation require that they proceed as class actions or not at all. Class actions create a procedural vehicle for vindicating the substantive rights of small-claims victims. Without class actions—whether in litigation or in arbitration—defendants face little risk of liability and thus weak deterrence from engaging in wrongdoing in the first place. The consequence is that the costs of misconduct are borne by the public, and not by the company that engaged in the bad behavior.

Brushing off the concern that small claims will go unprosecuted if collective arbitration is not an option, the *Concepcion* majority observes that "requiring consumer disputes to be arbitrated on a class-wide basis will have a substantial deterrent effect on incentives to arbitrate." Slip op at 17. The Court is obviously focused on the incentives of corporations, not of individuals. Companies may have less incentive to include arbitration agreements in their consumer contracts if class-wide arbitration must be permitted. But the incentives for the individuals are quite the opposite – where class arbitration can be prohibited, the likelihood that consumers will pursue valid claims against corporate wrongdoing goes down significantly.

[18] *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162, 113 P. 3d 1100, 1110 (2005) (quoting Cal.Civ. Code Ann. §1668).

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These decisions follow on the heels of other recent limitations on access to the justice system. In particular, during the past several years, a slim majority on the Court has tightened pleading standards so that many plaintiffs will see their cases thrown out of court before they have an opportunity to engage in basic fact discovery.[19] As a result of these decisions, whether companies engaged in prohibited conduct that harmed the plaintiffs will never be known.

The same is true for the decisions in *Wal-Mart* and *Concepcion*. By erecting barriers to class-wide presentation of harms that are themselves class-wide, the Supreme Court has drastically curtailed the picture presented to a judge, an arbitrator or a jury. The Court's rulings inhibit the effectiveness of the legal system by allowing procedural rules to disrupt the truth-seeking function of litigation. Moreover, for many years, companies have known that class-wide misconduct can lead to class-wide liability. That knowledge has spurred many corporations to make company-wide policy changes that avoid these harms. If companies are insulated from class-wide litigation, their incentives to voluntarily undertake such reforms are diminished.

These recent decisions thus risk distorting our justice system's ability to encourage reform, ensure accountability and compensate those injured by illegal conduct.

[19] *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).