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The Duchesses Come Out Swinging in *Dukes*: Restoring the Balance in Class Certification

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I. INTRODUCTION

With its much-anticipated *en banc* decision in *Dukes v. Wal-Mart Stores, Inc.*,² the Ninth Circuit became the most recent federal court of appeals to address the district court's role in deciding whether a plaintiff has met Federal Rule 23's class certification requirements. Like several other federal circuits in recent years, the Ninth Circuit considered whether the district court may analyze the underlying merits of the dispute in determining the class certification issue. The *en banc Dukes* majority upheld the district court's merits inquiry where essential to ruling on class certification. At the same time, however, the majority declined to require the district court to resolve disputed expert testimony offered in class certification proceedings, holding instead that such resolution may appropriately await a later stage of the litigation. As we discuss below, while this approach differs from that of other circuits, it is more faithful to the language of Rule 23 and to the function of class certification as a procedural device for managing complex litigation and for framing the substantive issues that these cases present.

Dukes itself arises in the employment discrimination context. However, the majority's ruling could well have a significant impact on class actions generally, including antitrust cases, both in the Ninth Circuit and in those other circuits where the court of appeals has not yet addressed similar issues.

II. THE ALLEGATIONS AGAINST WAL-MART

In 2001, six women—current and former Wal-Mart employees—filed a class action against Wal-Mart, the largest private employer in the world, on behalf of all female employees in company stores nationwide. The suit alleges that Wal-Mart violated Title VII of the Civil Rights Act of 1964 by adopting and implementing a corporate policy of gender discrimination that denied female employees equal pay and opportunities for promotion. The principal dispute at class certification was the issue of commonality—whether the plaintiffs could marshal sufficient evidence to raise an inference that Wal-Mart engaged in discriminatory employment practices that affected plaintiffs and all the putative class members in a common manner. This inquiry in the employment discrimination setting is akin to the inquiry in an antitrust case into the “impact” of price-fixing on purchaser-plaintiffs.

On June 21, 2004, the district court issued an 84-page ruling, certifying a class of perhaps as many as 1.5 million women employed at Wal-Mart's 3,400 stores throughout the country.³

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² 603 F.3d 571 (9th Cir. 2010).

³ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd and remanded in part*, 603 F.3d 571 (9th Cir. 2010) (*en banc*). The class size, however, depends heavily on whether or not former employees are included, an issue that the district court will need to re-examine on remand. *See Dukes*, 603 F.3d at 623.

Wal-Mart appealed, and a three-judge Ninth Circuit panel affirmed the district court's ruling.⁴ The Ninth Circuit subsequently vacated the affirmance and granted a rehearing before an 11-judge *en banc* panel.⁵ In an April 26, 2010 ruling, a six-judge majority of the *en banc* panel affirmed the district court's certification of a class of current employees with respect to their claims for injunctive relief, declaratory relief, and back-pay. The *en banc* majority remanded to allow the district court to reconsider the class's punitive damages claim, as well as the claims by putative class members who no longer worked for Wal-Mart when the class action was filed.

Five judges dissented, asserting that the plaintiffs had failed to present "significant proof" of a discriminatory policy or practice of Wal-Mart sufficient to sustain the conclusion that each class member suffered similar discrimination.⁶ The dissent criticized the district court's examination of the Plaintiffs' statistics expert as "superficial," concluding that it was error for the district court to find "that Wal-Mart had a general policy of discrimination absent convincing proof on that point."⁷

III. REVIEW OF THE DISTRICT COURT'S CLASS CERTIFICATION INQUIRY

Prior to addressing the parties' class certification contentions, the *Dukes* majority undertook to clarify the district court's role in determining whether Rule 23's requirements are satisfied.⁸ Citing the Supreme Court's decision in *General Telephone Co. of Southwest v. Falcon*,⁹ the *en banc* majority held that to resolve class certification, a district court "must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied" "[T]his analysis," the majority wrote, "will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims."¹⁰ The *Dukes* majority thus aligned itself with other recent rulings by the First,¹¹ Second,¹² Third,¹³ Seventh,¹⁴ and Eighth¹⁵ Circuits.

The *en banc* majority noted that, in the past, courts, including those in the Ninth Circuit, had misread the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*¹⁶ to preclude the district

⁴ *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168 (9th Cir. 2007), *aff'd*, 603 F.3d 571 (9th Cir. 2010).

⁵ Considerations of practicality generally preclude all 47 Ninth Circuit judges from taking part in a single oral argument and in the deliberations needed for a decision. The Ninth Circuit's rules thus provide for a "limited en banc" review by a randomly selected 11-judge panel. Because *en banc* reviews may not always reflect the views of the majority of the court, the Ninth Circuit rules also provide that, "[i]n appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing *en banc*." 9th Cir. R. 35-3 (limited en banc court).

⁶ *Dukes*, 603 F.3d at 629-52.

⁷ *Id.* at 636 (emphasis added).

⁸ Under Federal Rule of Civil Procedure 23, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if" the class meets the prerequisites of numerosity, commonality, typicality, and adequacy of representation and at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23.

⁹ 457 U.S. 147 (1982).

¹⁰ *Dukes*, 603 F.3d at 594.

¹¹ *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008).

¹² *In re Initial Pub. Offerings Sec. Litig. ("IPO")*, 471 F.3d 24, 41 (2d Cir. 2006).

¹³ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009).

¹⁴ *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-75 (7th Cir. 2001).

¹⁵ *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005).

¹⁶ The oft quoted passage in *Eisen* states, "We find nothing in either the language or history of Rule 23 that 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." 417 U.S. 156, 177 (1974).

court from “consider[ing] any aspect of the merits . . .”¹⁷ But Falcon and Eisen could be reconciled, the *Dukes* majority reasoned, by applying Eisen’s admonition only where “the certifying court is using the underlying facts [] to address a merits issue unnecessarily.”¹⁸ Accordingly, it “is whether courts are using the facts to probe the plaintiffs’ claims of compliance with Rule 23, or to hear either parties’ claims directed to stand-alone merits issues, that renders a court’s use of the facts proper or improper.”¹⁹

The *Dukes* majority therefore concluded that “[t]he district court must analyze underlying facts and legal issues going to the certification questions regardless of any overlap with the merits.”²⁰ The *en banc* majority cautioned, however, that “this does not mean a district court should put the actual resolution of the merits cart before the motion to dismiss, summary judgment, and trial horses by reaching out to decide issues unnecessary to the Rule 23 requirements.”²¹ Indeed, the *en banc* majority stated that “in some cases, the pleadings will be sufficient to render the certification decision and in others, the district court must make determinations on facts overlapping with the merits.”²² However, even where the district court has to determine factual issues overlapping with the merits, the *Dukes* majority cautioned that “the purpose of the district court’s inquiry . . . must remain focused on, for example, common questions of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), not the proof of answers to these questions or the likelihood of success on the merits.”²³

IV. APPLYING THE RIGOROUS ANALYSIS STANDARD IN DETERMINING COMMONALITY

The district court in *Dukes* held that plaintiffs had met their burden of establishing commonality through: (1) facts supporting the existence of company-wide policies and practices that, in part though their subjectivity, provided a potential mechanism for discrimination; (2) expert testimony supporting the existence of company-wide policies and practices that included a culture of gender stereotyping; (3) statistical evidence of gender disparities attributable to discrimination; and (4) anecdotal evidence of gender bias from class members throughout the country.²⁴

The *en banc* majority reviewed the district court’s analysis of each category of evidence. With respect to the first category, the *Dukes* majority found that the evidence, which Wal-Mart did not challenge, supported plaintiffs’ contention that the company operated a highly centralized company—one that promoted policies common to all stores and that maintained a single system of oversight.

The second evidence category—consisting of expert testimony—was hotly contested. Plaintiffs presented evidence from a sociologist who testified that Wal-Mart’s personnel policies and practices made pay and promotion decisions vulnerable to gender bias. Wal-Mart challenged plaintiffs’ evidence, arguing that it failed to meet the standards for expert testimony

¹⁷ *Dukes*, 603 F.3d at 582 (quoting *In re IPO*, 471 F.3d at 33).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 585-86.

²¹ *Id.* at 586.

²² *Id.* at 587.

²³ *Id.* at 590 (emphasis added).

²⁴ *Dukes*, 222 F.R.D. at 166.

set forth in Federal Rule of Evidence 702 and the Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals* decision.²⁵ According to Wal-Mart, while plaintiffs' expert concluded that Wal-Mart was "vulnerable" to bias or gender stereotyping, the expert failed to identify a specific discriminatory policy at Wal-Mart. This alleged deficiency in the expert's testimony, Wal-Mart asserted, rendered the evidence inadmissible under *Daubert*.

The district court rejected Wal-Mart's argument, holding that "courts should not even apply the full *Daubert* 'gatekeeper' standard" at the class certification stage."²⁶ The district court further found that because Wal-Mart's arguments did not challenge the reliability, methodology, or relevance of the expert's testimony, but instead questioned its persuasiveness, *Daubert* was not implicated.

The *en banc* majority suggested that the district court may have correctly concluded that *Daubert* does not apply at the class certification stage the same way that it does to expert testimony offered at trial.²⁷ However, the *Dukes* majority declined to resolve the issue.²⁸ Instead, the *Dukes* majority ruled that the district court correctly admitted plaintiffs' expert testimony "because *Daubert* does not require a court to admit or exclude evidence based on its persuasiveness, but rather requires a court to admit or exclude evidence based on its scientific reliability and relevance."²⁹ Wal-Mart's objection, in other words, went to the weight of the plaintiffs' expert testimony, not to its admissibility under *Daubert*.

On the third category of evidence, plaintiffs and Wal-Mart submitted the testimony of competing experts. Plaintiffs' expert sought to demonstrate "statistically significant disparities between men and women at Wal-Mart in terms of compensation and promotions," which could be explained only by gender discrimination.³⁰ Wal-Mart challenged this opinion, faulting the expert's decision to analyze only regional-level data, rather than analyzing store-by-store data as Wal-Mart's own expert had done. Though the district court declined to decide the actual merits of the claim, the lower court did "delve [] into the substance of the expert testimony . . . to the extent necessary to determine if it [wa]s sufficiently probative of an inference of discrimination to create a common question as to the existence of the pattern and practice of gender discrimination at Wal-Mart."³¹ The district court thus found that plaintiffs' statistical evidence raised common questions of fact.

On appeal, Wal-Mart argued that "the district court erred by not finding Wal-Mart's statistical evidence more persuasive than Plaintiffs' evidence."³² The *en banc* majority disagreed, holding that, after devoting 15 pages of its opinion to rigorously analyzing both sides' evidence, "the district court reasonably made the determination to credit Plaintiffs' statistics."³³ Indeed, the *Dukes* court concluded that "[w]hile plaintiffs and Wal-Mart disagree on whose findings are more

²⁵ 509 U.S. 579, 597 (1993) (trial court must act as a "gatekeeper" in determining whether to admit or exclude expert evidence).

²⁶ *Dukes*, 222 F.R.D. at 191.

²⁷ *Dukes*, 603 F.3d at 603 n.22.

²⁸ *Id.* But see *Am. Honda Motor Company, Inc. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) ("where an expert's report or testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis before certifying the class").

²⁹ *Dukes*, 603 F.3d at 602.

³⁰ *Dukes*, 222 F.R.D. at 154.

³¹ *Dukes*, 603 F.3d at 605 (quoting *Dukes*, 222 F.R.D. at 155).

³² *Id.* at 607.

³³ *Id.* at 608.

persuasive, the disagreement is not one of whether Plaintiffs have asserted ‘common questions of law or fact.’ The disagreement is the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation.”³⁴

Finally, the *en banc* majority reviewed the anecdotal evidence that plaintiffs offered, consisting of 120 affidavits, or one for every 12,500 class members. The *Dukes* majority held that such evidence, when taken together with the plaintiffs’ additional evidence, raised an inference of common discriminatory experiences among the class members.

V. IMPLICATIONS OF WITHHOLDING JUDGMENT ON THE BATTLE OF THE EXPERTS

While recognizing that the district court must perform a rigorous analysis in determining whether Rule 23’s requirements are met, the Ninth Circuit majority nevertheless declined to require the district court to resolve, at the class certification stage, disputes relating to the merits of competing expert testimony. In this respect, the *en banc* majority diverged from other recent courts of appeals rulings.³⁵

Prior to decisions such as *IPO* and *Hydrogen Peroxide*, most courts assessing expert testimony at class certification required that the plaintiffs’ expert merely had to demonstrate a plausible methodology in order to meet Rule 23’s threshold of commonality and predominance.³⁶ *IPO* and *Hydrogen Peroxide*, however, support the view that in determining whether to grant class certification, the district court must not only analyze factual disputes concerning expert testimony (among other things), it must also resolve them.³⁷

By contrast, the *Dukes* majority settled on a middle ground between the plausible methodology approach that prevailed until very recently and the *IPO/Hydrogen Peroxide* line of cases that has since developed. “Rigorous” district court analysis of competing expert testimony

³⁴ *Id.* at 609 (emphasis added).

³⁵ See, e.g., *In re Hydrogen Peroxide*, 552 F.3d at 323 (determining that the district court erred in assuming that it was barred from weighing competing expert opinion where the district court found plaintiffs’ expert to be reliable under *Daubert* and holding that “[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands”); *Blades*, 400 F.3d at 575 (“[I]n ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case[,]” including “the resolution of expert disputes concerning the import of evidence concerning the factual setting such as economic evidence as to business operations or market transactions”).

³⁶ See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (At class certification, “[a] district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law”); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 353 (N.D. Cal. 2005) (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995) (“[T]he certification stage of this litigation is not . . . the proper forum in which to resolve this battle [of the experts]. [W]hether or not plaintiffs’ expert is correct in his assessment of common impact/injury is for the trier of fact to decide, at the proper time’ Plaintiffs need only show that their proposed method is realistic.”)

³⁷ *IPO*, 471 F.3d at 41 (Rule 23 determinations can be made “only if the judge **resolves** factual disputes relevant to each [of the] Rule 23 requirements . . . and is **persuaded** to rule based on the relevant facts . . .”) (emphasis added); *Hydrogen Peroxide*, 552 F.3d at 324 (determining that the district court committed error in assuming that it was barred from weighing competing expert opinion where district court found plaintiffs’ expert to be reliable under *Daubert* and holding that “[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court . . .”) (emphasis added); *Blades*, 400 F.3d at 575 (“[I]n ruling on class certification, a court may be required to *resolve* disputes concerning the factual setting of the case,” including “the resolution of expert disputes concerning the import of evidence concerning the factual setting such as economic evidence as to business operations or market transactions”) (emphasis added).

may be necessary to inform the decision whether plaintiffs' claims raise questions common to the class. However, the district court is not required to resolve expert disputes at the class certification stage where "the disagreement is not one of whether Plaintiffs have asserted 'common questions of law or fact,'" but presents instead a question of "deciding which side has been more persuasive."³⁸ That dispute—which side's evidence is more persuasive on the merits of the common question—is appropriate "for the next phase of the litigation."³⁹

This middle-ground approach is sound. Class certification proceedings were never intended to be used to decide the merits of an underlying factual dispute in the lawsuit—be it discrimination felt by class members in common, or impact from a price-fixing violation on a class of purchasers generally. Rather, class certification proceedings are designed to determine, using the elements of Rule 23, whether claims of various persons are sufficiently similar that they may appropriately proceed to a merits resolution on a combined or aggregated basis. That, indeed, is the core teaching of *Eisen*.

Thus, before a case can be heard as a class action, Rule 23(a) requires plaintiffs to show, among other things, that "there are questions of law or fact common to the class."⁴⁰ A "question" is a matter fairly susceptible to dispute – something, in other words, that the litigation needs to answer to resolve the merits of the dispute. Similarly, in a typical Rule 23(b)(3) case, the court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members"⁴¹ The common questions "predominate" when admissible evidence offered to answer them on a classwide basis will likely be more important to resolving the merits of the case than will proof affecting only individual class members. Significantly, neither inquiry requires the district court, at the class certification stage, to reach the merits of any common question.⁴²

As the *Dukes* majority recognized, a common question sufficient to satisfy Rule 23(a) may exist even though the defendant disputes the factual underpinning for the question. In *Dukes*, that question was, in essence, whether Wal-Mart's discriminatory practices affected all class members in a similar fashion. Although Wal-Mart disputed both the existence of any discriminatory practices and the effect of any such practice on class members generally, the fact dispute over the merits of the discrimination claim did not detract from the plaintiffs' proof of commonality. The plaintiffs' evidence—which the district court rigorously analyzed, together with Wal-Mart's own opposing evidence—was sufficiently persuasive to show the existence of a common question. For that reason, the factual merits of the dispute itself could properly be resolved only at a later stage of the lawsuit—either on summary judgment under the standards that govern such motions, or at the trial itself.

Decisions such as *IPO* and *Hydrogen Peroxide*, on the other hand, permit the inquiry under Rule 23 to usurp the function of these later stages of the lawsuit. The *en banc* majority in *Dukes* refocuses the inquiry more clearly on the purpose for Rule 23's class certification determination.

³⁸ *Dukes*, 603 F.3d at 609.

³⁹ *Id.*

⁴⁰ Fed. R. Civ. P. 23(a)(2) (emphasis added).

⁴¹ Fed. R. Civ. P. 23(b)(3) (emphasis added).

⁴² "Impact" in antitrust cases often raises issues of commonality under Rule 23(a) and predominance under Rule 23(b)(3).

VI. A NEW ANALYSIS TO DETERMINE WHETHER MONETARY CLAIMS PREDOMINATE UNDER RULE 23(B)(2)

The *Dukes* court resolved another unrelated issue: whether the district court properly certified a class under Rule 23(b)(2), which governs class actions seeking injunctive or declaratory relief against conduct directed to the class generally.⁴³ Here, the rub was that the *Dukes* plaintiffs sought to recover back-pay and punitive damages, as well as injunctive relief. Wal-Mart argued that the district court erred in certifying because plaintiffs' claims for back-pay and punitive damages predominated.⁴⁴

In determining whether monetary relief "predominates" over injunctive or declaratory relief, and therefore precludes certification of a Rule 23(b)(2) class, the *en banc* majority rejected the subjective intent standard that the Ninth Circuit had previously adopted in *Molski v. Gleich*,⁴⁵ as well as the "incidental damage standard" first enunciated by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*⁴⁶

Instead, relying on a dictionary definition of "predominant," the *Dukes* majority held that "[t]o be certified under Rule 23(b)(2), [] a class must seek only monetary damages that are not 'superior [in] strength, influence, or authority' to injunctive relief."⁴⁷ To assess whether monetary damages are "superior" to injunctive relief, the *en banc* majority suggested various relevant factors, none of which is independently determinative, including: "whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature as measured by recovery per class member raise particular due process and manageability concerns."⁴⁸

Applying this analysis, the *Dukes* majority held that the district court did not abuse its discretion in certifying a Rule 23(b)(2) class, even though the plaintiffs alleged a significant claim for back-pay. However, with respect to plaintiffs' claims for punitive damages, the court reversed certification of a Rule 23(b)(2) class and remanded to allow the district court to determine whether the punitive damages sought predominated over injunctive and declaratory relief. If the district court concluded on remand that the punitive damage class could not be certified under Rule 23(b)(2), the *Dukes* majority instructed the lower court also to consider whether class

⁴³ Rule 23(b)(2) requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

⁴⁴ Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendments; see also *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180 (9th Cir. 2001) ("class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive").

⁴⁵ The subjective test assesses predominance by seeking to determine whether: (1) "in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." 318 F.3d 937, 950 n.15 (9th Cir. 2003) (citing *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001)).

⁴⁶ Under the *Allison* approach, monetary relief predominates over other forms of relief "unless it is incidental to requested injunctive or declaratory relief." 151 F.3d 402, 415-16 (5th Cir. 1998). See also *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 646-51 (6th Cir. 2006); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs Local No. 139*, 216 F.3d 577, 580-81 (7th Cir. 2000).

⁴⁷ *Dukes*, 603 F.3d at 616.

⁴⁸ *Id.* at 617.

certification of the punitive damages claims was appropriate under Rule 23(b)(3). Finally, the *Dukes* majority concluded that monetary relief predominated with respect to putative class members who were not Wal-Mart employees at the time that the plaintiffs' complaint was filed. Accordingly, the *Dukes* majority remanded to the district court to determine whether such a class could be certified under Rule 23(b)(3).⁴⁹

VII. CONCLUSION

Dukes, to reiterate, was decided by the barest of majorities—six to five. In view of the significance of the issues raised, and the sheer magnitude of the stakes in the lawsuit, an attempt at further appellate review, either in the Supreme Court or the Ninth Circuit itself, is not unlikely. For now, however, the majority ruling stands as a significant class action decision.

The *Dukes* majority joined recent circuits in holding that the district court must “rigorously analyze” the merits where such an inquiry is necessary in determining whether Rule 23's requirements are satisfied. However, the *en banc* majority rejected the notion that the district court must resolve expert disputes at the class certification stage where the disagreement does not pertain to whether plaintiffs have demonstrated common questions of law or fact, but instead centers on which side's expert is more persuasive. Moreover, the *en banc* majority's new, multi-factored analysis for determining when injunctive as opposed to monetary relief predominates under Rule 23(b)(2) creates a three-way circuit split, a circumstance that, too, may well command further appellate attention.

⁴⁹ The *en banc* panel noted, however, that putative class members who were still Wal-Mart employees as of the filing of the complaint had standing to seek injunctive and declaratory relief, irrespective of whether they later left the company. *Id.* at 623.