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Labor and Employment and ERISA Class Actions After *Wal-Mart* and *Comcast*—Practice Points for Defendants (Part III – Experts)

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Introduction and Overview Part III: *Wal-Mart* and *Comcast* and the Central Role of Experts in Class Certification

This is the final installment of a three-part Bloomberg BNA Insight article addressing the impact of *Wal-Mart* and *Comcast* on labor and employment and ERISA class actions (197 PBD, 10/10/13; 207 PBD, 10/25/13; 40 BPR 2427, 10/15/13; 40 BPR 2537, 10/29/13). This is a hotly contested and developing area—cases such as the U.S. Court of Appeals for the Fourth Circuit's recent ruling suggesting a class may be possible regarding management discretion indicate that the full meanings of *Wal-Mart* and of *Comcast* are still being developed.[1] This part focuses on experts, and how defendants may be able to use experts to defeat or limit class certification.

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Wal-Mart and *Comcast* offer a good place to begin a discussion on class certification and experts, since the failures of expert proof in those cases led to class decertification. In *Wal-Mart*, plaintiffs sought to prove commonality for their pay and promotion claims using two forms of expert proof: (i) a ''social framework'' analysis purporting to show that Wal-Mart had a corporate culture that made it susceptible to gender bias; and (ii) a statistical analysis that showed disparities in pay and promotions.[2] In answering the central question as to ''why was I disfavored,'' the Court found the social framework analysis of plaintiffs' expert useless for class purposes—it provided no ''glue'' to show that discretion was exercised in a common and discriminatory manner—since it could not answer whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart were determined by stereotyped thinking on gender.[3]

The Court also found plaintiffs' statistical evidence deficient. The Court noted that the presence of disparities at the national or regional level does not establish the existence of disparities—or discrimination—at the store level where the challenged decisions were made. The statistics' more fundamental flaw was that they failed to address possible sex-neutral reasons, including the relative availability of qualified and interested women at the store level, that could rebut any bottom-line disparities. Proof of bottom-line disparities does not answer the common question. Rather, the plaintiff must identify the *particular* employment practice causing the disparity and show that it caused the disparity through a common mode of acting.[4]

[1] *Scott v. Family Dollar Stores, Inc.*, No. 12-1610, 2013 BL 287115 (4th Cir. Oct. 16, 2013) (allowing complaint to be amended to assert class claims for decisions involving management discretion; distinguished *Wal-Mart* based on amended allegations involving higher-level managers than those at issue in *Wal-Mart*).

[2] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-56 (2011).

[3] *Id.* at 2553-54.

[4] *Id.* at 2555-56.

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In *Comcast Corp. v. Behrend*,[5] the Court addressed the proof of harm and damages—which is almost always done through experts—required to certify a class. In an antitrust claim regarding a proposed class of cable subscribers, plaintiffs proffered four theories of antitrust injury that they argued drove-up cable subscription rates.[6] The district judge found only one of these, the ''deterrence of overbuilding'' theory, capable of class-wide proof, and that the others could not be determined in a manner common to the class.[7] Plaintiffs' economics expert admitted that he had *not* isolated the damages resulting from the different theories of antitrust impact, instead including the non-class theories in his model.[8]

The Court concluded that this expert evidence failed to carry plaintiffs' burden of proof on Rule 23's requirements.[9] Specifically, the Court found that plaintiffs failed to satisfy the predominance requirements of Rule 23(b)(3) because they could not show damages capable of class-wide proof.[10] The Court held that the damages model must be consistent with the liability model—i.e., that any model purporting to serve as evidence of damages in a class action must measure *only* damages attributable to the class-wide theory of harm.[11] In the view of the dissent, the expert evidence tendered was sufficient for class purposes since it purported to show that Comcast's conduct resulted in higher prices, even though it failed to show causation tied to the class theory of harm.[12] The majority imposed a far more rigorous standard: Plaintiffs must prove that the claimed class-wrong *caused* the injury class-wide, free of taint from individual factors. Absent such proof, plaintiffs cannot satisfy Rule 23's requirement that common issues predominate for class claims seeking damages.[13]

As detailed below, *Wal-Mart* and *Comcast* provide significant grounds to challenge expert opinions supporting class certification.

Going on Offense: Using and Attacking Experts in Class Certification

The facts necessary to establish—or disestablish—whether Rule 23 has been met typically require expert analysis and opinion, *e.g.*, analysis of whether there are common issues or of whether everyone in the class has a common interest or suffered a common injury. These are not facts typically found in the record, and rulings like *Wal-Mart* and *Comcast* illustrate how expert issues can affect class certification.

To prohibit abuse and enhance evidentiary reliability, there are a host of rules that control and limit expert evidence. In the class stage, an initial issue is whether class experts are subject to *Daubert* and the attendant reliability requirements imposed on expert evidence.[14] To meet *Daubert's* reliability requirements, the expert must show that his testimony (i) is based on sufficient facts or data, (ii) is the product of reliable principles and methods, and (iii) that the expert has applied the principles and methods reliably to the facts at hand.[15] In a not-too-distant era of ''certify first, ask questions later,'' many courts declined to require that class experts meet the reliability standards imposed by *Daubert*. These days should be past; now class expert evidence must be not merely admissible but persuasive to pass class muster.[16]

On defense strategy, class certification is typically procedurally advantageous to defendants. Unlike in summary judgment, at class certification *plaintiffs* bear the burden of proof. Further, class certification is often the first opportunity for a defendant to put on facts supporting its case and to show the defects in a plaintiff's class claims. Defendants can challenge plaintiffs' experts, and defendants can also put on their own experts to show the defects in plaintiffs' expert-analyses or to develop expert evidence showing that the Rule 23 requirements have not been met. Potential grounds to challenge experts and the Rule 23 requirements are discussed throughout this three-part Bloomberg BNA Insight article; some key points include:

- On discrimination claims, are decisions made at the local store, office, or facility level? Does plaintiff's expert bundle up or ''average out'' the statistics? Conversely, can a defense expert show variability between the store, office, or facility on the challenged criteria?

- On discrimination claims, are decisions made at multiple levels, with multiple actors and inputs? Does plaintiff's expert use a ''bottom line'' analysis that does not account for or break out the steps in the process? Conversely, can a defense expert show the importance of the steps in the process, and any variability on the challenged criteria by the different actors and steps in the process?

- On discrimination claims, has plaintiff's expert accounted for employee choice and interest? Conversely, can a defense expert show that there is not homogeneous interest in or qualifications for the job positions at issue?

- On ERISA (or discrimination claims) have some in the proposed class benefitted from the challenged

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[5] 133 S. Ct. 1426 (2013).
[6] *Id.* at 1430-31.
[7] *Id.* at 1431, n.3.
[8] *Id.*
[9] *Id.* at 1433-35.
[10] *Id.* at 1433.
[11] *Id.*
[12] *Id.* at 1441.
[13] *Id.* at 1433-35.
[14] *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is the seminal Supreme Court ruling setting forth the reliability standards that apply before expert evidence is admissible. *See also Fed. R. Evid.* 702.
[15] FED. R. EVID. 702; *see also Daubert*, 509 U.S. at 589-95.
[16] The ruling by the *Wal-Mart* district court was an apt example of the prior standards, admitting a social framework analysis that could not answer with any degree of confidence the class issue; the district court did so because it thought *Daubert* did not apply at the class stage. The Supreme Court pointedly noted ''we doubt that is so,'' and proceeded to eviscerate and dismiss this evidence as it decertified the class. *See Wal-Mart*, 131 S. Ct. at 2553-54. After *Wal-Mart*, many courts apply *Daubert* to the admissibility of expert analysis of class issues; perhaps more important, like *Comcast*, they require this evidence to be not just admissible but *persuasive* in carrying plaintiff's burden to show that Rule 23's requirements have been met. *See, e.g.*, *Comcast*, 133 S. Ct. at 1433-35; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (expert's testimony must be admissible under *Daubert* and persuasive on the class issues under the ''rigorous analysis'' standard applied to class certification); *Pedroza v. PetSmart, Inc.*, (C.D. Cal. Jan. 28, 2013) (explaining and applying same).

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conduct? Can a defense expert statistically analyze and show these differences?

Practice Pointers:
- It sometimes may be worthwhile to file *Daubert* motions challenging the admissibility of class experts. Even if the motion is not granted, it can show flaws in the expert's analysis that undercut its persuasive value.
- Consider using defense experts not just to show flaws in the analyses of plaintiffs' experts, but also to affirmatively show why class certification requirements have not been met.

Expert Issues Arising in Employer Discrimination Class Claims

Because they may rely on invalid or questionable assumptions, plaintiffs' class experts in discrimination claims are often ripe for challenge. Specifically, it is common for the plaintiff's class expert to assume homogeneity so as to infer causation and discrimination; for example, by assuming that everyone in the proposed class has the same job qualifications or interests or that the challenged decisions were made by the same decision-maker. But as explained in the Federal Judicial Center's *Reference Manual on Scientific Evidence*, if the data is *not* homogeneous, the statistical analysis combining that data is irrelevant and often misleading.[17] Thus, as *Wal-Mart* noted, when discretionary decisions are made by different decision-makers, ''demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.''[18] Likewise, as illustrated in the *Reference Manual on Scientific Evidence*, if females are disproportionately applying to a position with a lower acceptance rate, those statistics cannot be reliably combined with other statistics to show gender discrimination.[19] Similarly, association does not necessarily show causation, as there may be confounding variables that cause or substantially affect the challenged disparities.[20] Statistics seeking to show disparities are also invalid if they fail to consider those who are similarly situated for the challenged action.[21]

Expert issues worth noting at the class-certification stage of employment discrimination actions may include:

- Failure to focus on the appropriate unit or level of analysis; and
- Failure to account for confounding variables like individual choice or the interests of putative class members.

''Soft science experts,'' like survey and other social science experts, may also be challenged as unreliable or unpersuasive in showing that class requirements, such as commonality, have been met. *Wal-Mart* illustrated this, rejecting a sociological expert who could not specify with any degree of precision how often gender stereotyping affected the managers' decisions, and, thus, his testimony was irrelevant since it provided no ''glue'' to show there was a common mode of exercising discretion.[22] Experts who purport to do surveys, or the like, to extrapolate to class damages also may be interdicted by *Wal-Mart*'s bar on ''Trial by Formula.''[23] Finally, it is important for defendants to consider using experts to undermine plaintiffs' statistical or other expert analyses and to develop alternative analyses showing, for example, that commonality, typicality, or adequacy are not met.

Failure to Focus on the Appropriate Unit or Level of Analysis. In *Wal-Mart*, commonality for plaintiffs' claims required showing that discretionary employment decisions were being made uniformly by individual store managers throughout all of Wal-Mart's 3,400 stores.[24] In attempting to make such a showing, plaintiffs presented statistical evidence based on aggregated data collected from the regional and national corporate levels. As discussed above, the Court found this evidence insufficient, because disparities between men and women at the national or regional level could not establish the existence of the same disparities at the individual store level.[25] The Court held that ''[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.''[26] The Court explained that when claims are based on discretionary employment decisions, proof of discrimination and commonality must account for the actions of the actual decision-maker.

In line with *Wal-Mart*, lower courts have denied class certification when claims regarding discretionary employment decisions rely on statistical analyses that aggregate data across decision-makers. Indeed, in *Bolden v. Walsh Construction Co.* the Seventh Circuit summarized the post *Wal-Mart* world by explaining that ''local

[17] Federal Judicial Center's *Reference Manual on Scientific Evidence,* 233-35 (3d Ed. 2011).

[18] *See* 131 S. Ct. at 2554.

[19] *Reference Manual on Scientific Evidence,* 233-35.

[20] *Id.* at 262-64; *see also Randall v. Rolls-Royce Corp.*, No. 1:06-cv-860-SEB-JMS (S.D. Ind. Mar. 12, 2010) (in gender discrimination claim over compensation in which managers had substantial discretion to adjust pay, expert's report failed to account for components of the compensation system such as merit increases, annual bonuses, and critical skills adjustments).

[21] *E.g.*, *EEOC v. Bloomberg L.P.*, No. 07 Civ. 8383 (LAP), 2010 BL 31687 (S.D.N.Y. Aug. 31, 2010) (in pregnancy discrimination claim over leave, expert's report was irrelevant and unreliable because it failed to compare class members to other similarly situated Bloomberg employees who had also taken leave); *Bolden v. Walsh Grp.*, No. 06 C 4104, 2012 BL 76095 (N.D. Ill. Mar. 30, 2012) (in race discrimination claim, the expert report was inadmissible because in coming up with labor market comparator to show disparities, it failed to take into account geography, commuting distance, ability and job interest).

[22] *See* 131 S. Ct. at 2553-55; *see also, e.g.*, *Jones v. YMCA*, No. 09 C 6437 (N.D. Ill. Sept. 5, 2013) (experts' research on unconscious bias based on millisecond word associations in a laboratory cannot be reliably applied to managers' decisions in the workplace; such an application has no social science research support, and ignores numerous differences, including that managers' decisions have consequences and there are accountability mechanisms that counteract any unconscious bias).

[23] *See Wal-Mart*, 131 S. Ct. at 2561; *cf., e.g.*, *In re Taco Bell Wage & Hour Actions*, No. 1:07-cv-01314-OWW-DLB., 2011 BL 244118 (E.D. Cal. Sept. 26, 2011) (to show class manageability under Rule 23(b)(3), plaintiff proposed an expert who would survey a sample to develop a statistical analysis of class liability and damages; court held expert's proposed method was too unreliable).

[24] *See* 131 S. Ct. at 2555.

[25] *Id.*

[26] *Id.* at 2555-56.

discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity.''[27] In *Bolden*, plaintiffs (construction workers formerly employed by defendant) alleged that defendant's construction-site superintendents exercised their discretion in a racially discriminatory fashion over assigning overtime hours and managing on-site working conditions.[28] Plaintiffs supported their allegations with statistical evidence based on data aggregated from all Chicago-area sites. The court, however, found that the analysis failed to focus on the ''appropriate unit of analysis.''[29] The court explained that if defendant ''had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers—but that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality.''[30]

The Third Circuit encountered the issue of an expert's failure to focus on the appropriate unit of analysis in a slightly different context in *Rodriguez v. National City Bank*.[31] In *Rodriguez*, the district court denied certification of the settlement class because, in *Wal-Mart*'s wake, plaintiffs' regression analyses could not establish commonality and typicality.[32] Plaintiffs' class action alleged that, because of defendant's discretionary pricing policy on certain mortgage fees, black and Latino borrowers received disproportionately higher non-risk-related charges than similarly-situated white borrowers.[33] The district court found that statistical evidence of an overall race-based disparity was insufficient to establish commonality and typicality; rather, plaintiffs would need ''to show the disparate impact and analysis for each loan officer or at a minimum each group of loan officers working for a specific supervisor[.]''[34] The Third Circuit agreed and explained that ''the exercise of broad discretion by an untold number of unique decision-makers . . . undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode.''[35]

Failure to Account for Confounding Variables like Individual Choice of the Putative Class Members. Statistical analyses may also be vulnerable to attack for failure to account for the individual choice or interests of putative class members. When defendants are able to put forth evidence suggesting proposed class members may not have homogeneous interests, choices or qualifications, courts have rejected plaintiffs' attempts to gloss over such variables and make assumptions regarding the homogeneity (and, in turn, commonality and typicality among the members) of the proposed class.

For example, in *York v. Starbucks Corp.*, a wage and hour case involving allegations that Starbuck's corporate policies incentivized managers to ''shortchange'' workers of their rights under California labor law, the court took issue with plaintiffs' statistical evidence for failure to take individual choice into account.[36] The court explained that, with regard to lunch and rest breaks, ''the statistical evidence cannot begin to show whether a break was skipped because a manager forbade the employee from taking it or whether it was not taken as a matter of individual choice.''[37] Accordingly, the court found that the statistical evidence failed to demonstrate what might have caused the alleged labor violations—corporate policy, or individual choices and desires.[38]

Similarly, in *Puffer v. Allstate Ins. Co.*, plaintiff commenced a Title VII sex-discrimination action against Allstate on behalf of all female Allstate employees in management positions.[39] In an effort to establish commonality, plaintiff proffered a statistical analysis of Allstate's personnel data, which provided information regarding employment records and compensation.[40] Plaintiff argued that the analysis identified disparities in job assignments, promotions, and levels of salary paid.[41] However, the court disagreed, taking issue with the fact that plaintiff's expert failed to consider, among other things, ''whether putative class members were interested in the management jobs that [the expert] found were underrepresented by women . . . .''[42] The court noted that although it is not necessary for experts to include all possible measurable variables in their analyses, crucial variables may not be omitted or glossed over—and in Title VII cases particularly, such crucial variables include the identification of those who were qualified and interested in the position.[43]

Failure to account for individual choices and interests—at least when the evidence suggests that this is a meaningful issue—also undermines statistical analyses by infecting the data with claims of putative class members who suffered no class harm. Such failures have led courts to reject employment-related sta-

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[27] 688 F.3d 893, 898 (7th Cir. 2012).

[28] *Id.* at 894.

[29] *Id.* at 896.

[30] *Id.* Similarly, in *Bell v. Lockheed Martin Corp.*, No. 08-6292 (RBK/AMD), 2011 BL 316158 (D.N.J. Dec. 14, 2011), plaintiffs alleged that Lockheed engaged in gender discrimination by promoting men more quickly than women who were equally, if not more, qualified for the respective positions. As in *Wal-Mart*, decisions regarding promotions and wage increases were made pursuant to the discretion of individual managers; however, the statistical analyses proposed by plaintiffs were aggregated based on company-wide data. The court found that because the statistical proofs proffered by plaintiffs were essentially the same as the proofs rejected in *Wal-Mart*, plaintiffs failed to establish commonality. *Id.* at *23-24.

[31] 726 F.3d 372 (3d Cir. Aug. 12, 2013).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id. But see Scott v. Family Dollar Stores, Inc.*, No. 12-1610, 2013 BL 287115 (4th Cir. Oct. 16, 2013) (''*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel. . . . Consequently, discretionary authority exercised by high-level corporate decision-makers, which is applicable to a broad segment of the corporation's employees, is more likely to satisfy the commonality requirement than the discretion exercised by low-level managers in *Wal-Mart*.'').

[36] No. CV 08-07919 GAF (PJW) (C.D. Cal. Nov. 23, 2011).

[37] *Id.*

[38] *Id.*

[39] 255 F.R.D. 450, 454-55 (N.D. Ill. 2009).

[40] *Id.* at 461-62.

[41] *Id.* at 462.

[42] *Id.* at 465; *see also In re Taco Bell*, 2011 U.S. Dist. LEXIS 109169, at *18 (finding that failure to consider all facts underlying terminations of putative class members eliminates ability to opine on class-wide terminations).

[43] *Puffer*, 255 F.R.D. at 461.

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tistical analyses as unreliable on proof of liability.[44] This also may have added force on proof of class damages. In *Comcast*, the Supreme Court faced analogous issues in rejecting plaintiffs' expert's damages model; this was so because ''at the class certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case . . . .''[45] Although *Comcast* was not an employment case, its principle that class damages must be limited to the class harm uninfected by individual issues is a broad one. The same principle applies when plaintiff's statistical analyses or proofs of class harm fail to account for individual choices and interests in the employment context—the analyses become over-inclusive and incapable of reflecting the class harm.

Defendants' Use of Experts to Defeat Class Certification. As the cases above illustrate, challenging plaintiff's proffered statistical experts is often effective to defeat or limit the class. Notably, this strategy need not be strictly defensive, as defendants may also affirmatively employ expert testimony to defeat class certification.

For example, in *Serrano v. Cintas Corp.*, the court found that defendants' statistical experts effectively undermined the statistical evidence proffered by plaintiffs, preventing plaintiffs from establishing a class-wide discriminatory impact.[46] In *Serrano*, plaintiffs alleged that defendant engaged in race and gender discrimination when hiring for sales positions, and they proffered statistical experts to establish commonality.[47] Defendant, in turn, presented statistical experts who demonstrated that although some of defendant's store locations under-hired women and racial minorities, other locations over-hired members of these groups.[48] Further, defendants' expert showed that although some locations under-hired women, those same locations over-hired racial minorities.[49] Indeed, some locations under-hired one or both groups one year and over-hired the same group or groups the following year.[50] Defendant's expert thus provided evidentiary support for the lack-of-commonality issue flagged in *Wal-Mart*—that a court can neither assume that there was a ''common mode of acting'' nor establish commonality by aggregating data across decision-makers and facilities.

In *Randall v. Rolls-Royce Corp.*, the district court denied class certification because, among other things, defendants' statistical expert demonstrated a lack of commonality among putative class members.[51] In a gender discrimination claim over compensation, defendants' expert showed that plaintiffs' expert failed to account for important variables in compensation.[52] The *Rolls-Royce* defendants also used statistical analyses to demonstrate that plaintiffs failed to satisfy Rule 23's typicality requirement. Here, defendants' expert showed that the named plaintiffs actually earned salaries equal to or greater than their male comparators during the class period.[53] Thus, the court found ''it is plainly true that the particular circumstances surrounding the named Plaintiffs' individual claims do not comport with the required element of typicality.''[54]

Practice Pointers:

- Closely examine statistical analyses to determine whether the expert utilized data based or focused on an inappropriate unit of analysis, *e.g.*, regional or national data as opposed to local data.
- Closely examine statistical analyses to determine whether statistical experts have considered factors such as individual choices or interests. Investigate whether there are other potential confounding variables lurking in the data and analysis.
- Investigate whether there is reliability and ''fit'' to opinions offered by social science or survey experts.
- Consider putting forth affirmative expert evidence showing lack of class commonality, typicality or class conflicts.

Expert Issues Arising in ERISA Class Claims

ERISA claims involving disclosures (ERISA imposes statutory and fiduciary duties on disclosing information to participants) or investments in 401(k) plans often raise class issues for experts. For disclosure claims, the assumption of homogenous understandings may be inaccurate. Many ERISA claims involve multiple disclosures over extended periods, each of which can raise issues about what the various class members knew, relied upon, or understood.

For example, in *Groussman v. Motorola, Inc.*, the court denied class certification for former participants in a 401(k) plan offered by Motorola.[55] Plaintiffs alleged that defendants imprudently managed the 401(k) plan, including by making misrepresentations related to their investments in Motorola's stock.[56] The court found that plaintiffs could not satisfy Rule 23's typicality requirement because, among other reasons, they failed to identify the specific misrepresentations that were made and relied upon.[57] In contrast, defendants showed that there was ''a difference as to what each [p]laintiff understood at any given time, and that [p]laintiffs did not rely upon

[44] *Bolden v. Walsh Grp.*, No. 06 C 4104, 2012 BL 76095 (N.D. Ill. Mar. 30, 2012) (in race discrimination claim the expert report was inadmissible because it failed to take into account how geography and commuting distance would affect job interest); *Aliotta v. Bair*, 614 F.3d 556, 568 (D.C. Cir. 2010) (''If [expert's] statistics do not control for [employee choice], they tell us nothing about *why* older employees took the buyouts, and are therefore not relevant to determining whether FDIC discriminated against them.''); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21, 324-26 (7th Cir. 1988) (same—statistics were flawed and failed to show discrimination when they failed to account for different interest between genders for commissioned sales position).

[45] 133 S. Ct. at 1433 (internal quotation omitted).

[46] No. 04-40132, 2009 BL 133763 (E.D. Mich. Mar. 31, 2009).

[47] *Id.*

[48] *Id.* at 6.

[49] *Id.*

[50] *Id.*

[51] No. 1:06-cv-860-SEB-JMS (S.D. Ind. Mar. 12, 2010) *aff'd* 637 F.3d 818 (7th Cir. 2011).

[52] *Id.* (explaining that Plaintiffs' expert ''examined components of the Rolls-Royce compensation system other than base salaries, such as the merit increases, annual bonuses, and critical skills adjustments to employee salaries, and found no evidence of disparities adverse to women. Conveniently, that conclusion is not disclosed in his report.'').

[53] *Id.*

[54] *Id.*

[55] No. 1:10-cv-00911, 52 EBC 1965 (N.D. Ill. Nov. 15, 2011) (222 PBD, 11/17/11; 38 BPR 2142, 11/22/11).

[56] *Id.*

[57] *Id.* at *5.

the same information or statements in making their investment decisions.''[58] Communications or statistical experts also may be coupled with this anecdotal evidence to defeat class; for example, a statistical analysis of actions taken may show that plaintiff's claim of uniform homogenous understandings and reliance is implausible.

Experts thus may prove useful when claims involve different communications made to different members of a proposed class—even when objective standards apply to whether a defendant is liable for those communications. In *Luiken v. Domino's Pizza LLC*, the issue was whether a delivery service charge imposed by defendant for pizza deliveries was a gratuity under a state statute.[59] The court held that even though the statute used an objective standard to determine whether a service charge is a gratuity, the context of the communications as to each customer still mattered. Thus, the court found that there was no commonality under *Wal-Mart*, because there was no common answer as to what each customer was told and understood regarding their service charge payments.[60] In this context communication experts could buttress this lack of commonality by showing how understandings vary based on the different communications made.

Experts also can be central to class claims challenging ERISA investments involving 401(k) or other participant-directed individual account plans. For example, experts may be able to show that the class's interests are not homogenous. This proved effective in *Langbecker v. Electronic Data Systems Corp.*, where plaintiffs claimed that the defendants breached their fiduciary duties by offering the company's stock in the 401(k) plan.[61] Defendants' expert showed that thousands of class members profited from this investment, and thousands more continued to invest in the company's stock *after* the plaintiffs claimed it should be eliminated. Moreover, the expert showed that putative class members had different interests on which theory of the case would maximize their claims and recovery.[62] The court found that the expert's analysis defeated Rule 23's adequacy requirement; thus, the class was decertified.[63]

Wal-Mart has reinvigorated this type of conflict analysis. In *Groussman*, defendants attacked the commonality of the proposed class by showing that the challenged investments had varying effects based on the putative class members' individual trading patterns.[64] The court held this defeated commonality, finding it ''likely that a portion of the proposed class members actually acquired a net gain during the class period as a result of the investments in Motorola stock.''[65]

Similarly, in *Spano v. Boeing Co.*, an action challenging defendant's 401(k) plan investment options and fees, the Seventh Circuit found that the named plaintiffs could not satisfy Rule 23's adequacy requirement, because the class was so broadly defined that many putative members suffered no harm or may have even profited from the challenged investment options.[66] These class conflicts and lack of commonality can arise in multiple contexts, such as for claims based on fund withdrawal restrictions imposed in response to financial disruption caused by the Great Recession.[67]

These intra-class conflict issues are also not limited to actions challenging investments in 401(k) or other participant-directed plans. For example, these issues may arise in actions challenging plan investments for closely held ESOPs. In *Hans v. Tharaldson* the court found current and former employees of an ESOP-owned company had divergent interests regarding the class litigation because the litigation risked harm to the company's value and sales prospects, thereby harming the ESOP investments of the current employees.[68]

Practice Pointers:

- If the class claims challenge plan investments, consider using an expert to analyze whether there is a lack of commonality, typicality or even possible conflicting interests and actions regarding the challenged investments.
- If the class claims challenge disclosures, consider using experts to analyze whether there were common, uniform understandings and actions in relation to the challenged disclosures.

[58] *Id.*

[59] 705 F.3d 370, 372 (8th Cir. 2013).

[60] *Id.* at 374-76.

[61] 476 F.3d 299, 39 EBC 2352 (5th Cir. 2007)(13 PBD, 1/22/07; 34 BPR 210, 1/23/07).

[62] *Id.* at 315.

[63] *Id.* at 315-16.

[64] No. 1:10-cv-00911, 52 EBC 1965 (N.D. Ill. Nov. 15, 2011).

[65] *Id.*

[66] 633 F.3d 574, 586-87, 50 EBC 1801 (7th Cir. 2011)(16 PBD, 1/25/11; 38 BPR 220, 2/1/11). *Cf. Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813-14, 56 EBC 2352 (7th Cir. 2013)(154 PBD, 8/9/13; 40 BPR 1959, 8/13/13)(in case challenging investment in a 401(k) plan, finding that the plaintiffs' use of the Hueler Index as a method of measuring damages was a reasonable way of excluding uninjured persons from the class and limiting intra-class conflicts).

[67] *See In re Principal U.S. Property Account ERISA Litig.*, No. 4:10-cv-00198 at pp. 46-57, 2013 BL 282261 (S.D. Iowa Sept. 30, 2013)(198 PBD, 10/11/13; 40 BPR 2413, 10/15/13) (class members made individual investment choices in response to withdrawal restrictions that impacted who was in the class and who was harmed; plaintiff's claims also created conflicts between those who wanted higher liquidity versus those who wanted higher returns).

[68] No. 3:05-cv-115, 49 EBC 2194 (D.N.D. May 7, 2010), *amended by* No. 3:05-cv-115 (D.N.D. Aug. 27, 2010). For cases raising similar issues outside the ERISA context, see *Gilpin v. American Federation of State, County, & Municipal Employees, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir. 1989) (affirming decision to refuse to certify a class when different groups of employees had differing interests as to the remedies to be sought from a union), and *United Independent Flight Officers v. United Air Lines*, 756 F.2d 1274, 1284 (7th Cir. 1985) (affirming refusal to certify class when members had divergent and antagonistic interests regarding goals of the lawsuit and benefits sought).

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