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Labor and Employment and ERISA Class Actions After *Wal-Mart* and *Comcast*—Practice Points for Defendants

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Introduction and Overview[1]

In *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court made clear that the class action rules apply with full force to employment discrimination cases.[2] *Wal-Mart* directs courts to conduct a "rigorous analysis" to determine whether employment discrimination plaintiffs have proven that they meet the requirements of Federal Rules of Civil Procedure Rule 23. Moreover, the decision breathes new life into the Federal Rules' commonality requirements and the limitations on "mandatory" classes embodied in Rule 23.

After *Wal-Mart,* the Supreme Court again altered the landscape of class action litigation when in *Comcast Corp. v. Behrend*[3] the court applied what it called the "straightforward application of class certification principles" to issues of class damages. Though not a labor and employment case, the import of *Comcast* is clear: plaintiffs' damages theory must (i) match their class liability theory and (ii) be able to prove damages on a classwide basis, free from taint from individualized harms.[4]

This report addresses the impact of *Wal-Mart*, *Comcast* and the developing body of cases applying them. The report focuses on how they may be used to defend against labor and employment and Employee Retirement Income Security Act class actions. The report also briefly addresses the potential impact of *Wal-Mart* and *Comcast* on Fair Labor Standards Act and Age Discrimination in Employment Act "collective actions." Some of the key conclusions are:

- By adopting a dissimilarities analysis to determine whether common questions have common answers, *Wal-Mart* makes commonality a significant screen to eliminate or cabin many types of labor and employment and ERISA class actions.

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[2] 131 S. Ct. 2541, 2011 BL 161238 (2011).

[3] 133 S. Ct. 1426, 1433, 2013 BL 80435 (2013).

[4] *Id.* at 1433-35.

- *Wal-Mart*'s dissimilarities analysis is particularly important (i) to labor and employment class actions involving discretionary or complex multilevel or multisource decision making, (ii) to ERISA investment cases in 401(k) and similar plans, and (iii) to ERISA (and labor and employment) class actions that depend on allegedly defective or misleading communications.
- *Wal-Mart* requires many, if not all, class actions seeking individualized monetary relief to meet Rule 23(b)(3)'s more stringent predominance and superiority requirements before any class can be certified.
- *Comcast*'s making damages a central part of class analysis is a substantial change in the law, and should bar class actions unless plaintiffs can prove that the alleged class wrong caused a classwide harm. This change is already having a substantial impact in many wage-and-hour cases.
- *Comcast* and *Wal-Mart* both illustrate the importance of expert testimony in class certification, and apply strict standards to that testimony.

This report addresses the impact of *Wal-Mart* and *Comcast* in three parts. Part I discusses the *Wal-Mart* and *Comcast* rulings, and how commonality may be applied to eliminate or cabin class actions after *Wal-Mart*. Part I also discusses adequacy and typicality, and how these requirements may be heightened after *Wal-Mart* and *Comcast*. Part II addresses the Rule 23(b) principles in *Wal-Mart*, including some defenses to plaintiffs' use of "issue" or "hybrid" certifications to limit or circumvent *Wal-Mart*. On a related point, Part II addresses whether *Wal-Mart* may limit certification of ERISA classes under Rule 23(b)(1)(A). Part II also addresses the use of trial plans and subclasses as means to limit or defeat class actions and ends with a brief discussion of *Wal-Mart* and *Comcast's* possible impact on "collective actions" under the Fair Labor Standards Act and the Age Discrimination in Employment Act. Finally, Part III addresses experts in class actions, and how defendants may use expert analysis to defeat or limit class certification.

Part I—COMMONALITY, TYPICALITY, AND ADEQUACY AFTER *WAL-MART* AND *COMCAST*

The Class and the Substantive Aspects of the *Wal-Mart* Ruling

Wal-Mart Stores v. Dukes arose out of the largest labor and employment class action ever filed.[5] In *Wal-Mart*, plaintiffs challenged pay and promotion practices on behalf of a proposed class of one and one-half million current and former female employees of Wal-Mart. Plaintiffs claimed that Wal-Mart's supervisors and local managers exercised their discretion on pay and promotions in a way that discriminated against females. Pay was set within bounded ranges, while promotions included both objective and subjective criteria.[6] Plaintiffs sought to prove their claim through three forms of proof: (i) a "social framework" analysis that purported to show Wal-Mart had a corporate culture that made it susceptible to gender bias; (ii) a statistical analysis that showed disparities in pay and promotions; and (iii) anecdotal statements claiming discriminatory actions.[7]

The *Wal-Mart* court began its analysis by focusing on the standards applicable to class actions. The Supreme Court began by noting that class actions are exceptions to the rule that litigation is conducted by and on behalf of only individual named parties, and thus plaintiffs bear the burden of proving, not merely pleading, that they satisfied all of Rule 23's requirements. The court confirmed that lower courts must consider *both* the merits and the evidence—including the quality of any expert evidence—to determine whether a plaintiff met the requirements of Rule 23.[8]

Applying these standards, the Supreme Court first held that plaintiffs failed to meet the commonality requirement of Rule 23(a)(2). Quoting a now famous article by Professor Nagareda, the court framed the commonality inquiry as follows: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. ***Dissimilarities*** within the proposed class are what have the potential to impede the generation of common answers."[9]

The Supreme Court thus framed the central question as "why was I disfavored." In so doing, the court held the evidence set forth by plaintiffs failed to provide the "glue" needed to supply a common answer to that question. First, the court found plaintiffs' expert's social framework analysis useless for class purposes, 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. The corporate policy granting discretion to local supervisors was the precise opposite of an employment practice that would generate a common answer to the "why was I disfavored" question.[10] Tellingly, the court noted that this granting of discretion "is also a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.' "[11] Recognizing that discretion can be used in a fashion that causes disparities is ***not*** the same thing as proving it was exercised in the same common and discriminatory fashion. Rather, it was more plausible to assume managers would follow a company's nondiscrimination policies, and that, in any event,

[5] 131 S. Ct. 2541, 2011 BL 161238 (2011).

[6] *Id.* at 2547.
[7] *Id.* at 2553-56.
[8] *Id.* at 2550-52.
[9] *Id.* at 2551 (emphasis added) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (internal quotations omitted).
[10] *Id.* at 2553-54.
[11] *Id.* at 2554 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988)).

"demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."[12]

The Supreme 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 it failed to address possible sex-neutral reasons, including the relative availability of qualified and interested women at the store level, that would 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.[13] Finally, the court held that the anecdotal evidence, which did not include 90 percent of the stores and represented only one out of every 12,500 proposed class members, failed to show that the entire company operated under a general policy of discrimination.[14]

The Supreme Court also rejected Rule 23(b)(2) certification for plaintiffs' back pay claims. Although a fair reading of Rule 23(b)(2) would preclude its application to a class seeking *any* form of monetary relief, the court noted it did not need to reach that issue since Rule 23(b)(2) did not include claims for individualized monetary relief. Rule 23(b)(2) is limited to one final, indivisible injunction for the class as a whole, and precluded claims for individualized monetary relief.[15] The history and structure of Rule 23 compelled this holding as it provides for mandatory classes (classes with no notice or opt-out rights) under Rules 23(b)(1) and (b)(2) precisely because these classes have the rule-prescribed characteristics that make them unitary and cohesive.[16] The court thus held claims for individualized monetary relief belong in Rule 23(b)(3), where the procedural protections of predominance, superiority, notice, and opt-out apply.[17]

The Supreme Court then rejected the argument that monetary relief in a Rule 23(b)(2) class action is permitted if the injunctive relief "predominated." The court noted the perverse incentives this would create to limit monetary claims as well as the unworkable nature of such a test in employment discrimination classes, where the class members lose their right to prospective injunctive relief as they leave employment.[18] According to the court, any individualized monetary relief could not be deemed incidental to injunctive relief. Rather, citing *Teamsters*[19](which set up a two-phase proceeding for pattern-and-practice cases), the court held that class analysis must assume defendants will be entitled to litigate their defenses to back pay claims and courts cannot use "trial by formula" or the like to defeat or impair those rights.[20]

Wal-Mart's impact on class issues is analyzed in the following sections of this report. Of note here, a subtle but important point embedded in *Wal-Mart* is its ruling on the substantive law of employment discrimination. Class rulings often have a "law declaring" function, as courts have to decide whether the substantive law permits aggregate proof for the claim at issue.[21] Rule 23(f) exists to facilitate appellate review of class rulings precisely because these rulings may raise important questions of law.[22] *Wal-Mart* illustrated this: to determine whether commonality was met the Supreme Court had to decide what the substantive law required. The majority ruled that a policy granting discretion is "a very common and presumptively reasonable way of doing business" and "should itself raise no inference of discriminatory conduct."[23] Proof of disparities from a discretionary practice is not enough, since proof that one or even some supervisors exercised discretion in a discriminatory fashion does not prove others did, particularly when the company's policy prohibits such conduct thus precluding any common answer to the key "why was I disfavored" question. [24] In contrast, the dissent believed that if delegated discretion results in discriminatory outcomes, that practice is itself actionable under Title VII, and commonality could be met under such circumstances.[25]

Practice Pointers

- For discrimination claims based on challenges to the exercise of discretionary policies, the substantive rulings in *Wal-Mart* may be just as important as the class rulings.
- Experts will often be critical to class certification. At the beginning of the case consider how to attack plaintiff's experts and what expert proof is needed for defendants.

Comcast and Classwide Proof of Damages

In *Comcast Corp. v. Behrend*,[26] the Supreme Court addressed the proof of harm and damages required for Rule 23 class certification. *Comcast* arose out of an antitrust claim based on the notion Comcast had ac-

[12] *Id.*
[13] *Id.* at 2555-56.
[14] *Id.* at 2556.
[15] *Id.* at 2557.
[16] *Id.* at 2557-58.
[17] *Id.* at 2558-59.
[18] *Id.* at 2559-60.
[19] *Int'l Bhd. of Teamsters v. United States*, 97 S. Ct. 1843 (1977).
[20] *Wal-Mart*, 131 S. Ct. at 2560-61.
[21] 20 Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 98-108 (2009).
[22] *See Fed. R. Civ. P.* 23(f) advisory committee's note to 1998 amends., subdiv. (f) (discussing use of interlocutory appeals to decide novel or unsettled questions of law). *See also, e.g.*, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 306-07, 39 EBC 2352 (5th Cir. 2007) (noting in a Rule 23(f) appeal that the court must consider and decide substantive law to the extent it impacts class certification issues).
[23] *Wal-Mart*, 131 S. Ct. at 2554 (internal quotation marks and citation omitted).
[24] *Id.* at 2555-56.
[25] *Id.* at 2565, 2567 (Ginsburg, J., dissenting).
[26] 133 S. Ct. 1426, 2013 BL 80435 (2013).

quired monopolistic power over the Philadelphia. Plaintiffs proffered four theories of antitrust injury that they argued drove up cable subscription rates.[27] The judge found only one of these, the "deterrence of overbuilding" theory, capable of classwide proof, and that the others could not be determined in a manner common to the class.[28] Plaintiffs' economics expert calculated damages by comparing the current market to one without Comcast's alleged anti-competitive activity.[29] Plaintiffs' economic expert admitted that he had *not* isolated the damages resulting from the different theories of antitrust impact.[30]

The Supreme Court concluded plaintiffs failed to satisfy Rule 23's requirements. The court held that regardless whether defendants challenged its admissibility, expert evidence used to prove class certification requirements are met must be persuasive, and must carry plaintiff's burden of proof at the class stage.[31] To this end, the court found plaintiffs failed to satisfy the predominance requirements of Rule 23(b)(3) because they could not show damages capable of classwide proof.[32] Specifically, the court held that the damages model must be consistent with the liability model. Any model purporting to serve as evidence of damages in a class action must measure only damages attributable to the classwide theory of harm.[33] In contrast, the plaintiffs' damages model included the impact of the claims that supported only individualized damages.[34] Thus, plaintiffs proffered no "but for" damages model limited to the class claim—and likewise provided no requisite proof that the claimed damages were *caused* by the classwide wrong.[35]

Justice Ruth Bader Ginsburg's dissent illustrates the importance of *Comcast*. Justice Ginsburg noted that before *Comcast*, courts often held damage issues could be ignored at the class certification stage.[36] Although the dissent argued *Comcast* should be limited to its facts to avoid any change in the law,[37] the majority opinion explicitly stated it was setting forth the "straightforward application of class-certification principles."[38] Notably, the court vacated a wage-and-hour ruling to be reconsidered in light of its *Comcast* ruling.[39]

Of equal importance, the back-and-forth between the majority and dissent on the expert evidence reveals *Comcast*'s holding as to class proofs. 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.40 The majority imposed a far more rigorous standard: plaintiffs must prove the claimed class wrong *caused* the injury classwide, free of taint from individual factors. Absent such proof, plaintiffs cannot satisfy Rule 23's requirements that common issues predominate for class claims seeking damages.[41]

Comcast has obvious import to labor and employment cases, and for certain claims in ERISA cases. For example, on discrimination claims, *Comcast* should directly bar use of bottom-line statistics to prove class damages. *Comcast* further supports the notion that such statistics cannot be used to show a class claim of liability since liability and damages must sync up to satisfy Rule 23. In ERISA cases, disclosure and investment claims may raise *Comcast* issues on whether there is classwide proof of damages. Finally, as discussed in Part II of this report, defendants are applying *Comcast* in wage-and-hour claims to defeat or limit class on issues such as whether eligibility for overtime can be determined classwide, and to determine whether there is a classwide method to prove damages.

Practice Pointers

- *Comcast* supports that there cannot be a class certified unless plaintiffs can prove a classwide theory of harm, uninfected by individual issues. In discrimination claims challenging complex decisions or actions, *e.g.*, multistep hiring procedures or compensation claims, this may be difficult for plaintiffs to do. The same analysis may apply in ERISA disclosure or investment claims.
- *Comcast* provides grounds to attack economic experts' class analysis since (i) it held that what those models prove are not "questions of fact," and (ii) those models must show the asserted class claim caused the harm or disparities across the proposed class.
- In wage-and-hour cases, anything that would make classwide liability or damages non-mechanical are possible grounds to defeat class certification, *e.g.*, whether each person's actual job duties qualify for overtime and whether actual time worked can be calculated without individualized inquiries.

Commonality After *Wal-Mart*

Commonality and Discrimination Claims Challenging Discretionary Conduct

In *Wal-Mart* the Supreme Court noted that an employer's policy of granting discretion to supervisors is "a very common and presumptively reasonable way of doing business" and "should itself raise no inference of

[27] *Id.* at 1430-31.
[28] *Id.* at 1431 & n.3.
[29] *Id.* at 1432.
[30] *Id.*
[31] *Id.* at 1433-35. *See also, e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (finding that an expert's testimony must be admissible under *Daubert* and persuasive on the class issues under the "rigorous analysis" standard applied to class certification).
[32] *Comcast*, 133 S. Ct. at 1433.
[33] *Id.*
[34] *Id.* at 1433-34.
[35] *Id.* at 1433-35.
[36] *Id.* at 1437 (Ginsburg, J., dissenting).
[37] *Id.*
[38] *Id.* at 1433.
[39] *See Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013) (vacating and remanding in light of *Comcast*).
40 *Id.* at 1441.
[41] *Id.* at 1433-35.

discriminatory conduct."[42] Moreover, the mere existence of disparities from a discretionary practice is not enough for class certification since proof that one or some supervisors exercised that discretion in a discriminatory fashion does not prove that others did—particularly when company policy prohibits such conduct.[43] For example, in *Wal-Mart*, regional and national disparities could not demonstrate the uniform store-by-store disparity required for a claim premised on discriminatory decision making by store-level managers.[44] Prior decisions of the Supreme Court, notably *Watson v. Fort Worth Bank & Trust*[45] and *Wards Cove Packing Co., Inc. v. Atonio,*[46] require that a plaintiff identify the specific employment practice causing the disparity. *Wal-Mart* recognized this rule when it found reliance on bottom-line disparities arising out of a discretionary system insufficient,[47] a point further buttressed by *Comcast*.

Wal-Mart thus clarifies the difference, from a class perspective, between a policy that grants discretion to individual managers, which plaintiffs claim is implemented in a discriminatory way, and a policy (such as a test) that itself has a disparate impact. In the case of the discretionary policy, the class claim must focus on the implementation, not the overarching lawful policy of granting discretion. But when the claim is that a test causes disparate impact without business justification, the claim is based on the test itself, and whether it is being used in an unlawful manner.[48] Notably, even before *Wal-Mart*, many courts recognized that employment discrimination claims that depend on managerial discretion (even when exercised in the context of common policies) are not proper for class certification.[49]

In contrast, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[50] the Seventh Circuit held post-*Wal-Mart* that an otherwise lawful policy permitting discretion can be the basis for a class claim if the policy "influences" the managers' exercise of discretion in a discriminatory manner. *McReynolds'* "influences" theory arguably contradicts *Wal-Mart*'s pronouncement that the alleged discriminatory act is the exercise of discretion and not the otherwise lawful policies that typically bound and channel—and thus "influence"—that discretion. *Wal-Mart* further held that (at least absent compelling proofs) a court cannot presume that discretion by the individual actors is exercised in a common and discriminatory manner, particularly when the corporate policy is to the contrary.[51]

McReynolds appears to be developing into a minority view.[52] For an excellent illustration of *Wal-Mart*'s limitations on class claims when discretion is involved see *Tabor v. Hilti Inc.*,[53] in which the Tenth Circuit considered sex discrimination challenges to the promotion of inside sales representatives to account managers. The defendant had a facially neutral policy with some objective criteria but also allowed managers substantial discretion in employee evaluation.[54] Records showed managers used their discretion to constantly override the objective criteria.[55] Plaintiffs claimed the managers exercised their discretion in a way that favored males; plaintiffs also had anecdotal evidence that males were favored in promotions.[56]

The Tenth Circuit found that only one of the plaintiffs raised a triable issue of intentional discrimination and disparate impact.[57] On the disparate impact claim, the court found that in light of the discretionary nature of the policy and, in particular the consistent promotion of unqualified candidates under the policy, the statistics showing stark "bottom line" disparities between male and female sales representatives was sufficient to identify the employment practice—management discretion—and make out the claim.[58] However, the court agreed this was *not* a class claim.[59] Referring to *Wal-Mart*, the court noted that considerations on the validity of a disparate impact claim is different from the considerations of whether it is a proper class claim—namely, uniformity.[60] The court also held that there was no commonality regarding promotions under such a haphazard policy, as illustrated by the two named plain-

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[42] *Wal-Mart*, 131 S. Ct. at 2554.

[43] *Id.* at 2554-56. *see also, e.g.*, *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896-97, 2012 BL 201297 (7th Cir. 2012) (applying same to decertify discrimination class).

[44] 131 S. Ct. at 2554-56.

[45] 108 S. Ct. 2777 (1988).

[46] 109 S. Ct. 2115 (1989).

[47] *Wal-Mart*, 131 S. Ct. at 2555-56.

[48] Thus, testing cases can be distinguished based on the unique characteristics of the claim. *See, e.g., Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 907 F. Supp. 2d. 492, 505-09, 2012 BL 316576 (S.D.N.Y. 2012) (using Rule 23(c)(4) to certify a class of teachers for declaratory and injunctive relief in a discriminatory impact testing claim).

[49] *See, e.g.*, *Gaston v. Exelon Corp.*, 247 F.R.D. 75, 87 (E.D. Pa. 2007) (holding that certification pursuant to Rule 23(b)(2) would be inappropriate in this case involving facially neutral practices because "this case, in very large measure, turn[ed] on the individual determinations of autonomous managers rather than on common questions of fact and law").

[50] 672 F.3d 482, 490 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012).

[51] *See, e.g.*, *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896-97, 2012 BL 201297 (7th Cir. 2012) (applying same to decertify discrimination class); *Bell v. Lockheed Martin Corp.*, No. 08-6292 (RBK/AMD), 2011 BL 3161568 (D.N.J. Dec. 14, 2011) (applying *Wal-Mart* to conclude that there was no class based on objective policies that gave managers discretion within certain boundaries).

[52] *See also Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 2013 BL 287115 (4th Cir. 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*.").

[53] 703 F.3d 1206, 1211, 2013 BL 11038 (10th Cir. 2013).

[54] *Id.* at 1212.

[55] *Id.*

[56] *Id.* at 1212-13.

[57] *Id.* at 1216-26.

[58] *Id.* at 1219-26.

[59] *Id.* at 1230.

[60] *Id.* at 1222.

tiffs.[61] One appeared qualified and had a valid claim but the other was subject to numerous defenses based on poor performance.[62] Also, there was no predominance under Rule 23(b)(3) because a court would have to look at the individual circumstances and defenses tendered as to both claims.[63]

The Third Circuit came to a similar conclusion in a race discrimination claim involving discretionary decisions.[64] And following in the footsteps of *Wal-Mart* and *Tabor*, the Sixth Circuit also recently denied class certification in a gender discrimination case.[65] In *Davis*, the plaintiff was twice denied employment as a sales representative.[66] She alleged that the defendant's hiring practices were discriminatory and moved for class certification.[67] While the defendant had a well-defined companywide hiring policy, local managers made the final hiring decisions based on the needs of the individual location.[68] The Sixth Circuit noted that "bottom line" hiring disparities did not prove that there was a common question because the disparities did not demonstrate the existence of a uniform companywide exercise of discretion in a way that favored men over women.[69] Tellingly, there were also disparities between offices, with some underhiring and some overhiring women during the class period.[70] Citing *Wal-Mart* extensively, the Sixth Circuit affirmed the district court's determination that the class could not be certified pursuant to Rule 23(a)(2) because the plaintiff could not show that the proposed class of women "who failed to obtain employment at many places, over a long time, under a largely subjective hiring system, shared a common question of law or fact."[71] As in *Wal-Mart*, the Sixth Circuit also denied certification pursuant to Rule 23(b)(2) because the requested individualized monetary relief was not incidental to the injunctive and declaratory relief sought.[72]

Practice Pointers

- Demonstrate that your client has a facially neutral policy that is communicated to supervisors and managers. Evidence on monitoring and enforcement of that policy may also be helpful.
- Show business reasons for the challenged policy and that, under *Wal-Mart*, a policy of granting discretion is not inherently suspect, and is not sufficient to show a common mode of acting for class certification.
- Show that any discretion is exercised in the context of anti-discrimination policies and that discretion exercised in a discriminatory fashion is prohibited and punishable.
- Attack plaintiffs' use of statistics that do not match the decisional unit, *e.g.*, use of regional or national statistics when the decisions are made at the store level like in *Wal-Mart*.
- Consider putting on affirmative proof of statistics and anecdotes to rebut any claims that there was a common mode of exercising the challenged discretion in a discriminatory fashion.
- Consider using *Comcast* to show how individual choices defeat any classwide proof of damages, and break the required connection between the class liability and class damages theories.

Commonality and Claims Challenging ERISA Disclosures

Commonality issues can arise in many contexts in ERISA cases, including even on claims involving plan terms.[73] ERISA disclosure claims often raise issues of reliance and causation and, at a minimum, they can raise issues as to whether there is a common answer to the questions of what each participant knew, whether he was misled, and on what he relied. As Professor Nagareda notes in his seminal article relied on in *Wal-Mart*, even claims predicated on common and single classwide misrepresentation do not necessarily prove classwide reliance; in addition to issues of whether each proposed class member actually read the claimed misrepresentation, there are, absent compelling facts, typically individualized issues on whether and why each proposed class member acted.[74] These are the types of dissimilarities that can defeat class certification for disclosure claims.[75] In ERISA cases there are also often multiple representations, individual and group, over the proposed class period that individually and collectively call into question what each participant knew and upon what he relied. Thus if, for example, a participant understood the matter at issue, he cannot prove a material misrepresentation for purposes of sustaining a claim for fiduciary breach.[76]

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[61] *Id.* at 1229-30.
[62] *Id.*
[63] *Id.*
[64] *See Rodriguez v. National City Bank*, 726 F.3d 372, 2013 BL 211204 (3d Cir. 2013) (applying *Wal-Mart* to refuse to certify a class challenging discretionary mortgage charges applied in an alleged discriminatory fashion to minorities).
[65] *Davis v. Cintas Corp.*, 717 F.3d 476, 479-80, 2013 BL 140912 (6th Cir. 2013).
[66] *Id.* at 479.
[67] *Id.*
[68] *Id.* at 480-81.
[69] *Id.* at 487-88.
[70] *Id.*
[71] *Id.* at 487-89. *See also In re Countrywide Fin. Corp. Lending Practices Litig.*, 708 F.3d 704, 706, 708-10 (6th Cir. 2013) (holding that there was no commonality even though there were bottom-line statistics showing minority borrowers paid more than white borrowers).
[72] *Davis*, 717 F.3d at 490-91.
[73] *See, e.g., Lipstein v. United Health Group*, No. 11-1185 (JBS/JS), 2013 BL 262424 (D.N.J. Sept. 26, 2013) (applying *Wal-Mart* to conclude there was no commonality for a proposed class of plans challenging how Medicare offsets were calculated; plans had different language on the issue and different standards of review).
[74] *E.g.*, *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 667-68 (9th Cir. 2004) (noting cannot assume classwide reliance unless it is the only common sense or logical behavior of the class in response to the claimed misrepresentation, and that in the case at issue people gambled for a myriad of reasons and motivations).
[75] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009).
[76] *See Bell v. Pfizer, Inc.*, 626 F.3d 66, 75-76, 2010 BL 200701, 49

Consistent with *Wal-Mart*, courts have declined to certify class actions in ERISA communication suits when individualized issues regarding the class member knowledge and understanding impact the outcome of the underlying legal issues.[77] Likewise, causation and reliance cannot be presumed classwide in ERISA cases, at least absent unusual and compelling circumstances.[78] Plaintiffs sometimes argue their cases raise compelling circumstances warranting a form of presumed reliance, or that their case fits within the *Affiliated Ute* presumption of reliance for omissions.[79] But as a court recently held in *Bacon v. Stiefel Labs., Inc.*,[80] such forms of presumed reliance are unlikely to apply in ERISA contexts, as the reasons why participants make decisions on benefits (in that case selling their shares back to an ESOP) are typically complex and often individualized. Similarly, the Supreme Court, in *Cigna Corp. v. Amara*, rejected a form of presumed reliance (*i.e.*, assumptions of "likely prejudice") for claims based on defective SPDs, and instead required proof of actual harm and causation to warrant monetary relief.[81]

Thus, the absence of common answers to the questions of knowledge or reliance often means there is no common answer to key questions such as "was I misled" or "did I rely" or "was I harmed." These dissimilarities should typically defeat class certification.

Practice Pointers

- For ERISA disclosure claims, one key way to defeat class certification is to focus on the dissimilarities, since often there will be multiple "plan wide" and individual communications at issue.
- Anecdotal and documentary evidence of different communications and of different understandings or choices help to show dissimilarities.
- Expert evidence, including statistical evidence, can often show there is no factual basis to assume classwide reliance, common actions, or common harms.

Typicality and the Importance of Considering the Impact of Defenses on Class Claims

Commonality is a meaningful and appropriate focus of many class claims and issues in the post-*Wal-Mart* landscape. However, even when some claims have at least one major common issue and common answer, typicality may be a material issue because defenses, or the varying circumstances of the named plaintiffs and class members, make the claims atypical of each other. Of import here, *Wal-Mart* held that the class analysis must assume that defendants will be entitled to litigate their defenses, and that plaintiffs cannot use "trial by formula" or similar assumptions to impair those rights.[82]

Thus, if the facts show that the named female plaintiffs have better pay than average males in the same office, these facts can create unique defenses that make their claims atypical of the class and them inadequate class representatives.[83] Likewise, weaknesses in plaintiff's performance or claims can defeat typicality.[84] Accord-

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EBC 2153 (2d Cir. 2010) (holding there is "no sustainable claim," in an ERISA disclosure case, if the participant was not misled); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 125, 20 EBC 2625 (2d Cir. 1997) (explaining that materiality of ERISA misrepresentations is "fact-specific and will turn on a number of factors" including what each employee knew and understood).

[77] 75 *See Groussman v. Motorola, Inc.*, No. 10 C 911, 2011 BL 291923, 52 EBC 1965 (N.D. Ill. Nov. 15, 2011) (denying ERISA disclosure class for lack of commonality, typicality, and adequacy due to "difference[s] as to what each Plaintiff understood . . . and . . . rel[ied] upon"); *Carr v. Int'l Game Tech.,* Nos. 3:09-cv-00584, 0585, 2012 BL 73267, 53 EBC 2354 (D. Nev. Mar. 16, 2012) (holding no typicality due to individualized issues of reliance on alleged misrepresentations and defenses).

[78] *E.g.*, *Walsh v. Principal Life Ins. Co.*, 266 F.R.D. 232, 259-60, 2010 BL 76302, 49 EBC 1344 (S.D. Iowa 2010) (no proof common letters drove 401(k) roll-over decisions, and the evidence offered for each individual plan participant regarding their reliance on the letters and any misrepresentations and omissions that continued through the phone calls differs, strongly suggesting that the Court would have to engage in extensive individualized inquiries regarding causation if this case proceeded as a class action); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344-45, 37 EBC 1161 (11th Cir. 2006) (holding that class certification was inappropriate because the ERISA breach of fiduciary duty claim would require each class member to show that he or she relied on the "no deductible" term when purchasing their prescription drugs).

[79] *See, e.g.*, *Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705, 43 EBC 1769 (7th Cir. 2008) (Easterbrook, J) (cautioning plaintiffs not to conflate securities and ERISA litigation; declining to apply *Affiliated Ute* presumption); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344-45, 37 EBC 1161 (11th Cir. 2006) (noting importance of proof of individualized reliance when pleading classwide claim of misrepresentation and therefore not allowing for *Affiliated Ute*'s presumed reliance); *Kenney v. State Street Corp.*, No. 09-10750-DJC, 2011 BL 235547, 52 EBC 1110 (D. Mass. Sept. 15, 2011) (considering *Amara* and rejecting the import of a presumed reliance theory from securities litigation); *Stanford v. Foamex L.P.*, No. 07-4225, 2008 BL 173250, 44 EBC 2072 (E.D. Pa. Aug. 20, 2008) (rejection of presumed reliance); *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 F.R.D. 613, 34 EBC 2373 (E.D. Tex. Nov. 8, 2004), *vacated on other grounds sub nom. Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 39 EBC 2352 (5th Cir. 2007) (rejecting the "fraud on the market" theory and presumed reliance and holding that reliance must be established). *But see Harris v. Amgen, Inc.*, 717 F.3d 1042, 1058-59, 2013 BL 294229 (9th Cir. 2013) ("We see no reason why ERISA plan participants who invested in a Company Stock Fund whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor in publicly traded stock.").

[80] 275 F.R.D. 681, 698-99, 2011 BL 267518, 51 EBC 2809 (S.D. Fla. 2011).

[81] 131 S. Ct. 1866, 1880-82, 2011 BL 128629, 50 EBC 2569 (2011).

[82] *Wal-Mart*, 131 S. Ct. at 2560-61.

[83] *Cf., e.g.*, *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 823-24, 2011 BL 86015 (7th Cir. 2011) (noting that named plaintiffs' pay in several years exceeded that of men and that such unique defenses made them inadequate class representatives and their claims atypical of the class).

[84] *E.g.*, *Drake v. Morgan Stanley & Co., Inc.*, No. CV 09-6467 ODW (RCx), 2010 BL 318273 (C.D. Cal. Apr. 30, 2010) (holding, in state law wage claim for financial assistants at Morgan Stanley, that named plaintiffs' claims were atypical and they were inadequate representatives because they were subject to unique defenses on performance issues and counterclaims for expenses due).

ingly, analysis of named plaintiffs' claims may show that success or failure of the claims depends on facts unique to the named plaintiffs, raising issues of commonality, typicality, and adequacy.[85] Further, individualized issues with respect to defendants' affirmative defenses, such as the statute of limitations defense, can preclude a finding of commonality and typicality.[86] Contractual agreements, such as releases or agreements to arbitrate, can bar named plaintiffs from pursuing their claims, and make their claims atypical of the class.[87]

Practice Pointers

- Affirmative defenses (*e.g.*, statute of limitations, releases, arbitration) can defeat typicality or limit classes.
- Defects or weaknesses in the merits of plaintiff's claims can also be grounds to defeat typicality. If this is the case, it may be better to put off class certification until summary judgment motions are filed so that the court will have the factual record needed, such as in *Tabor*.

Adequacy and Class Conflicts

Wal-Mart's discussion of the "predominance" test, and how the test created perverse incentives for named plaintiffs to forgo monetary claims of absent class members, illustrates the type of conflicts that often lurk in class actions.[88] Manipulating a class to exclude these claims of absent class members may confirm—not absolve—the conflict.[89] Further, under Rule 23(a)(4), a plaintiff cannot adequately represent a class if there are conflicting interests with or among the proposed class members. For example, factual investigation or expert analysis may show a substantial number of class members benefitted from the challenged policies or practices. As discussed in Part II of this report, conflicts can arise over prospective relief, particularly if some of the absent class members are benefitting from the policy or practice at issue. Conflicts can also arise because the claims of different groups are of different relative strengths. Thus, at a minimum, subclasses may need to be created to represent and protect the interests of each discrete group.[90]

Further, it is a core requirement of Rule 23 and due process (albeit sometimes forgotten) that absent class members are entitled to have named plaintiff and putative class lawyers not make arguments—or take positions or bring claims—that conflict with the absent class members' interests.[91] Thus, no class should be certified when the proposed class members have different financial interests as to the claims or the relief sought, or where some of the proposed class members benefit from the very program or practice the plaintiffs are challenging.[92] For example, conflicts can arise in the labor and employment area over the proposed goals and remedies sought in the litigation.[93] These conflicts can arise in ERISA cases over, *e.g.*, whether the litigation may be harming current participants' investments in an ESOP,[94] or where there are different interests as to who benefitted and who lost, or over who may want to keep the challenged investments.[95]

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[85] *E.g.*, *Tabor v. Hilti, Inc.* 703 F.3d 1206, 1229, 2013 BL 11038 (10th Cir. 2013) (finding commonality requirement not met when courts have to look at circumstances of individual claims—the two named plaintiffs illustrated this because one had a much weaker claim).

[86] *See Novella v. Westchester Cnty.*, 661 F.3d 128, 148-49, 2011 BL 284954, 52 EBC 1505 (2d Cir. 2011) (noting statute of limitations defense often precludes certification of an ERISA class); *In re Unisys Corp. Retiree Med. Benefits Litig.*, No. 969, 2003 BL 2035, 29 EBC 2473 (E.D. Pa. Feb. 4, 2003) (decertifying class for ERISA fiduciary breach claim based on misrepresentations because statute of limitations defense would require "myriad of individual determinations").

[87] The Supreme Court's embrace and enforcement of arbitration agreements may make them more common in the employment context. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that arbitration agreements can bar class arbitration even if a party cannot effectively vindicate his federal rights absent a class action).

[88] *See Wal-Mart*, 131 S. Ct. at 2559-60.

[89] *See, e.g., Beyond Knowles: Fairness to Absent Class Members and the Manipulation of Class Action Claims*, BNA Class Action Litig. Rep. (Sept. 13, 2013) (discussing conflicts brought about by claims splitting); *see also* discussion in forthcoming Part II discussing claims splitting issues arising from hybrid or issue certification.

[90] *E.g.*, *In re Literary Works Copyright Litig.*, 654 F.3d 242, 249-52 (2d Cir. 2011) (creating subclasses to represent each group because of differences in relative strengths of claims).

[91] *E.g.*, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 317-18, 39 EBC 2352 (5th Cir. 2007) (holding intra-class conflict negated adequacy under Rule 23(a)(4)); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 246, 41 EBC 2558 (2d Cir. 2006) (finding antagonistic interests and refusing to certify the class where the interests of the class representatives would not advance the interests of class members who participated in self-funded ERISA plan).

[92] *E.g.*, *Langbecker*, 476 F.3d at 317-18.

[93] *See Gilpin v. Am. Fed'n of State, County, & Mun. Employees, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir. 1989) (affirming decision to refuse certification when different groups of employees had differing interests as to the remedies to be sought from a union); *United Indep. Flight Officers v. United Air Lines*, 756 F.2d 1274, 1284, 6 EBC 1086 (7th Cir. 1985) (affirming refusal to certify class when members had divergent and antagonistic interests regarding the goals of the lawsuit and benefits sought).

[94] *See, e.g.*, *Hans v. Tharaldson*, No. 3:05-cv-115, 2010 BL 102567, 49 EBC 2194 (D.N.D. May 7, 2010), *amended by* (D.N.D. Aug. 27, 2010).

[95] *See, e.g.*, *Langbecker*, 476 F.3d at 316 n.28, 318 (stating "[a] few class members cannot hijack litigation 'on behalf of the plan' to pursue their preference at the expense of others," and holding plan claims could not proceed without class procedural safeguards in light of the class conflicts); *Spano v. Boeing Co.*, 633 F.3d 574, 586-87, 2011 BL 16204, 50 EBC 1801 (7th Cir. 2011) (named plaintiffs did not satisfy adequacy of representation requirement in action claiming fiduciaries caused plan to pay excessive fees and maintained imprudent investment options, where many members of proposed class had no complaint about investment options offered by employer, in light of dates when they first invested and date when they exited, and would be harmed by the relief sought by named plaintiffs); *cf. Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 2013 BL 216743, 56 EBC 2352 (7th Cir. 2013) (narrowing a prudent investment class to those in stable value fund that underperformed against benchmark should sufficiently limit or

Practice Pointers

- Investigate whether there are any tensions or conflicts between what plaintiffs want and the interests of the various class members. It is not unusual for plaintiffs to challenge policies or practices that benefit a large number of class members.
- Conflicts are more likely to arise when plaintiffs plead broad classes or try to include in one class those that may have differing interests, such as former versus current employees.
- Experts can be very useful to develop data showing class conflicts, such as members who benefitted from challenged policies or practices.

Part II—RULE 23(b) AND HYBRID AND ISSUE CERTIFICATION AFTER *WAL-MART*

Part II of this report addresses *Wal-Mart*'s Rule 23(b) principles, including some defenses to plaintiffs' use of "issue" or "hybrid" certifications to limit or circumvent *Wal-Mart*. On a related point, Part II addresses whether *Wal-Mart* may limit certification of ERISA classes under Rule 23(b)(1)(A).

Part II also addresses the use of trial plans and subclasses as means to limit or defeat class actions and ends with a brief discussion of *Wal-Mart* and *Comcast's* possible impact on "collective actions" under the FLSA and the ADEA.

Wal-Mart substantially tightened class action procedure. This included halting the practice of permitting individualized monetary relief to be joined in Rule 23(b)(2) classes whenever a court could deem injunctive relief "predominant."96 *Wal-Mart* bars any direct coupling of such monetary claims with Rule 23(b)(2) classes. As discussed below, the structural analysis in *Wal-Mart*, which explained why these monetary claims need Rule 23(b)(3)'s protections, should preclude indirect attempts to do the same.

Rule 23(b)(2) Class and Relief and Former Employees.

Plaintiffs often seek to include former employees in Rule 23(b)(2) classes for injunctive or declaratory relief. Rule 23(b)(2), however, limits this type of class to when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[97] First, former employees should not be included in a Rule 23(b)(2) class because they lack standing to seek such prospective relief since it would not help them, *i.e.*, it would not "redress" their injury.[98] These limitations apply with added force to former employees of a defunct company. In such a case, there is no prospective conduct to enjoin and no chance of reinstatement.[99]

Second, former employees should not be part of a Rule 23(b)(2) class because a declaration or injunction is not "final" relief as to them.[100] For example, former employees should not be in a class seeking a declaration that the challenged conduct is "unlawful," since what justifies Rule 23(b)(2) certification is enjoining *prospective* conduct that constitutes final relief as to the plaintiff, not a declaration to use as a step on the way to the ultimate relief of a monetary payment.[101] On a related point, former employees should not be part of a Rule 23(b)(2) class because the declaration must be for the class "as a whole." Former employees would not be within the required class-wide declaration for final relief because whether they recover often depends on whether there are defenses to their individual claims for relief.[102]

Finally, it is worth noting that even when a Rule 23(b)(2) class is limited to prospective injunctive relief for current employees, such relief may raise conflicts that defeat or limit classes. For instance, class conflicts may exist if certain class members benefit from or desire the continuation of the challenged practice.[103] Additionally,

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eliminate intra-class conflicts).

96 *See, e.g.*, *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001).

[97] FED. R. CIV. P. 23(b)(2).

[98] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60, 2011 BL 161238 (2011) (stating that injunctive or declaratory relief cannot be ordered for former employees as required by Rule 23(b)(2) since there is no *prospective* conduct to enjoin). *See also Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 120-22, 2012 BL 178009 (S.D.N.Y. 2012) (applying *Wal-Mart* to hold same).

[99] *E.g.*, *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 478 (E.D.N.Y. 2001) (finding that even under the rejected "predominating" standard, there is no Rule 23(b)(2) certification when the plant where employees worked had been sold because there is no chance of injunctive relief and the case is realistically one for monetary damages).

[100] *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2557, 2560 (stating that injunctive or declaratory relief must be "final relief" and control prospective conduct, which former employees have no standing to pursue).

[101] *See, e.g.*, *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892-93, 2011 BL 38671 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 242 (2011) (holding that injunctive relief is not appropriate nor final as required by Rule 23(b)(2) when the ultimate relief sought is monetary and an injunction would only initiate that process); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825-26, 2011 BL 86015 (7th Cir. 2011) (same for Title VII claim—finding that relief is not final when back pay proceedings are still needed to determine any monetary award).

[102] *See, e.g.*, *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344, 37 EBC 1161 (11th Cir. 2006) (finding that Rule 23(b)(2) certification is inappropriate in this ERISA misrepresentation case because proving reliance as to the named plaintiff does not prove that other class members would be entitled to relief). *See also Wal-Mart*, 131 S. Ct. at 2557 (stating that injunctive or declaratory relief must be "final relief" for "the class as a whole," and cannot vary based on whether different individuals are entitled to such relief).

[103] *See, e.g.*, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 316 n.28, 318, 39 EBC 2352 (5th Cir. 2007) (stating that "[a] few class members cannot hijack litigation 'on behalf of the plan' to pursue their preference at the expense of others," and holding that plan claims cannot proceed without class procedural safeguards in light of the class conflicts); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 246 (2d Cir. 2007) (finding antagonistic interests and

injunctive relief in Title VII cases that impinges on the rights of employee third parties raises a host of issues, which can limit the scope or nature of such relief.[104] Remedies based on inclusion (*e.g.*, attracting more female applicants through recruitment) are more likely to be acceptable than those based on exclusion (*e.g.*, selecting some candidates rather than others from a pool).[105] Further, Title VII has put in place notice requirements and protections before these absent parties can be bound by such relief.[106]

Practice Pointers

- Resist attempts to include former employees in a Rule 23(b)(2) class by urging standing, finality and "class as a whole" requirements.
- If any class member benefits from or supports the current practice, use this to show class conflicts that should limit or defeat class certification. Experts may also be helpful to show this.
- In Title VII cases, show that the desired prospective relief impinges on the rights of employee third parties.

Hybrid or Issue Certification Should Not Be Used To Circumvent *Wal-Mart*'s Procedural Protections

Rule 23(c)(4) provides that "*[w]hen appropriate*, an action may be brought or maintained as a class action with respect to particular issues."[107] Some courts have read this as a housekeeping rule for use only when the claim is certified as meeting the class requirements of Rule 23(a) and (b).[108] In other words, they have read "when appropriate" as incorporating the other requirements of Rule 23. Other courts, however, have treated this as a "fourth way" to certify a class action under Rule 23(b). Under this analysis, the Rule 23(b) class includes an "issues class." Similarly, some courts have used this rule to justify "hybrid certifications," in which only part of a case is certified as one of the class types in Rule 23(b), and then the rest of the case is to be certified in a mix-and-match method as a different type of class, or perhaps as no class at all going forward for case resolution.[109] Procedural Frankensteins come to mind, in which procedures and rights are uncertain and ad hoc. The use of issue classes appears to be on the rise since *Wal-Mart* shut down the overbroad use of Rule 23(b)(2).[110]

There are several arguments against such approaches. First, Rule 23(b) lists only three types of class actions, and the courts are unequivocal that a class action must satisfy at least one of these three types to be certified.[111] Rule 23(b) also speaks in terms of "class actions" for Rule 23(b)(1) and (b)(3) classes and of "final relief" for "the class as a whole" for Rule (b)(2) classes. "Action" is understood to be the case as a whole, not a piece of it.[112] And nowhere does Rule 23(b) include "issues" classes as an additional category of class action.[113] Rather, reading the "when appropriate" requirement of Rule 23(c)(4) in light of the rest of Rule 23(b) would suggest the case—the action—first must meet the standards to be certified as one of the permitted Rule 23(b) classes *before* this rule can apply. Second, overbroad use of hybrid and issue certification is inconsistent with *Wal-Mart*, the structure of Rule 23(b) and its underlying principles of Due Process. This applies with added force when the ultimate relief is principally monetary and there will be substantial individualized issues and defenses.[114]

Finally, even if permitted, hybrid or issue certification should be used only in rare circumstances, and not when (i) the ultimate relief sought is predominately monetary, or (ii) the declaratory or injunctive claims are inextricably intertwined with individual issues and there are too many individualized issues left to resolve the claims. *Wal-Mart* supports that attempting to carve up a claim with monetary relief to try to fit part of it within Rule 23(b)(2) is improper, as it infringes on due process protections—notice, opt-out, predominance and superiority—embedded in Rule 23(b)(3) that protect *both* plaintiffs and defendants.[115] Cases such as *McReynolds*, however, have certified hybrid classes that include monetary claims without considering whether this is consistent with *Wal-Mart*.[116]

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refusing to certify the class where the interests of the class representatives would not advance the interests of class members who participated in self-funded ERISA plan); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1284, 6 EBC 1086 (7th Cir. 1985) (affirming the refusal to certify a class when the class members had divergent and antagonistic interests regarding the goals of the lawsuit and benefits sought).

[104] *See, e.g.*, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2009 BL 139592 (2009); *United States v. Brennan*, 650 F.3d 65, 2011 BL 120452 (2d Cir. 2011).

[105] *See, e.g.*, EMPLOYMENT DISCRIMINATION LAW ch. 32.IX.C (Barbara Lindemann & Paul Grossman eds., BNA 4th ed. 2007).

[106] *See* Title VII § 703(n), 42 U.S.C. § 2000e-2(n).

[107] FED. R. CIV. P. 23(c)(4) (emphasis added).

[108] *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

[109] *See, e.g.*, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491-92, 2012 BL 53080 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012) (certifying part of the case on legality of policy under Rule 23(b)(2), and leaving for a later day whether individual trials on damage claims were needed).

[110] *See* Rebecca Bjork, *Recent Developments in Issue Certification Under Rule 23(c)(4)*, BNA Class Action Litigation Report (Aug. 21, 2013).

[111] *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548, 2011 BL 161238 (2011).

[112] *Cf. e.g., Fed. R. Civ. P.* 2 ("There is one form of action – a civil action").

[113] *See Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200-01 n.25 (3d Cir. 2009) (noting circuit split on whether "issue" classes are appropriate under Rule 23(b)).

[114] *Wal-Mart*, 131 S. Ct. at 2557-58 (noting structural reasons why claims for individualized monetary relief needed to be certified under Rule 23(b)(3)). Note that when read in light of the rest of the opinion *Wal-Mart*'s reference to *Teamster*'s pattern-and-practice methodology, supports that a *Teamsters*-type "pattern or practice" claim can be properly certified under Rule 23(b)(3) *if* the claim meets those standards. *Cf. Wal-Mart*, 131 S. Ct. at 2561 (noting that the *Teamsters* approach permits defendants to litigate defenses to claims for individual relief).

[115] *Wal-Mart*, 131 S. Ct. at 2558-59.

[116] *McReynolds*, 672 F.3d at 491-92 (relying on pre-*Wal-Mart* Seventh Circuit authority permitting hybrid certification that fo-

Accordingly, even if issue or hybrid certification is deemed consistent with Rule 23(b), courts should permit such certification only in limited circumstances. As the Federal Judicial Center's *Manual for Complex Litigation* notes, issue certification should not be used unless it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole. If the resolution of an issues class leaves a larger number of issues requiring individual decisions, the certification may not meet this test.[117]

Thus, for example, even if there were a claimed common scheme to mislead employees, no issue certification is appropriate if there are numerous individualized issues left on reliance, injury and damages.[118] Likewise, the individualized issues and defenses often attendant on claims for monetary relief should preclude any hybrid or issue certification for injunctive or declaratory relief for those claims.[119]

Finally, hybrid or issue certification presents significant *res judicata* consequences for absent class members. For example, what exactly is being decided in a proposed Rule 23(b)(2) hybrid or issue class proceeding?[120] Plaintiffs can create class conflicts by pursuing such approaches, as they risk claims splitting and *res judicata* impacts on the absent class members.[121] Tellingly, in *Wal-Mart's* rejection of Rule 23(b)(2) certification, the Court noted that absent class members with claims for monetary relief risked having their claims precluded by class rulings seeking to fit the case under Rule 23(b)(2), and thus they needed Rule 23(b)(3) protections.[122]

Practice Pointers

- There are multiple grounds to challenge issue or hybrid certification for claims seeking monetary relief. If the jurisdiction permits such certifications, consider the additional arguments discussed in this section to limit or defeat hybrid or issue certification.
- Consider developing the factual record, including with experts as necessary, to show the individual issues and defenses interposed between any class-wide issue, and any final relief for plaintiffs.

Wal-Mart and Potential Limits on Rule 23(b)(1)(A) Certification

Wal-Mart explained that claims for individualized monetary relief should be brought under Rule 23(b)(3) since the mandatory classes in Rule 23(b)(2) and (b)(1) do not offer proper procedural protections for such claims. Rather, the mandatory classes of Rule 23(b)(1) and (b)(2) should apply only when the class has the unitary and cohesiveness characteristics embodied in those rules. In other words, mandatory classes are permitted only when and because they are unitary and cohesive, and thus do not need the procedural protections of Rule 23(b)(3).[123] These class requirements apply even when monetary relief is denominated "equitable."[124]

Rule 23(b)(1)(A) applies when inconsistent or varying adjudications would establish incompatible standards of conduct for the party opposing the class. Rule 23(b)(1)(A) classes are sometimes asserted in ERISA cases where plaintiffs argue that various obligations in ERISA to treat plan participants the same justify certifying the class under Rule 23(b)(1)(A). Rule 23(b)(1)(A), however, makes sense when applied to *prospective* conduct that must be the same as to all class members.[125] And in many ERISA cases, even when it is

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cused on whether it was judicially efficient to break out issues for class certification; court also noted that an injunction could not resolve any class members' claims, and that resolution may require separate trials); *see also Haddock v. Nationwide Life Ins. Co.*, No. 3:01-cv-01552-SRU, 2013 BL 238899, 56 EBC 2189 (D. Conn. Sept. 6, 2013) (concluding *Wal-Mart* did not preclude hybrid certification of ERISA fiduciary class seeking monetary relief).

[117] FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 21.24 (4th ed. 2004) (footnote omitted); *see also, e.g.*, *Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598, 609 (D. Kan. 2012) (discussing same).

[118] *Cf., e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234, 2008 BL 69995 (2d Cir. 2008) (holding, in RICO consumer fraud class action, that issue certification of claimed common scheme to defraud would not materially advance the litigation since numerous individualized issues on reliance, injury and damages would be left).

[119] *See, e.g.*, *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 894-95, 2011 BL 38671 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 242 (2011) (in claims challenging how insurer handled hail-damage claims, held that even when hybrid certification is permitted, the Rule 23(b)(2) certification is only permitted for prospective relief, and any claims in which monetary relief is the ultimate remedy must be certified under Rule 23(b)(3)). *See also Yarger v. ING Bank, FSB*, 285 F.R.D. 308, 320-21, 2012 BL 265132 (D. Del. 2012) (rejecting hybrid or issue certification under Rule 23(b)(2) in consumer fraud class action since injunction must be same for class "as a whole," and this case would require more than one injunction to enforce right to rate guarantee, of which there were at least two).

[120] *Cf., e.g.*, FED. R. CIV. P. 23(c)(1)(B) (order certifying a class must define the class and the class claims, issues, or defenses); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 184-86, 38 EBC 1161 (3d Cir. 2006) (applying same).

[121] *See, e.g., Beyond Knowles: Fairness to Absent Class Members and the Manipulation of Class Action Claims*, BNA Class Action Litig. Rep. (Sept. 13, 2013) (discussing conflicts brought about by claims splitting); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.,* 209 F.R.D. 323, 338-40 (S.D.N.Y. 2002) (noting that certifying an injunction only class in this tort case on damage to land would raise claim splitting and *res judicata* concerns as to any subsequent actions for damages; also noted courts had allowed such claim splitting in civil rights class actions); RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (claim splitting generally prohibited; claim includes all rights to remedies with respect to the transaction or series of transactions out of which the action arose).

[122] *Wal-Mart,* 131 S. Ct. at 2559. *See also, e.g.*, *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 242-45 (W.D. Tex. 1999) (holding, in race discrimination claim, that excluding compensatory damage claims to make a better case for class certification causes class conflicts since if plaintiffs prevailed, class members with strong claims would be unable to seek such relief).

[123] *See Wal-Mart*, 131 S. Ct. at 2557-59.

[124] *Id.* at 2558, 2560.

[125] *See, e.g.*, *Oakley v. Verizon Comm'ns Inc.*, No. 09 Civ. 9175(CM) (S.D.N.Y. Feb. 1, 2012) (holding that when some plaintiffs may recover and others may not, Rule 23(b)(3) protections

at issue, the prospective conduct often involves whether payment is due under plan provisions—which is analogous to a claim for payments due under a contract, a classic Rule 23(b)(3) issue.

Rule 23(b)(1)(A) certification is thus not appropriate when there are individualized issues as to whether any claimant is entitled to relief.[126] Furthermore, Rule 23(b)(1)(A) certification is not appropriate when primarily monetary relief is sought.[127] Finally, Rule 23(b)(1)(A) certification should not be appropriate when the declaratory relief is merely a step to the final monetary relief. Just like in Rule 23(b)(2) cases, there may be substantial individualized issues between the declaration and any monetary payment that raise the need for Rule 23(b)(3)'s requirements and protections.[128]

Practice Pointers

- In ERISA cases, is the claim truly about prospective discretionary (typically fiduciary) conduct, or is it about payments allegedly due under a plan? If the latter, then argue it is like any contract claim for payments, and the class should have to meet Rule 23(b)(3) requirements.

- Defenses and facts that are interposed between an injunction or declaration and any final monetary relief provide good grounds to show why the class should not be certified under Rule 23(b)(1)(A).

- Many of the same arguments against hybrid and issue certification under Rule 23(b)(2) apply to attempts to certify parts of ERISA cases as a Rule 23(b)(1)(A) class.

Using Trial Plans and Subclasses to Limit or Defeat Class Certification

Wal-Mart held the Rules Enabling Act[129] prohibits "Trial by Formulas" and other shortcuts to what the substantive law requires as proofs in class actions.[130] *Comcast* makes clear that whether damages can be proved at trial class-wide is part of the class certification analysis, and should end attempts to "muddle through" class certification proof requirements.[131] Of similar import, in 2003, Rule 23 was amended to require that any order certifying a class must define the class and the class claims, issues or defenses.[132] The comments to this amendment explained that a critical issue at class certification "is to determine how the case will be tried" and to test whether the issues are "susceptible of class-wide proof."[133] Requiring plaintiff to create a trial plan on how the proposed class claims, issues and defenses can be tried on a class basis often exposes whether a case can proceed as a class action.[134]

Thus, for example, in *Espenscheid v. DirectSat USA, LLC*, plaintiffs brought an action on behalf of 2,341 satellite dish technicians alleging various types of "off the clock" unpaid overtime claims.[135] The judge decertified the classes prior to trial because plaintiffs failed to devise a feasible trial plan.[136] The Seventh Circuit affirmed, emphasizing plaintiffs' burden to develop a workable trial plan: piece rate work meant a separate trial would be needed for each plaintiff.[137] The court rejected plaintiffs' proposal to have 42 "representative" individuals testify, as there was no basis to extrapolate from their claims to those of the rest of the proposed class.[138]

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and opt-out rights must apply).

[126] *See, e.g.*, *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 633, 2011 BL 208924, 52 EBC 1590 (6th Cir. 2011) *cert. denied*, 132 S. Ct. 1757, 54 EBC 2922 (2012) (vacating ERISA Rule 23(b)(1)(A) class when defendant could be liable to some participants but not others, even though nondisclosure was uniform for all).

[127] *Wal-Mart*, 131 S. Ct. at 2558 ("[I]ndividualized monetary claims belong in Rule 23(b)(3)."); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193-95, (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001) (same—requests for monetary damages under Rule 23(b)(1)(A) could be certified outside 23(b)(3) only if they were "incidental" to the suit). *See also, e.g.*, *Heffelfinger v. Elec. Data Sys. Corp.*, No. CV 07-00101 (C.D. Cal. Jan. 7, 2008), *aff'd and remanded*, 492 F. App'x 710 (9th Cir. 2012) (former employees in overtime wage claim cannot seek classwide prospective injunctive relief, and any restitutionary award they may recover is akin to damages—thus certification under Rule 23(b)(1)(A) is not appropriate).

[128] *Cf., e.g.*, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499, 2012 BL 28334 (7th Cir. 2012) (holding "declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made."); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825-26, 2011 BL 86015 (7th Cir. 2011) (holding that injunctive relief cannot "merely lay an evidentiary foundation for subsequent determinations of liability").

[129] 28 U.S.C. § 2072(b).

[130] *Wal-Mart*, 131 S. Ct. at 2560-61.

[131] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-35, 2013 BL 80435 (2013).

[132] FED. R. CIV. P. 23(c)(1)(B); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 184-86, 38 EBC 1161 (3d Cir. 2006) (applying same).

[133] *See Fed. R. Civ. P.* 23 advisory commitee's note to 2003 amends., subdiv. (c), para. (1) (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.213 (1995)); *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013) (finding that there must be a clear trial plan to proceed under Rule 23(c); judgment vacated in light of *Comcast*); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011) (highlighting the critical need to determine how a case will be tried when deciding class certification); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 197 (3d Cir. 2009) (quoting Federal Rule of Civil Procedure 23's advisory note statement that " '[a] critical need is to determine how the case will be tried' " and finding that a court must ascertain the proof required to determine whether the claim can proceed as a class claim).

[134] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773-75, 2013 BL 30258 (7th Cir. 2013) (Posner, J.) (decertifying the class because proposed trial plan exposed that plaintiffs were trying to improperly extrapolate class proofs from testimony of 42 individuals).

[135] *Id.* at 772-73.

[136] *Id.* at 773.

[137] *Id.* at 774-75.

[138] *Id.* at 774-76.

Forcing plaintiffs to articulate how a case will be tried also can expose the need to limit the class, or to create subclasses to deal with the different issues, interests and proof requirements revealed by this process. When subclasses are involved, each one must separately meet the requirements for class certification.[139]

When the alleged discriminatory decisions are made at, *e.g.*, the office or supervisor level, defendants have strong arguments that this is the level at which classes or subclasses should be certified. As *Wal-Mart* teaches, it is not appropriate to bundle up and "average out" these decisions.[140] Likewise, courts should not certify a class across subsidiaries or divisions if managers have substantial autonomy in the challenged decisions or policies.[141] Further, case law supports that no multi-facility class should be certified when the challenged decisions or policies include discretion exercised at the local level.[142] Finally, subclasses are often required when different policies or systems are in place,[143] or when claims depend on different facts or law.[144]

Practice Pointers

- Don't overlook the importance of requiring plaintiffs (i) to define the class and the claims, issues, and defenses to be tried, and (ii) to develop the trial plan. This will often expose the flaws or limitations in plaintiffs' class claims.
- Make sure that plaintiffs show that each subclass separately meets the requirements for class certification. Know when to push for subclasses to limit the case.
- Subclasses should be created in accordance with the appropriate level of decisional unit, such as office, supervisor, or other.
- Subclasses are often required for employees in different divisions, under different work rules and policies, or at different facilities.
- Subclasses are also often required when claims depend on different facts or law.
- Contest certification across subsidiaries or divisions if managers have substantial autonomy in challenged decisions or policies. Also contest certification across facilities when the challenged decisions or policies include locally exercised discretion.

Wal-Mart and *Comcast*'s Potential Salutary Impact on Cabining Collective Actions Under FLSA and ADEA

Unlike class suits under Title VII, the Americans With Disabilities Act, or ERISA, all of which are governed by Rule 23, suits brought under the FLSA and ADEA are brought as "collective actions" under the FLSA. Section 216(b) of the FLSA states that:

> An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[145]

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[139] *See Fed. R. Civ. P.* 23(c)(5) (providing that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under the rule"); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 368-69, 2012 BL 316792 (7th Cir. 2012) (stating that each subclass is treated as separate and must meet the requirements to be a Rule 23(b)(2) class).

[140] *See, e.g.*, *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896-98, 2012 BL 201297 (7th Cir. 2012) (holding same to refuse to certify broad multi-facility class based on claim that supervisors exercised discretion in discriminatory way); *Gutierrez v. Johnson & Johnson*, 269 F.R.D. 430, 432-33, 438, 2010 BL 175525 (D.N.J. 2010) (same—finding that there is no class for race discrimination claims on pay and promotions when the company uses a decentralized management structure and grants local autonomy to its thirty-five American subsidiaries); *Garcia v. Johanns*, 444 F.3d 625, 632-33 (D.C. Cir. 2006) (refusing to certify a nationwide class when decisions were made at the local level, which had substantial autonomy) (collecting cases); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 667-71 (N.D. Ga. 2001) (refusing to certify a multi-facility class in race discrimination case because the facilities and plant managers had discretion over how they implemented corporate policies, and complaints of discrimination related to how first-level managers and supervisors implemented their discretion); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-40 (W.D. Tex. 1999) (refusing to certify a class where the facilities and business units had varying degrees of autonomy over challenged decisions).

[141] *See, e.g., Gutierrez*, 269 F.R.D. at 432-33, 438 (finding that there is no class for race discrimination claims on pay and promotions when the company uses a decentralized management structure and grants local autonomy to its thirty-five American subsidiaries).

[142] *See, e.g.*, *Garcia*, 444 F.3d at 632-33 (finding that no nationwide class was possible when decisions were made at the local level, which had substantial autonomy in this discrimination case based on government farm loans) (collecting cases); *Reid*, 205 F.R.D. at 667-71 (refusing to certify a multi-facility class in this race discrimination case because managers had discretion in how they implemented corporate policies, and complaints of discrimination related to how first-level managers and supervisors implemented their discretion); *Zachery*, 185 F.R.D. at 238-40 (same—facilities and business units had varying degrees of autonomy over challenged decisions).

[143] *See Briceno v. USI Servs. Grp, Inc.*, No. 09-CV-4252, (E.D.N.Y. Sept. 28, 2012) (requiring subclasses in wage and hour claim under state law because there was no "single, uniform policy;" rather, the employer used two different systems for recording time—a paper and then telephonic system); *Meyers v. Crouse Health Sys., Inc.*, 274 F.R.D. 404, 413 (N.D.N.Y. 2011) (holding, in a wage claim case, that it is appropriate to create subclasses because the claims are based on four distinct policies). *See also Guan Ming Lin v. Benihana Nat'l Corp.*, 275 F.R.D. 165, 177, 2011 BL 144520 (S.D.N.Y. 2011) (finding that there is no commonality for the proposed class because different rules apply in different ways to each class member).

[144] *See, e.g.*, *Culver v. City of Milwaukee*, 277 F.3d 908, 911 (7th Cir. 2002) (holding, in a failure-to-hire race discrimination claim, that if the class otherwise qualified, two subclasses would be required because of the factual differences in the claims between those denied job applications and those claiming the entrance exam was scored in a discriminatory fashion). *See also, e.g.*, *Weekes-Walker v. Macon Cnty. Greyhound Park, Inc.*, 281 F.R.D. 520, 525-26, 2012 BL 60360 (M.D. Ala. 2012) (finding that to satisfy commonality in this WARN case, subclasses were required for each layoff because each one raised different factual and legal issues).

[145] 29 U.S.C. § 216(b).

Collective action certification generally occurs in two stages: the notice stage and an optional final stage.[146] The district court first makes a decision whether notice of the action should be given to potential class members. If the court conditionally certifies the class, the putative class members are given notice and an opportunity to opt in. Conditional certification is used to determine (1) the contour and size of the group of employees that may be represented in the action so as to authorize a notice to possible collective members who may want to participate, and (2) if the members as described in the pleadings are similarly situated. Conditional certification must be based on allegations showing there is a common policy that affects all the collective members, *i.e.*, a factual nexus that binds the named plaintiffs and the potential class members together.[147]

After discovery is largely complete, the defendant typically files a motion for decertification, at which time the court makes a second factual determination on the "similarly situated" question. If the claimants are not similarly situated the class is decertified and the opt-in plaintiffs are dismissed without prejudice, but if the claimants are similarly situated, the representative action is allowed to proceed to trial.[148]

Although courts do not apply all of Rule 23's standards to collective actions,[149] some of these concepts can still inform the "similarly situated" analysis. In particular, *Wal-Mart*'s explanation of why a court needs "common answers" to "glue together" and make common the claims of the individuals ought logically to apply to collective actions. Although many courts reject the formal application of *Wal-Mart* to collective actions,[150] it remains true that the "common answer" analysis is a useful mechanism to determine whether and what claims are "similarly situated."[151]

Courts are also applying *Comcast* to wage and hour actions to defeat or limit class on issues such as whether eligibility for overtime can be determined class-wide, and whether there is a class-wide method to prove damages.[152] *Comcast*'s mandate against bifurcating damages and liability applies to the "similarly situated" analysis as it forecloses class treatment where "questions of individual damage calculations . . . overwhelm questions common to the class."[153] As such, *Comcast* drives home that any damages model must be consistent with the class liability model, and must provide a class-wide method to prove damages, including in wage-and-hour actions.[154]

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[146] *See, e.g.*, *Myers v. Hertz Corp.*, 624 F.3d 537, 2010 BL 254601 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 368 (2011) (approving the use of the two-step method for adjudication of motions seeking certification of a collective action under the FLSA and noting that the approach was not required by the terms of the FLSA or the Supreme Court's cases); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240 (11th Cir. 2003) (same); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 2614 (2002) (same).

[147] *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260, 2008 BL 277492 (11th Cir. 2008) ("[P]laintiff has the burden of showing a 'reasonable basis' for his claim that there are other similarly situated employees."); *Heagney v. Eur. Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988).

[148] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 2013 BL 30258 (7th Cir. 2013); *Frye v. Baptist Mem'l Hosp., Inc.*, 495 F. App'x 669, 2012 BL 211800 (6th Cir. 2012); *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 2012 BL 202173 (3d Cir. 2012).

[149] *See generally Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529, 2013 BL 101434 (2013) (noting that in certain respects "Rule 23 actions are fundamentally different from collective actions under the FLSA").

[150] *See, e.g.*, *Winfield v. Citibank, N.A.*, 843 F. Supp. 2d 397 (S.D.N.Y. 2012) (refusing to apply *Wal-Mart* on motions for conditional certification under the FLSA, concluding that the Rule 23 analysis had no place at this stage of the litigation); *Pippins v. KPMG LLP*, No. 11 Civ. 0377 (S.D.N.Y. Jan. 3, 2012) (internal quotation marks and citation omitted) (the "similarly situated" standard is "considerably more liberal than class certification under Rule 23"); *Ware v. T–Mobile USA*, 828 F. Supp. 2d 948, 955-56 (M.D. Tenn. 2011) (*Wal-Mart* does not affect its analysis of whether the plaintiffs are similarly situated to employees in the putative class under the FLSA).

[151] *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772, 2013 BL 30258 (7th Cir. 2013) (Posner, J.) ("[T]here isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences."); *MacGregor v. Farmers Ins. Exch.*, No. 2:10-CV-03088, 2011 BL 191710 (D.S.C. July 22, 2011) (recognizing FLSA collective actions are not subject to Rule 23 but applying *Wal-Mart*'s Rule 23 analysis of commonality to the FLSA's "similarly situated" test); *Till v. Saks Inc.*, No. C 11-00504, 2013 BL 304600 (N.D. Ca. Sept. 30, 2013) (SBA) (in case challenging exempt status for assistant store managers, court applied Wal-Mart to find lack of commonality on the state law class action, and that these "disparate experiences" defeated a collective action under the FLSA).

[152] *See, e.g.*, *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013) (vacated a wage-and-hour ruling to be reconsidered in light of the Court's ruling in *Comcast*).

[153] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433, 2013 BL 80435 (2013).

[154] *See, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 2013 BL 139706 (9th Cir. 2013) (rejecting class certification where plaintiff's damage calculations were insufficient to satisfy class certification under the predominance requirement); *Ealy v. Pinkerton Gov't Servs., Inc.*, No. 12-1252, 2013 BL 67784 (4th Cir. Mar. 14, 2013) (applying *Wal-Mart* to require a more searching inquiry into whether plaintiffs meet Rule 23 criteria of commonality, typicality, and predominance of common issues and vacating class certification of state wage and hour law claims because the district court did not conduct a "rigorous analysis" of whether plaintiffs satisfied Rule 23); *Cowden v. Parker & Assocs., Inc.*, No. 5:09-323-KKC, 2013 BL 134148 (E.D. Ky. May 22, 2013) (applying *Comcast* and rejecting class certification where individual commission calculations for a purported class of at least 1,800 would overwhelm class-wide commonality); *Wang v. Hearst Corp.*, 293 F.R.D. 489, No. 12 CV 793(HB), 2013 BL 122761 (S.D.N.Y. May 8, 2013), *interlocutory appeal certified* (S.D.N.Y. June 27, 2013) (denying class certification in wage and hour putative class action where plaintiff could not satisfy *Comcast*'s directive that individual damage calculations may not overwhelm questions common to the class); *Forrand v. Fed. Express Corp.*, No. CV 08-1360 DSF (PJWx) (C.D. Cal. Apr. 25, 2013) (same); *Roach v. T.L. Cannon Corp.*, No. 3:10–CV–0591, 2013 BL 83767 (N.D.N.Y. Mar. 29, 2013) (applying *Comcast* to reject class-wide analysis in a putative wage and hour case where plaintiffs offered no manageable way to calculate damages across the entire class,

Practice Pointers

- *Comcast* provides good grounds to defeat or limit collective actions that involve complex or individualized damage claims.
- Although courts sometimes resist applying *Wal-Mart* directly to collective actions, the principles in *Wal-Mart* can be used to challenge whether the class members are similarly situated.
- Plaintiffs often join state law class action claims to collective actions. As cases like *Espenscheid* demonstrate, in those circumstances, courts will be more inclined to hold collective actions to class action standards.

Part III—EXPERTS AFTER *WAL-MART* AND *COMCAST*

This part focuses on experts, and how defendants may be able to use experts to defeat or limit class certification. This is a hotly contested and developing area—cases such as 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.[155]

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.[156] In answering the central question as to "why was I disfavored," the Supreme 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.[157]

The Supreme 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.[158]

In *Comcast Corp. v. Behrend*,[159] the Supreme 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.[160] 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.[161] 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.[162]

The Court concluded that this expert evidence failed to carry plaintiffs' burden of proof on Rule 23's requirements.[163] 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.[164] 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.[165] 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.[166] 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.[167]

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

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and the individual damages calculations that would be required would inevitably overwhelm any questions common to the entire class).

[155] *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*).

[156] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-56, 2011 BL 161238 (2011).

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

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

[159] 133 S. Ct. 1426, 2013 BL 80435 (2013).

[160] *Id.* at 1430-31.

[161] *Id.* at 1431, n.3.

[162] *Id.*

[163] *Id.* at 1433-35.

[164] *Id.* at 1433.

[165] *Id.*

[166] *Id.*at 1441.

[167] *Id.* at 1433-35.

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.[168] 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.[169] 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.[170]

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 report; 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 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.[171] 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."[172] 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.[173] Similarly, association does not necessarily show causation, as there may be confounding variables that cause

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[168] *Daubert v. Merrell 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.

[169] FED. R. EVID. 702; *see also Daubert*, 509 U.S. at 589-95.

[170] 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).

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

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

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

or substantially affect the challenged disparities.[174] Statistics seeking to show disparities are also invalid if they fail to consider those who are similarly situated for the challenged action.[175]

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.[176] 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."[177] 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.

[174] *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).

[175] *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).

[176] *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).

[177] *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).

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.[178] 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.[179] The Court held that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[180] 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 discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity."[181] 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.[182] 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."[183] 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."[184]

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

[179] *Id.*

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

[181] 688 F.3d 893, 898 (7th Cir. 2012).

[182] *Id.* at 894.

[183] *Id.* at 896.

[184] *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 com-

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*.[185] 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.[186] 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.[187] 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[.]"[188] 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."[189]

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.[190] 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."[191] 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.[192]

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.[193] In an effort to establish commonality, plaintiff proffered a statistical analysis of Allstate's personnel data, which provided information regarding employment records and compensation.[194] Plaintiff argued that the analysis identified disparities in job assignments, promotions, and levels of salary paid.[195] 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 . . . ."[196] 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.[197]

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 statistical analyses as unreliable on proof of liability.[198] 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 consis-

monality. *Id.* at *23-24.

[185] 726 F.3d 372, 2013 BL 211204 (3d Cir. 2013).

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *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*.").

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

[191] *Id.*

[192] *Id.*

[193] 255 F.R.D. 450, 454-55 (N.D. Ill. 2009).

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

[195] *Id.* at 462.

[196] *Id.* at 465; *see also In re Taco Bell*, No. 1:07-cv-01314-OWW-DLB., 2011 BL 244118 (E.D. Cal. Sept. 26, 2011) (finding that failure to consider all facts underlying terminations of putative class members eliminates ability to opine on class-wide terminations).

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

[198] *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, 2010 BL 187745 (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).

tent with its liability case . . . ."[199] 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.[200] 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.[201] 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.[202] Further, defendants' expert showed that although some locations under-hired women, those same locations over-hired racial minorities.[203] Indeed, some locations under-hired one or both groups one year and over-hired the same group or groups the following year.[204] 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.[205] In a gender discrimination claim over compensation, defendants' expert showed that plaintiffs' expert failed to account for important variables in compensation.[206] 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.[207] 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."[208]

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.[209] Plaintiffs alleged that defendants imprudently managed the 401(k) plan, including by making misrepresentations related to their investments in Motorola's stock.[210] 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.[211] 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 the same information or statements in making their investment decisions."[212] 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

[199] 133 S. Ct. at 1433 (internal quotation omitted).
[200] No. 04-40132, 2009 BL 133763 (E.D. Mich. Mar. 31, 2009).
[201] *Id.*
[202] *Id.* at 6.
[203] *Id.*
[204] *Id.*
[205] No. 1:06-cv-860-SEB-JMS (S.D. Ind. Mar. 12, 2010) *aff'd* 637 F.3d 818 (7th Cir. 2011).
[206] *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.").
[207] *Id.*
[208] *Id.*
[209] No. 1:10-cv-00911, 2011 BL 291923, 52 EBC 1965 (N.D. Ill. Nov. 15, 2011).
[210] *Id.*
[211] *Id.* at *5.
[212] *Id.*

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.[213] 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.[214] 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.[215] 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.[216] The court found that the expert's analysis defeated Rule 23's adequacy requirement; thus, the class was decertified.[217]

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.[218] 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."[219] 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.[220] 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.[221]

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.[222]

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.

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[213] 705 F.3d 370, 372, 2013 BL 28470 (8th Cir. 2013).
[214] *Id.* at 374-76.
[215] 476 F.3d 299, 39 EBC 2352 (5th Cir. 2007).
[216] *Id.* at 315.
[217] *Id.* at 315-16.
[218] No. 1:10-cv-00911, 52 EBC 1965 (N.D. Ill. Nov. 15, 2011).
[219] *Id.*
[220] 633 F.3d 574, 586-87, 2011 BL 16204, 50 EBC 1801 (7th Cir. 2011).*Cf. Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813-14, 2013 BL 216743, 56 EBC 2352 (7th Cir. 2013)(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).
[221] *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)(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).
[222] No. 3:05-cv-115, 2010 BL 102567, 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).