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# CLASS ACTION CERTIFICATION OF PUNITIVE DAMAGES CLAIMS AFTER *WAL-MART v. DUKES*

by  
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For years, plaintiffs and defendants have clashed over whether claims for punitive damages can be certified for class treatment pursuant to Federal Rule of Civil Procedure 23(b). But the legal landscape on which this conflict has raged may well have shifted. The U.S. Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), could circumscribe federal courts' authority to certify punitive damages claims for class treatment.

Ordinarily, when plaintiffs seek class treatment of claims for monetary damages, federal courts may grant class certification only if the claims meet the prerequisites for class certification set by Rule 23(b)(3). See *Wal-Mart*, 131 S. Ct. at 2558-59. Rule 23(b)(3) allows for class certification solely where "questions of law or fact predominate over any questions affecting only individual members" and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

Several courts have determined that claims for punitive damages do not qualify for class treatment under Rule 23(b)(3) because they fail to satisfy the predominance requirement.<sup>1</sup> It should therefore come as no surprise that, over the years, plaintiffs have sought to sidestep Rule 23(b)(3)'s stringent predominance standard by seeking class certification of punitive damages claims under a different provision—Rule 23(b)(2).

Rule 23(b)(2) allows for class treatment only when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Before *Wal-Mart*, intermediate federal appellate courts were divided over the proper standard for determining whether Rule 23(b)(2) authorized class certification where the class demanded monetary relief in addition to injunctive and declaratory relief.

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<sup>1</sup> See, e.g., *Allison v. CITGO Petroleum Corp.*, 151 F.3d 402, 418-20 (5th Cir. 1998); *Xavier v. Belfor Group USA, Inc.*, 254 F.R.D. 281, 291 (E.D. La. 2008); *In re Baycol Products Litig.*, 218 F.R.D. 197, 215-16 (D. Minn. 2003); *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 548-50 (D.N.J. 2001).

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In *Wal-Mart*, the Supreme Court assessed whether Rule 23(b)(2) permitted class certification where the class sought not only declaratory and injunctive relief but backpay as well. *See Wal-Mart*, 131 S. Ct. at 2557-61. The Court held that this provision does not authorize class certification of claims for backpay or other sorts of relief for which each class member would be entitled to an individualized award of monetary damages. *Id.* at 2557 (“[A]t a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy” Rule 23(b)(2)).

*Wal-Mart*’s interpretation of Rule 23(b)(2) should, at a minimum, bar courts from certifying punitive damages claims for class treatment under that provision.<sup>2</sup> The Supreme Court has previously held that any punitive damages award must be tied to the harm suffered by a plaintiff. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23, 426 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580 (1996).<sup>3</sup> Accordingly, claims for punitive damages, like claims for backpay, are claims for an individualized award of monetary damages and thus they equally should not be subject to class certification under Rule 23(b)(2). Indeed, several federal district courts, following *Wal-Mart*’s interpretation of Rule 23(b)(2), have already reached precisely that conclusion.<sup>4</sup>

The U.S. Court of Appeals for the Ninth Circuit recently sidestepped this issue in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011). The Ninth Circuit vacated a district court’s order granting class certification and remanded the case to the district court to consider whether class certification should be granted pursuant to the legal standards set by *Wal-Mart*. In doing so, the Ninth Circuit “highlight[ed] several factors for the district court to consider” on remand. *Id.* at 987. Among those factors, the Ninth Circuit said the district court may consider on remand whether plaintiffs’ claim for punitive damages could be certified in accordance with *Wal-Mart*’s interpretation of Rule 23(b)(2). *Id.* But regardless of whether the district court in *Ellis* grants or denies class certification on remand, one party or the other may petition for permission to pursue an interlocutory appeal or challenge the class certification ruling on appeal from a final judgment, so the issue could well return to the Ninth Circuit.<sup>5</sup>

Whether the issue returns to the Ninth Circuit in *Ellis* or arises in some other case, sooner or later the federal appellate courts are likely to address whether *Wal-Mart* precludes class certification of punitive damages under Rule 23(b)(2).

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<sup>2</sup> If anything, *Wal-Mart* calls into question whether Rule 23(b)(2) could ever authorize class certification of *any* claim for monetary relief. Since the plain text of Rule 23(b)(2) allows for class treatment only where “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole,” FED. R. CIV. P. 23(b)(2), and never even refers to monetary relief, *Wal-Mart* indicates that this provision may not authorize class certification of monetary claims. *Wal-Mart Stores*, 131 S. Ct. at 2557 (explaining that “[o]ne possible reading” of Rule 23(b)(2) “is that it applies *only* to requests” for injunctive and declaratory relief “and does not authorize the class certification of monetary claims at all,” but declining to decide whether that is the proper construction of this rule).

<sup>3</sup> *Accord, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) (indicating punitive damages are one “form of individual relief”); *Magallanes v. Superior Court*, 213 Cal. Rptr. 547, 553 (Cal. Ct. App. 1985) (“Punitive damages are an individualized punishment and deterrent . . .”); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 376 (E.D. Ark. 2007) (“[G]iven the Supreme Court’s repeated insistence that an award of punitive damages be reasonably related to the harm to the individual plaintiff, an award of punitive damages often must include an inquiry into each plaintiff’s individual circumstances in order to determine the amount of punitive damages awardable to that plaintiff” (footnote omitted)).

<sup>4</sup> *See Morrow v. Washington*, \_\_\_ F.R.D. \_\_\_, 2011 WL 3847985, at \*30 (E.D. Tex. Aug. 29, 2011) (claims for punitive damages “are not appropriate for Rule 23(b)(2) certification” because they “would require an individualized, factual determination for each claim”); *Altier v. Worley Catastrophe Response, LLC*, 2011 WL 3205229, at \*13 (E.D. La. July 26, 2011) (denying class certification under Rule 23(b)(2) with respect to punitive damages claim because such a claim “requires a focus on individualized issues to comply with constitutional protections”).

<sup>5</sup> Of course, it’s possible the district court in *Ellis* may sidestep this Rule 23(b)(2) issue since the Ninth Circuit also indicated that the district court could consider whether the punitive damages claim could be certified pursuant to Rule 23(b)(3). There is no guarantee, however, that the district court would do so and, in any event, the court may decide, as have other federal courts, that a claim for punitive damages cannot be certified for class treatment under Rule 23(b)(3) since it does not satisfy that rule’s predominance requirement.