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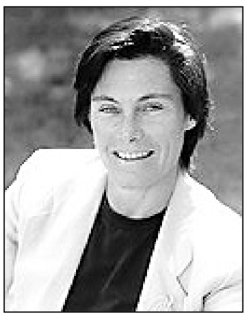
WAL-MART – BEYOND EMPLOYMENT DISCRIMINATION LAW



Georgene Vairo

My dear colleague, Michael Waterstone, weighed in on the Supreme Court's decision in *Wal-Mart, Inc. v. Dukes* in a post on Loyola's "Summary Judgments" faculty blog. *See* Michael Waterstone, *Wal-Mart and the Future of Employment Discrimination Class Action Law*, http://llsblog.lls.edu/faculty/2011/06/wal-mart-and-the-future-of-employment-discrimination-class-action-law.html (last visited June 30, 2011). As a procedure geek, I want to go down a different road and to talk a bit about Wal-Mart's place in the (r)evolution of the Federal Rules of Civil Procedure, and the rules making process. For my purposes it is necessary to dwell simply on two aspects of the opinion: the Court's

Continued on Page 3...

— *INSIDE* —

MERS AND ITS DETRIMENTAL IMPACT ON HOMEOWNERS

Niki Okcu

Mortgage Electronic Registration Systems, Inc. or "MERS", is an entity that is at the center of the foreclosure debacle. However, many have very little to no knowledge about what this entity is or its detrimental impact on homeowners.

I first encountered MERS during the prosecution of a pro bono case I handled on behalf of my 89-year-old client who was bilked out of nearly $600,000.00 by a scam contractor through a fraudulent loan transaction. When I got involved, my client was facing foreclosure through a trustee sale on a loan she had no idea she had. I had no idea what I was in for. I prosecuted the case for two years with my firm's support and backing. After countless hours of investigation, multiple amendments to the complaint, oppositions to countless demurrers, numerous depositions and discovery motions, and review of reams of loan securitization documents that seemed to require translation from some unknown language into English, I was able to prevent my 89-year-old client from becoming homeless. In the end, the entity who held the note forgave the loan in its entirety, and I was able to secure an additional settlement for the client from other defendants.

Despite my ultimate success, getting to that point was incredibly difficult. In addition to the typical difficulties one encounters during the normal course of litigation, the scam contractor had fled the country, the title company, broker and the initial lender had all gone out of business, and the loan had been securitized and sold in the secondary market. Yet I

Continued on Page 5...

PRESIDENT'S MESSAGE

Dear Friends and Supporters of the ABTL:

I am honored to assume the position of President of the Los Angeles Chapter of the ABTL and look forward to the coming year.

It was over a decade ago that I started to regularly attend ABTL lunch and dinner programs as well as the annual seminar. My involvement in the organization has not only provided me with interesting presentations on both substantive and practical topics but I believe that the greatest benefit has been the number of new friends and colleagues that I have come to know—both in the judiciary and the Bar. The relaxed and collegial atmosphere of ABTL events is to me the hallmark of the ABTL and what sets it apart from other bar organizations. After all, how often can you find yourself snorkeling with a California Supreme Court justice in Maui or zip lining with your former opposing counsel.

There are so many challenges facing the bench and the Bar in these current times and I am hoping that the ABTL can provide insight through its programs to issues of concern to practitioners and also a relaxing and congenial environment to discuss how to tackle some of the matters of concern for both the bench and the Bar.

For my mission, I would like to reach out not only to longstanding (and valued) members of the business litigation community but to new (or newer) attorneys who are either currently practicing in the area or who would like to. I invite each of you to join me in reaching out to those you know and to invite at least one new attorney to each of the dinner/lunch programs you attend so that we can work to expand our already outstanding base of ABTL members and participants.

I welcome your thoughts and ideas and look forward to seeing you at our next ABTL dinner program in September.

With warm regards,

Theresa Kristovich

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Wal-Mart…continued from Page 1

discussion of commonality for Rule 23(a) purposes, and its restriction of monetary relief in the context of a Rule 23(b)(2) class action seeking injunctive relief.

First, this is the third time in relatively recent times that, in a major way, the Supreme Court has adopted such a radically different view of a Federal Rule of Civil Procedure that it amounts to an amendment of the rule outside of the Rules Enabling Act ("REA") process. *See* 28 U.S.C. § 2071. Starting in the 1970s, defense interests began to really scream about the costs of civil litigation. So, the Advisory Committee on the Civil Rules, appointed by the Chief Justice to adopt and amend the rules pursuant to the REA, went about tinkering with the discovery rules. *See* Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting from Court's approval of 1980 Amendments regarding discovery).] In 1983, the Advisory Committee proposed more than tinkering rules amendments to Rules 11 — the sanctions rule, Rule 16 — the pretrial conference rule, and Rule 26 — the general discovery rule, to help reduce costs and delay. Did any of these amendments change anything? Yes, but they were not enough for some. In 1986, the Supreme Court entered the fray directly for the first time. In its "Summary Judgment Trilogy" it adopted an approach to Rule 56 that, while sensible, overturned the prevailing view that summary judgment ought to be granted sparingly because a plaintiff's right to jury trial was at stake. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The Court piled on when it decided *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The Court made the district court a gatekeeper — keep out the junk science that some plaintiffs use to defeat motions for summary judgment. Although empiricists disagree as to the extent to which the 1986 and Daubert trilogies resulted in more summary judgments or not, they certainly sent a message.

I said above that the 1986 Trilogy was "sensible" because I believed in what Justice Rehnquist said in Celotex v. Catrett — summary judgment should be "put up or shut up" time. If a plaintiff has had enough time for discovery, and it is apparent that it lacks evidence on a material issue of fact, there really is no reason for a trial. Although I have always bought into that notion, there was much loose and troubling language in the Trilogy cases. To paraphrase: "District courts ought not evaluate the evidence — that is the province of the jury — but they ought to take into account the quantum and quality of the evidence." *See Anderson*, 477 U.S. at 254-55. Is that not weighing? In one of the cases *(Matsushita)*, an antitrust case, the Court said that when deciding whether to grant summary judgment, the court ought to look at whether the plaintiff's claims are "plausible." *See, e.g. Matsushita Elec.*, 475 U.S. at 596-97.

Fast forward to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 7, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Let's look at what I contend is the Court's second major encroachment on the rules making process. In 2008 and 2009, the Supreme Court's decisions in these two pleading cases turned the liberal notice pleading philosophy, if not the letter, of the Federal Rules of Civil Procedure on its head. For decades, the idea that a plaintiff need plead only a "short, plain statement" showing entitlement to relief, meant just that—enough to start the litigation ball rolling; just enough to let the defendant know what it was being sued for so it could answer and mount a defense. The idea was to reduce the role of pleading so that the parties could take discovery of each other and third parties and have the case resolved on the merits through settlement or trial.

The idea that a plaintiff's claim be "plausible" was pushed back by *Twombly* and *Iqbal* from the post-discovery, summary judgment stage to the pleadings stage. When I wrote about the summary judgment trilogy decades ago, I failed to grasp that the Court had effectively amended Rule 56 outside of the formal Rules Enabling Act rules making

Continued on Page 4...

Wal-Mart…continued from Page 3

process. Indeed, the Advisory Committee recently finally caught up with the Supreme Court by amending Rule 56 to essentially codify the 1986 Trilogy. When *Twombly* and *Iqbal* were decided, it was impossible to ignore what had really happened: the Court was amending Rule 8. The majority could say that it was simply interpreting the meaning of the word "show" in Rule 8 — as in the plaintiff's "short, plain statement" must "show" that the pleader is entitled to relief. However, hundreds of law review articles would not have been written discussing these cases if the Court had not done something huge. And, there would have been no need for the Duke Conference in May 2010 — yes it also focused on the costs of discovery, especially e-discovery — if the Court had simply provided a bit of meat to the bones of Rule 8. Bills have been proposed to legislatively overturn the decisions. What should the civil rules Advisory Committee do — like Rule 56, should they propose amendments to Rule 8 to codify the result, or overturn it? Leave it to Congress? Just leave it alone?

Now, we see the same scenario playing out post-Wal-Mart. *See Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541; 180 L. Ed. 2d 374 (2011). For the third time, the Supreme Court has taken the bull by the horns. Class actions are still perceived to be a huge problem by defense interests. The Class Action Fairness Act gets most class actions into federal court. And now, it will be even harder to get classes certified given the Court's stringent approach to the Rule 23(a) commonality requirement. The Court has effectively amended the class action rule. As some U.S. Senators did in the wake of the Court's other notorious class action case this Term — *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), in which the Court held that the Federal Arbitration Act preempted any state laws barring class action waivers on unconscionability grounds — there will be bills seeking to restore the pre-*Wal-Mart* conception of "commonality" for Rule 23(a) purposes and to allow back-pay as an additional remedy in the context of Rule 23(b)(2) class actions seeking injunctive relief. We will see the civil rules Advisory Committee wondering how or whether to respond in some way.

My take here is that whether one is pro-plaintiff or pro-defendant as a general matter, we all ought to be concerned about the approach the Supreme Court is taking to procedure generally and the Federal Rules of Civil Procedure specifically. With the Rules Enabling Act ("REA"), Congress has provided an excellent process that provides for a deliberation that takes into account the views of all the users of the federal judicial system, and allows for empirical study of the issues facing litigants and the courts. It is true that the Supreme Court is the ultimate judge of the rules that are proposed via that process, and is free to reject them. But the process does not give the Court the right to write the rules any way it sees fit apart from that process. The Court ought to let the Advisory Committee and the REA rules-making process do their job. So too should Congress. Whether one agrees or disagrees with the folks in Congress who want to overturn the pleading cases and Wal-Mart, it is perhaps even worse to let members of Congress who are not experts in judicial rule making, as opposed to general legislation, undertake the task. Congress does a poor enough job drafting jurisdictional statutes — think CAFA — but at least the drafting of jurisdictional statutes is well within Congress' province. Congress has enacted a rule making process, and it also should let the REA process provide the solution, whatever that may be. Whether we are plaintiff-oriented and concerned about Rule 8 or Rule 23, or defense oriented and concerned about Rule 11 (*see* the Lawsuit Abuse Reduction Act of 2011 ("LARA"), H.R. 966, S. 533, 112th Cong. (2011)), we ought to let the experts do their job.

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MERS…continued from Page 1

expended the most herculean amount of effort to find an answer to what one would think is a straightforward and simple question: Who was the note holder on my client's loan? I desperately needed to locate the note holder because only the note holder had the authority to negotiate a resolution regarding my client's loan and prevent her from becoming homeless. Amazingly, however, this question was lost on everyone, even on the servicer of the loan, who claimed ignorance for as long as it could. This is because I was dealing with something called MERS.

What is MERS?

Mortgage banking industry insiders created MERS, purportedly to monitor and track the ownership and servicing of residential and commercial mortgage loans and to facilitate their transfer. It is a subsidiary of MERSCORP, Inc., which is owned by some of the nation's biggest banks and mortgage companies, including Bank of America Corp., Citigroup, HSBC, GMAC, Wells Fargo, Fannie Mae and Freddie Mac. MERS is not a lender and does not own any beneficial interest in a note or a mortgage. MERS maintains a computer database which tracks ownership and servicing rights of mortgages. Lenders and other mortgage companies pay membership dues and transaction fees to use this database.

MERS' electronic database eliminates the necessity of recording assignments of mortgages in county records each time the ownership of a mortgage changes; thus, it eliminates the need to pay county recorder filing fees each time a loan is assigned. In other words, MERS systematically eliminates public records of mortgage loan ownership and assignments, and it is a vehicle to avoid paying fees to local governments for recording assignments during the life of a loan.

MERS also serves another function. When closing on a home mortgage, MERS is named as a "mortgagee of record in a nominee capacity" for the lender who actually loaned the money to the borrower. The mortgage is then recorded with the county property recorder's office under the name MERS, rather than the loan originator's name. MERS remains mortgagee of record for the duration of the loan, even after the loan gets transferred. MERS has a right to bring foreclosure proceedings in its own name even though it is not the lender.

There are typically two ways in which MERS can become a mortgagee on a loan. The first and the preferred method is through an arrangement in which MERS is the original mortgagee or "MOM." During the initiation of the loan, the lender demands that the borrowers convey their property to MERS, agreeing to permit MERS to hold legal title and authority to exercise all mortgagee rights, including foreclosure. The second method is through an assignment some time during the life of the loan. Under either scenario, MERS holds legal title, but no financial, beneficial or other interests to the loan. Yet it maintains all the rights to act against homeowners as the loan holder. Under either scenario, the borrower is dependent on MERS to tell her who the real holder of her loan is.

More than half of the nation's residential mortgages are estimated to be recorded in the name of MERS rather than the bank, trust, or company that actually has a meaningful economic interest in the repayment of the debt. On its website, MERS states that its "mission is to register every mortgage loan in the United States on the MERS® system."

MERS Obfuscates the True Owner of the Note and Impedes Borrowers' Legal Rights

The biggest problem with MERS from a borrowers' standpoint is that by shielding the identity of the note and the mortgage holder, MERS makes it extremely difficult for borrowers, such as my pro bono client, to track down the real party behind their loan, and to enforce their legal rights whether they are challenging predatory lending practices or facing foreclosure.

In a traditional two- or three-party mortgage, the borrower generally has a clear idea with whom it is dealing and who might seek to foreclose upon her if she falls fell behind on the mortgage. Securitization further complicates and convolutes this process. Depending on how a loan is securitized, it may be sold multiple times and change several servicers before ending up in a trust pool, creating an environment where there are ten or more different entities who have somehow touched a given loan. This makes it daunting for the borrower to reconstruct the history of the loan and track down the different players involved and their roles.

Continued on Page 6...

MERS…continued from Page 5

Engaging in a protracted legal battle with corporate giants to uncover unscrupulous lending practices or to fight foreclosure is not feasible for most borrowers when there are two or three parties involved. This task is even more arduous when a borrower is contending with a dozen or so parties. Injecting MERS into the equation makes matters far worse. Before MERS, the current holder of a mortgage could be identified by checking public records for the last assignment of mortgage. Under the MERS system, assignments are not filed except when the mortgage is initially assigned to MERS or assigned to a non-MERS mortgagee. As a result, when MERS is the nominee for a mortgage, the borrower cannot determine who owns her note and the mortgage by checking public records, nor can the borrower obtain this information from MERS.

MERS is not prepared or equipped to respond to borrowers' questions regarding their loans. The company does not have any employees or customer service personnel to deal with inquiries from borrowers. On the contrary, MERS operates by having its members upload and manage their own data. If MERS needs to have someone physically present to handle a task, such as appear at a deposition, it certifies an officer, typically an employee of one of its members. The certifying officer is usually someone who has a very limited power, no personal knowledge about the loan, and cannot provide much information about the loan. Based on my experience, the certifying officer typically is not someone who can even provide basic information about the loan, such as who holds the note or the mortgage — even though the stated purpose of MERS is to keep track of this information. When I took the deposition of MERS' person most knowledgeable regarding my pro bono client's loan — I should really say person least knowledgeable — not only did the witness have no idea what or who MERS was and had never seen MERS' famous database, he also could not identify who held the note on my client's loan.

Borrowers' inability to timely determine who owns the note and mortgage prevents borrowers from exercising important rights under federal and state law and creates obstacles for borrowers in defending foreclosure proceedings. The owner of the note alone has the power to make critical decisions. Dealing with the servicer alone is rarely sufficient to handle restructuring overdue payments or loan modification because the servicer often lacks the authority to handle these matters.

Under federal law, borrowers have a right to rescind their loan under certain circumstances, including when the lender fails to comply with the Truth-in-Lending Act. If a borrower rescinds, this cancels the lender's security interest or mortgage, credits all payments entirely to principal, relieves the borrower of the obligation to repay any closing costs or fees financed, and provides the possibility of recovering statutory and compensatory damages. 12 C.F.R. § 226.23. The borrower may assert the right of rescind against assignees of the obligation, including the note holder. Rescission is an extremely powerful tool, in fact, one of the few tools available to homeowners to stop a foreclosure. 15 U.S.C. § 1641(c).

In order to rescind, the homeowner must provide notice to the holder of the note or its agent. MERS does not serve as the holder, nor does it serve as the holder's agent for this purpose. Therefore, service upon MERS is ineffective. *See Mortg. Elec. Registration Sys. v. Estrella*, 390 F.3d 522 (7th Cir. 2004) (MERS is a nominee on the mortgage only); *Mortg. Elec. Registration Sys. v. Neb. Dep't of Banking & Fin.*, 704 N.W.2d 784 (Neb. 2005) (MERS argues that it is only nominee of mortgage). The Truth-in-Lending Act requires servicers to tell borrowers, upon request, who the holder is, 15 U.S.C. §1641(f)(2), but there is no requirement that the response be timely and there is no remedy for its violation. Most of the time, servicers do not want to come forward with this information.

Borrowers face the same problems when they try to raise common law fraud or claim unfair business practices defenses. In foreclosure proceedings, assignee note holders often claim that they are a holder in due course when a borrower raises certain defenses such as common law fraud or the unfair business acts and practices. Before MERS, borrowers could easily access the complete chain of title through public records by identifying each assignment of the loan. Under the MERS system, this information is not readily available to the borrower.

Continued on Page 7...

MERS…continued from Page 6

MERS Lacks Standing To Foreclose

A party must have possession of the promissory note in order to have standing to enforce or collect on a debt. MERs admittedly does not ever own the note or the mortgage, and therefore, does not have standing to bring foreclosure on the millions of mortgage loans in which MERS is recorded as the nominee.

MERS' standing to bring foreclosure in its own name has been the subject of much legal debate and public controversy in recent years. Numerous lawsuits around the country have been filed on behalf of home owners alleging that because MERS does not own the note and mortgage, it does not have standing to sue or the right to assign ownership of the note and mortgage.

In the last couple of years, MERS has prevailed in number of lawsuits. However, decisions have also been going against MERS. Several courts have acknowledged that MERS is not the owner of the underlying note and therefore could not transfer the note, the beneficial interest in the deed of trust, or foreclose upon the property secured by the deed. *In re Foreclosure Cases,* 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007); *In re Vargas,* 396 B.R. 511, 520 (Bankr. C.D. Cal. 2008); *LaSalle Bank v. Lamy,* 824 NY.S.2d 769 (N.Y. Sup. Ct. 2006) .

MERS' standing to foreclose took a serious blow in 2009, when the Kansas Supreme Court unanimously rejected a claim by MERS that as the representative of a lender that owned the second mortgage on a property, it should have been notified of a foreclosure action brought by the owner of the first mortgage. In its ruling, the court called MERS a "straw man" that lacks the rights of a creditor and likened MERS to "the blind men of Indian legend describ[ing] an elephant -- their description depended on which part they were touching at any given time." *Landmark Nat'l Bank v. Kesler,* 289 Kan. 528, 538 (Kan. 2009).

More recently, in May 2010, in Kings County, New York, Supreme Court Judge Arthur Schack ruled that MERS had improperly transferred a mortgage to HSBC, when its own records indicated the party with a right to foreclose was Wells Fargo. MERS creates a "mortgage twilight zone," Schack said, calling arguments that the foreclosure in question was legitimate "incredible, outrageous, ludicrous and disingenuous." He dismissed the foreclosure and ruled that it could not be resubmitted. *See HSBC Bank, USA v. Yeasmin*, 2010 N.Y. Slip. Op. 50927U (N.Y. Sup. Ct. May 24, 2010). On October 6, 2010, U.S. District Judge Garr King of Oregon, issued an injunction halting a foreclosure sale after determining that MERS lacked standing to transfer the mortgage. Natache D. Rinegard-Guirma, Civil Case No. 10-1065-PK.

Questions regarding MERS' controversial role in the mortgage crisis continue. On November 16, 2010, the CEO of MERS Corp. Inc., R.K. Arnold, defended MERS' practices in testimony before the Senate Banking Committee. On November 17, 2010, John Walsh, the acting Comptroller of the Currency, testified before the House Financial Services Committee and said his agency is conducting an examination of "corporate governance, control systems, and accuracy and timeliness of information maintained in the MERS system."

Conclusion

They say there are multiple sides to every story. Advocates of MERS undoubtedly disagree with my position on this article. However, no matter what side of this story one is on, one thing is clear, MERS has diminished the transparency in the mortgage market and has placed the borrower in unfair and significant disadvantage at the benefit of big banks and mortgage industry insiders who appear to be the sole beneficiaries of the MERS system.

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NINE WAYS FOR COUNSEL TO PREPARE FOR MEDIATION

Daniel Ben-Zvi

Once the mediator and a date for mediation have been selected, the question then is how best to prepare for the mediation. Attorneys know how to prepare for trial: motions in limine, evidence, witness exams, and opening statements. How to get ready for mediation is not as obvious. Here are nine suggestions for counsel to best prepare for mediation.

Don't resume negotiations prior to mediation. Mediation is typically elected after counsel has explored settlement, found the parties too far apart and initiated litigation. Once the parties agree to mediate, it is then best not to negotiate further until the mediation. Offers made or positions expressed a short time before the mediation may set a floor or ceiling for the negotiation and can create unrealistic expectations. The mediator's function and expertise is to set expectations and guide negotiation in ways to maximize the opportunity to reach agreement.

Discuss procedure with the mediator. The mediator is there to be of service to you. It is your negotiation. If you feel strongly about whether there should or should not be a joint session, let the mediator know. If the mediator disagrees, be open-minded. Trained in what works in the ebb and flow of the process, the mediator will recommend whether, when and what kind of joint session should be held.

Have a meaningful private conversation with the mediator. It can be helpful to meet with the mediator without your client present to candidly discuss strengths and weaknesses of the case. You can also request the mediator's assistance to guide your client to a more realistic position. In mediation, unlike arbitration, ex parte communications are not only appropriate but encouraged. Thus, you can raise these and any other points with the mediator at or before the mediation.

Be prepared with the most persuasive law and facts. In addition to coming into mediation flexible and ready to negotiate, attorneys should be prepared to argue their best case. The decision to mediate does not lessen your duty to be a zealous advocate. Before mediation, a brief is submitted either for the mediator's eyes only or shared with the other side. In the latter case, the mediator may then be provided also with a supplemental brief or letter for the mediator's eyes only. It is critical to provide the mediator with controlling precedents and governing laws. Also, quite helpful are verdicts in similar cases (particularly from the courthouse in which your case will be tried) and reported settlements in similar cases. Be prepared to argue your position from the head and, in cases with a compelling emotional component, from the heart.

Have present at the mediation the decision makers and those upon whom the party will rely. Any key decision makers, including anyone the party would rely on to make a final decision such as a spouse or confidant, and the key insurance adjusters should be present. If a decision maker cannot be in attendance, the mediator and the opposition parties should be informed before the mediation to assess the alternatives, e.g. telephonic appearance.

Share what you plan to do in the litigation should the case not settle in mediation. Be ready to share, for the most part, what production and other discovery you intend to pursue if no settlement is reached, including party, witness and expert depositions. You should be ready to approximate the length of trial and share which kind of experts you intend to use.

Have an estimate of the fees and costs incurred and projected fees and costs should the case not settle. These figures of past and future expenses are clearly relevant in a mediation where attorney fees and costs are recoverable by the prevailing party by law or contract. These numbers may also be of use by the mediator in cases where fees and costs are not recoverable.

Continued on Page 9...

Nine Ways for Counsel…continued from Page 8

Consider the value your client places on being free of the anxiety and uncertainty caused by the ongoing dispute. Most parties tend to find the anxiety of being engaged in an ongoing conflict deeply uncomfortable. Their tolerance for living with the uncertain outcome of a prolonged litigation is unique to their individual temperament, but most will ultimately place a value on being able to trade uncertainty for certainty. In order to effectively exhaust the mediation opportunity, one should not just account for the unknown future ruling and the real costs to get there, but also the value to the client in achieving immediate certainty and peace.

Be prepared with specific terms to include in a settlement agreement or memorandum of understanding. Most mediations that settle end with the signing of a settlement agreement or at least a memorandum of understanding intended to be binding and enforceable under California Code of Civil Procedure Section 664.6. Most mediators will have a form memorandum of understanding and settlement agreement, but before mediation you should know the particular terms required for a settlement for your type of case. You should also be cautious of unenforceable terms. Some plaintiffs' attorneys still try to add a certain term – that upon default of a payment, judgment shall enter for an amount significantly higher than the balance due – despite the likelihood of it being invalidated as an unenforceable penalty. Many attorneys find it helpful to come to mediation with a prepared draft of a memorandum of understanding or settlement agreement on their laptop computer.

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THE ANTI-INJUNCTION ACT TAKES ON RULE 23

Andrew Sokolowski

For obvious reasons, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), is the summer's hot topic for class action CLE programs, blogs, scholarly articles and water cooler discussions among class action practitioners. Much discussion addresses *Dukes*' scope, and – for plaintiffs' attorneys like myself – how to limit *Dukes*' reach and distinguish the decision legally and factually. However, four days before the Supreme Court issued the *Dukes* opinion, the Supreme Court itself limited its reach in *Smith v. Bayer Corp.*, __ U.S. __, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011). *Smith* received less press than *Dukes*, possibly because it involves the somewhat esoteric Anti-Injunction Act, but also because the scope of *Dukes* – in size and potential damages – had garnered the attention of the mainstream media and everyday news watchers. If it is any indication, I heard about the decision on AM radio on my way to the office. I heard no such reports about *Smith*.

Lack of fanfare aside, *Smith* is important to class action attorneys who litigate in state court. As an aside, even post-Class Action Fairness Act, a significant number of class actions are litigated at the state level, including wage and hour cases. The Anti-Injunction Act, first enacted in 1793, is federalism at its finest. The Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Thus, the Act presumes that a federal court cannot enjoin state court proceedings, subject only to limited exceptions.

So, how does an injunction case have any bearing on Rule 23 or *Dukes*? *Smith* addressed – in the context of competing class certification motions in state and federal court – the Act's third exception regarding a federal courts'

Continued on Page 10...

The Anti-Injunction Act…continued from Page 9

ability to "protect or effectuate [their] judgments," which is colloquially known as the "relitigation exception." As is common in many class actions involving nationally distributed products, in *Smith* two plaintiffs filed separate suits in West Virginia state court, alleging state law consumer protection and warranty claims regarding Bayer's sale of Baycol. Bayer removed the first case, filed in 2001, to federal court, and it was eventually transferred to the District of Minnesota for Multidistrict Litigation proceedings. *Smith*, 131 S. Ct. at 2373. The second case, filed about one month later, remained in state court. The second case named several non-diverse West Virginia defendants and, because if predated the Class Action Fairness Act, was not removable. *Id.* Both cases went forward and, six years later, the federal district court issued an order declining to certify the West Virginia class of Baycol purchasers under Federal Rule of Civil Procedure 23. *Id.* at 2374.

Defendant then asked the federal court to issue an order, under the Act's relitigation exception, enjoining the West Virginia state court from hearing the plaintiff's state court motion for class certification. The district court granted the injunction, and the Eighth Circuit affirmed, relying on principles of issue preclusion, and holding that the state court plaintiff invoked a similar certification rule, sought to certify the same class, and relied on the same legal theories. *Id.*

The Supreme Court reversed. Two main holdings emerge from *Smith*. First, drawing an analogy to *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988), and its discussion of differing *forum non conveniens* analyses, the Court ruled that the relitigation exception was improperly applied, because Federal Rule of Civil Procedure 23 is not the same as West Virginia Rule 23. *Smith*, 131 S. Ct. at 2379. Second, the denial of class certification in one case cannot bind the parties in another case or prevent the latter from independently seeking class certification. *Id*. at 2379-80.

The first holding is particularly important for class action practitioners in state court. The Court's ruling that state class action rules are not necessarily the same as the Federal rule means that *Dukes*, which is a pure federal Rule 23 decision, will not apply to many state court class actions. Still, *Dukes*' inapplicability is not automatic. Even so, similar or identical language in the state and federal class certification rules is not sufficient for finding they are the same. To assess "sameness," at least for the purposes of issue preclusion, the determination must focus on how the state interprets and applies the state standard. *Id.* at 2377. If the state courts explicitly follow the federal standard, then the relitigation exception likely applies. *Id.* Where the state court overtly refuses to follow federal standards, it does not. "[T]he federal court must resolve any uncertainty on that score by leaving the question of preclusion to the state courts." *Id.* Therefore, "absent clear and convincing evidence that the state courts" adopt the same analysis as federal courts, an injunction should not issue. *Id*. at 2378.

In California, courts may look to Federal Rule of Civil Procedure 23 only "in the absence of controlling state authority." *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1347 (1987) (citing *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 469-470, n. 7 (1981); *LaSala v. Am. Sav. & Loan Ass'n*, 5 Cal. 3d 864, 872 (1971); *Vasquez v. Sup. Ct.*, 4 Cal. 3d 800, 821 (1971)); see also *Wash. Mut. Bank, N.A. v. Sup. Ct.*, 24 Cal. 4th 906, 922 (2004). California has developed its own body of case law regarding commonality, the overarching issue in *Dukes*. California courts embrace a wide array of evidence, including statistical modeling, that goes to commonality and other certification issues, and which *Dukes* arguably calls into question. *See, e.g.*, *Sav-On Drug Stores, Inc. v. Sup. Ct.*, 34 Cal. 4th 319, 333 (2004) (noting California court consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate"). To some extent, *Dukes* is thus inconsistent with controlling California law. It remains to be seen whether California courts will adopt – wholly, partially or not at all – the rationale and analysis contained in *Dukes*. Thus, until the law develops further, it is unlikely that federal courts will enjoin parallel class certification proceedings in California, as the lower court did in *Smith*.

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