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Four Lessons from *Wal-Mart v. Dukes* and Their Application to Montana Class Action Law

Robert H. King, Jr.

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FOUR LESSONS FROM *WAL-MART v. DUKES* AND THEIR APPLICATION TO MONTANA CLASS ACTION LAW

Robert H. King, Jr.*

I. INTRODUCTION

A class action is a departure from the usual rule that litigation is conducted by and on behalf of the named parties only.[1] In a class action, one or more named plaintiffs are permitted to represent a class of other individuals possessing the same interest and same injury.[2] To protect the interests of those other, absent individuals, both federal and state rules of civil procedure impose certain requirements for certifying actions as class actions. The 1966 amendments to Federal Rule 23(a) and (b), governing class actions, significantly altered the requirements for maintenance of class actions.[3] Those amendments were copied into many states' rules of civil procedure, including Montana's.[4] Those amendments led to a virtual explosion in class litigation over the past 40 years.[5] Despite the volume of class ac-

* B.A. Dartmouth College 1975 *magna cum laude*; J.D. University of Michigan Law School 1978 *magna cum laude*. Admitted to practice: Montana (2011), California (1989) (currently inactive), and Illinois (1978). Mr. King is a partner in the firm of SNR Denton US LLP in its Chicago, Illinois office and has been engaged in class action defense nationwide for over thirty years. Other lawyers in SNR Denton on occasion do legal work for Wal-Mart Stores, Inc.; Mr. King has never personally represented Wal-Mart Stores, Inc. The views expressed in this article are the author's alone, and do not necessarily reflect the views of SNR Denton, its lawyers, or its past or present clients.

1. *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979).

2. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

3. *See* discussion, *infra* part II.

4. *See* Mont. R. Civ. P. 23.

5. *See* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 345–346 (2005). National concern regarding the perceived expanded misuse of the

tion decisions in the lower courts in both the state and federal systems, the United States Supreme Court has issued only slightly more than a handful of decisions touching upon the requirements of Rule 23(a) and (b).[6] Thus, a United States Supreme Court decision providing guidance on the meaning of Rule 23 is significant, and warrants special attention.

In June 2011, the Court issued a landmark decision in *Wal-Mart Stores, Incorporated v. Dukes*,[7] reversing the certification of a nationwide class of approximately 1.5 million current and former female Wal-Mart employees who alleged sexual discrimination under Title VII.[8] A 5–4 majority of the Court held that the proposed class failed to satisfy the "commonality" requirement of Federal Rule of Civil Procedure 23(a)(2), finding that the case presented no significant common question of fact or law that was capable of being answered on a class-wide basis.[9] The Court also held unanimously that the class should not have been certified under Rule 23(b)(2) because the plaintiffs sought individualized monetary relief in the form of back pay.[10]

Several significant clarifications to federal class action law emerge from the *Wal-Mart* decision. Prior to *Wal-Mart*, it was a common mantra that courts could not take into consideration the merits of the underlying claims in ruling on class certification.[11] The *Wal-Mart* majority clarified that Rule 23's requirements are not a mere pleading standard, and the proponent of class certification must prove compliance with the rule, even if that overlaps with a merits issue. Before *Wal-Mart*, Rule 23(a)(2)'s "commonality" requirement had been characterized as a mere technical formality easily satisfied.[12] The *Wal-Mart* majority established a new, more stringent test for determining commonality that gives teeth to that requirement. Prior to *Wal-Mart*, courts had interpreted Rule 23(b)(2) to extend beyond injunctive or declaratory relief to other forms of "equitable" relief, and had devised various tests for allowing monetary recovery in Rule 23(b)(2) class actions if such recovery did not "predominate" or was "incidental" to de-

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class action device—particularly in state courts—induced Congress to pass the Class Action Fairness Act (28 U.S.C. § 1332(d)), which, among other things, permits removal of most major class actions to federal court. *See Phillip Morris, Inc. v. Scott*, 131 S. Ct. 1, 4–5 (2010).

6. *See e.g. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *E. Tex. Motor Freight Sys.*, 431 U.S. 395; *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Califano*, 442 U.S. 682; *Gen. Tel. Co. of N.W. v. EEOC*, 446 U.S. 318 (1980); *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147 (1982); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Oritz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

7. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) [hereinafter *Wal-Mart*].

8. *Id.* at 2544.

9. *Id.* at 2546, 2555.

10. *Id.* at 2561.

11. *See infra* part IV(a)(1).

12. *See infra* part IV(b)(1).

claratory or injunctive relief.[13] The *Wal-Mart* Court unanimously held that Rule 23(b)(2)'s explicit language restricts its application to claims for injunctive or declaratory relief, and that classes cannot be certified under this section for the recovery of individualized monetary relief. Prior to *Wal-Mart*, lower courts had suggested that class monetary awards could be predicated upon formulas or sampling approaches.[14] However, the *Wal-Mart* Court rejected an approach to awarding class-wide damages based upon random samples or extrapolations if such an approach would deprive defendants of the right to raise individual challenges to class member recoveries.

The *Wal-Mart* decision will have an important impact on the future development of federal class action practice. This article posits that the *Wal-Mart* decision should similarly have a large impact on the development of Montana class action law. Montana's Rule of Civil Procedure 23(a) and (b) set forth the requirements for certification of class action claims in Montana state court. The language of Montana Rule 23(a) and (b) is identical to the Federal Rule of Civil Procedure 23(a) and (b), and the Comment to the Montana Rule makes clear that it was intended to follow the federal example.[15] Montana courts have traditionally found federal caselaw "instructive" in interpreting Montana's version of the Rule.[16] In its first post-*Wal-Mart* class certification opinion, the Montana Supreme Court cited with approval *Wal-Mart*'s holding pertaining to the impropriety of individualized monetary awards in a Rule 23(b)(2) class, but the Court failed to apply this holding appropriately to the case before it or to appreciate the significance of the remainder of the *Wal-Mart* decision.[17] Montana law thus has yet to fully embrace or understand the lessons to be learned from *Wal-Mart*.

This article will first discuss the history of the class action device and the evolution of Federal Rule of Civil Procedure 23. It will then review the reasoning of the lower court opinions in the *Wal-Mart* case that led to the United States Supreme Court's decision, which will help place the *Wal-Mart* decision in context. It will then examine four lessons to be gleaned from the *Wal-Mart* decision and explain how and why they should be applied in the further development of Montana class action law.

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13. *See infra* part IV(c)(1).

14. *See infra* part IV(d)(1).

15. *See* Mont. R. Civ. P. 23 comm. nn. (2011) (explaining that recent changes were made in part to the Montana Rule "to conform to the recent changes in the Federal Rules."); *see also* Mont. Sup. Ct. Or., *In Re Revs. to the Mont. R. of Civ. P.*, No. AF 07-0157 (Apr. 26, 2011) (effective Oct. 1, 2011).

16. *McDonald v. Washington*, 862 P.2d 1150, 1154 (Mont. 1993); *Sieglock v. Burlington N. Santa Fe R.R. Co.*, 81 P.3d 495, 497 (Mont. 2003).

17. *See Diaz v. Blue Cross & Blue Shield of Mont.*, 267 P.3d 756, 765 (Mont. 2011).

II. History of the Class Action Device and the Evolution of Federal Rule of Civil Procedure 23

Class actions originally were a creature of the English Chancery courts. Under English practice, a class action could be maintained if there was a common interest, joinder of all class members was impracticable, and the class was adequately represented.[18] In the United States, the class action was initially governed in the federal courts by Equity Rule 38 which provided that "[w]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[19] As its name implied, the application of this rule was limited to actions brought in equity; it did not apply to actions at law for money damages.[20]

In 1938, the Federal Rules of Civil Procedure were promulgated, which, among other things mandated one form of action, making the rules applicable to both equity and legal claims.[21] Rule 23 essentially incorporated the requirements of Equity Rule 38, but also created three different types of class actions: "true" class actions, in which the rights sought to be enforced were "joint or common or secondary"; "hybrid" class actions, in which the rights were several and related to identifiable property; and "spurious" class actions, in which the rights sought to be enforced were several, but encompassing a common question of law or fact forming the basis for common relief.[22] The spurious class became the principal vehicle for assertion of money damage claims on behalf of a class. A judgment in a spurious class action did not bind absent class members. Some courts held that class members of a spurious class could sit back and await the outcome of the suit, and "opt-in" to the action if the judgment were favorable to them; this was known as "one-way intervention."[23]

Federal Rule 23 underwent substantial amendment in 1966. Amended Rules 23(a)(1)–(4) were thought to essentially carry forward the former rule's requirements and were not thought to be controversial.[24] Rule 23(a)(1)–(4) sets forth the "prerequisites" for class certification:

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18. *See* Tom Ford, *Federal Rule 23: A Device for Aiding The Small Claimant*, 10 B.C. L. Rev. 501, 502 (1969).

19. *See* James Love Hopkins, *The New Federal Equity Rules*, 231 (W.H. Anderson, Co. 1930).

20. Ford, *supra* n. 18, at 502.

21. *See* Fed. R. Civ. P. 2 (1938).

22. *See* Advisory Committee Notes to Former Rule 23, 28 U.S.C. app. at 6102; Fed. R. Civ. P. 23(a)(1)–(3), 28 U.S.C. app. at 6101.

23. *See e.g. Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 587–590 (10th Cir. 1961).

24. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 (1967) (requirements of Rule 23(a) described as a "well-agreed proposition.").

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[25]

The 1966 amendments replaced the 1938 class action categories with Rule 23(b)'s three new types of class action. The former "hybrid" class action was replaced by amended Rule 23(b)(1), which provided for certification if prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying judgments with respect to individual class members that "would establish incompatible standards of conduct for the party opposing the class" or which would, as a practical matter "be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."[26]

The former "true" class action was replaced by amended Rule 23(b)(2), which permitted class actions when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole" because "the party opposing the class has acted or refused to act on grounds generally applicable to the class."[27] Civil rights cases against parties charged with unlawful, class-based discrimination were considered to be the "prime examples" of the amended Rule 23(b)(2) class.[28]

The former "spurious" class action was replaced by Rule 23(b)(3), which allowed classes if questions of law or fact common to class members "predominates over any questions affecting only individual members," and a class action was superior to other methods for adjudicating the controversy.[29] Pursuant to amended Rule 23(c)(2), a certified Rule 23(b)(3) class must receive notice and be given an opportunity to opt-out of the action before resolution on the merits.[30] If a Rule 23(b)(3) class member did not exercise his right to opt-out of the class, any judgment entered would be

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25. Fed. R. Civ. P. 23(a)(1)–(4) (1966).

26. Fed. R. Civ. P. 23(b)(1) (1966); *See also Amchem*, 521 U.S. at 614 ("Rule 23(b)(1)(A) 'takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners.)). Rule 23(b)(1)(B) includes, for example, 'limited fund' cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims.") (internal citations omitted).

27. Fed. R. Civ. P. 23(b)(2) (1966).

28. *Amchem*, 521 U.S. at 614; *see also Wal-Mart*, 131 S. Ct. at 2557–2558.

29. Fed. R. Civ. P. 23(b)(3) (1966). Rule 23(b)(3) was thought to the "'most adventuresome' innovation," and was "[f]ramed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations . . . ." *Amchem*, 521 U.S. at 614–615 (internal citations omitted).

30. Fed. R. Civ. P. 23(c)(2) (1966).

binding upon him.[31]. Thus amended, Rule 23 eliminated the "one-way intervention" previously permitted under the spurious class-action category.

There were additional amendments to Rule 23 in 1998, and 2003, but none of these amendments altered the basic provisions of Rule 23(a) and (b).[32] As one commentator has noted, "[t]hough Rule 23 was never intended nor designed to handle a wide array of class actions, lawyers and courts began to push the envelope, using the class-action device in novel ways and new circumstances."[33] What should have been Rule 23(b)(3) actions for money damages were being filed as Rule 23(b)(1) or (b)(2) actions for tactical reasons, to bind absent class members or to avoid the costs associated with providing notice to the class.[34] Thus, it was not entirely surprising that eventually such envelope-pushing would spawn a mammoth nationwide class like the 1.5 million-member one certified by the district court in *Wal-Mart.*

III. BACKGROUND ON THE *WAL-MART* DECISION

a. Nature of the Action

On June 8, 2001, six women who had worked for Wal-Mart or Sam's Club, either as hourly or salaried workers in several different Wal-Mart or Sam's Club stores in California or other states, brought suit under Title VII against Wal-Mart.[35] The plaintiffs alleged that Wal-Mart sexually discriminated against them by paying them less than men in comparable positions, awarding them fewer promotions to in-store management compared to men, and forcing them to wait longer than their male counterparts to advance.[36] Although Wal-Mart had a formal, written company policy that forbade gender discrimination,[37] the plaintiffs claimed that Wal-Mart allowed individual store managers to use their own subjective decision-making process in both hiring and promotion decisions.[38] Such a subjective decision-making process, it was argued, made Wal-Mart's corporate culture "vulnerable" to sexual stereotyping and discrimination.[39] The named plaintiffs sought injunctive relief, back pay, and punitive damages on behalf of themselves and

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31. *Id.*

32. *See Rabiej, supra* n. 5, at 324, 348–390.

33. *Id.* at 345–346.

34. *Id.* at 346.

35. *See* Def.'s Opposition to Mot. for Class Certification, 17–18 n. 9, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. June 12, 2003).

36. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004).

37. *Wal-Mart*, 131 S. Ct. at 2553 ("Wal-Mart's announced policy forbids sex discrimination . . . and as the District Court recognized the company imposes penalties for denials of equal employment opportunity.").

38. *Dukes*, 222 F.R.D. at 145.

39. *Id.* at 145, 154.

a class of current and former Wal-Mart female employees from December 26, 1998 to the present, estimated to number more than 1.5 million members.[40] Plaintiffs sought compensatory damages for themselves, but they did not seek traditional compensatory damages on behalf of the class.[41]

b. The District Court's Certification Decision

In an 84 page order, the district court granted in part and denied in part plaintiffs' motion to certify. Regarding the plaintiffs' claim for equal pay, the district court granted the plaintiffs' motion and the proposed class was certified with respect to issues of liability and all forms of requested relief, including punitive damages. As for the plaintiffs' promotion claim, the motion was granted in part and denied part. The district court certified the proposed class with respect to issues of liability (including liability for punitive damages) and injunctive and declaratory relief, but the court found that in regard to the remedy of back pay, such a class would be "manageable only with respect to those challenged promotions where objective data is available to document class member interest in the challenged promotion."[42]

In reaching its decision, the district court held that the plaintiffs had satisfied their burden of showing "commonality" under Rule 23(a)(2).[43] The district court observed that commonality does not require all questions of law or fact to be common: "one significant issue common to the class may be sufficient to warrant certification."[44] The district court noted that the "necessary showing to satisfy commonality is 'minimal.'"[45] Plaintiffs relied upon three types of evidence to establish commonality: statistical,[46]

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40. *Id.* at 141–142.

41. *Id.* at 141.

42. *Id.* at 143.

43. *Id.* at 166.

44. *Dukes*, 222 F.R.D. at 145.

45. *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Relying upon *Hanlon*, the district court also stated that commonality could be satisfied by "showing that class members shared legal issues but divergent facts or that they share a common core of facts but base their claims for relief on different legal theories." As discussed below, *infra* part IV(c), the continuing vitality of that line of reasoning is suspect as a result of the Supreme Court's *Wal-Mart* opinion.

46. Plaintiffs' experts presented "descriptive statistics which show that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time . . . that women take longer to enter into management positions and that the higher one looks in the organization the lower the percentage of women." *Id.* at 155. Separate regression analysis was conducted that showed "statistically significant gender-based disparities for all in-store classifications in all 41 Wal-Mart regions." *Id.* at 156. Wal-Mart submitted its own statistical experts who rejected the focus at the regional level, and ran their own regression analysis at the department/individual store level that showed "a lack of broad-based gender differential in pay for hourly employees, although they show some gender disparities in limited instances." *Id.*

sociological,[47] and anecdotal.[48] The district court concluded that plaintiffs' evidence "raises an inference that Wal-Mart engages in discriminatory practices," exceeding "the permissive and minimal burden of establishing commonality."[49] Wal-Mart's objections to plaintiffs' evidence were deemed "insufficient to defeat Plaintiffs' showing of commonality; rather, the objections [were] predominately of the type that go to the weight of the evidence, and thus should properly be addressed by a jury considering the merits."[50]

The district court expressly rejected Wal-Mart's contention that plaintiffs' expert testimony was required to pass muster under a *Daubert*[51] analysis, holding instead that so long as the expert's opinion was not "so flawed that it lacks sufficient probative value to be considered," it was sufficient for class certification purposes.[52] The district court's adoption of this "test" for consideration of expert testimony at the class certification stage appears to have been driven, in part, by its understanding of the Supreme Court's 1974 opinion in *Eisen v. Carlisle & Jacquelin*.[53] Citing *Eisen*, the district court stated that "arguments on the merits are improper at this stage of the proceedings."[54] From this premise, the district court concluded that "courts should avoid resolving 'the battle of the experts,'" and indeed "should not even apply the full *Daubert* 'gatekeeper' standard at this stage."[55]

The district court had little trouble concluding that a Rule 23(b)(2) class for injunctive and declaratory relief was appropriate because

47. Plaintiffs' expert sociologist testified that Wal-Mart's "'strong and widely shared organizational culture promotes uniformity of practices throughout an organization,'" and that gender stereotyping was "likely" to exist at Wal-Mart because "gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker discretion tends to allow people to 'seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.'" *Id.* at 151, 153 (citations omitted). This expert could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," and conceded "that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Id.* at 189, 192.

48. Plaintiffs submitted declarations from each of the class representatives and 114 putative class members from around the country testifying "to being paid less than similarly situated men, being denied promotion or being delayed in promotion in a disproportionate manner compared with similarly situated men, working in an atmosphere with a strong corporate culture, and being subjected to various individual sexist acts." *Dukes*, 222 F.R.D. at 165.

49. *Id.* at 166.

50. *Id.* Wal-Mart had moved to strike portions of the plaintiffs' evidence, which was denied. *See id.* at 189.

51. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

52. *Dukes*, 222 F.R.D. at 192.

53. *Eisen*, 417 U.S. 156.

54. *Dukes*, 222 F.R.D. at 191 (citing *Eisen*, 417 U.S. at 177).

55. *Id.* As discussed *infra* part IV(a)(1), *Eisen* had generated similar confusion about what courts could or should consider in determining compliance with Rule 23's requirements, which the *Wal-Mart* majority clarified.

"[p]laintiffs allege that Wal-Mart has acted or refused to act . . . on grounds generally applicable to the proposed class . . . ."[56] The district court also had little problem with the concept of certifying a (b)(2) class for back pay because "it is well established that lost pay is recoverable as an equitable make-whole remedy in employment class actions notwithstanding its monetary nature."[57] However, the propriety of certifying a class under Rule 23(b)(2) for punitive damages raised larger analytic hurdles.[58]

Relying upon prevailing Ninth Circuit law governing the recovery of monetary relief in Rule 23(b)(2) actions, the district court held that the proposed (b)(2) class "can include claims for monetary damages so long as such damages are not the 'predominant' relief sought, but instead are 'secondary to the primary claim for injunctive or declaratory relief.'"[59] In applying this "predominance" test, the district court attempted to determine the plaintiffs' intent in bringing the suit.[60] The district court found that the "equitable relief sought predominates over the claim for punitive damages" because the injunctive relief sought "would achieve very significant long-term relief," the "recovery of lost pay for all injured class members would result in additional substantial equitable relief to the class," and the named class representatives affirmed in declarations that "their central motivation for participating in this action is to improve opportunities for women at Wal-Mart."[61] However, recognizing the Due Process concerns that could arise with the individual recovery of punitive damages, the district court directed that notice be sent to the class and class members be given an opportunity to "opt-out" of the punitive damage class.[62] Although such notice and opt-out procedures are not encompassed by the actual text of Rule 23(b)(2) or consistent with its purpose, the district court noted that there was ample authority for such an exercise of the court's discretion.[63]

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56. *Id.* at 170.

57. *Id.* (citing *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1152–1155 (9th Cir. 1999); *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997); *Salinas v. Roadway Express*, 735 F.2d 1574, 1576 (5th Cir. 1984)).

58. If the *Wal-Mart* plaintiffs had been pursuing standard Montana state law tort claims on behalf of the class, their failure to seek compensatory damages for the class would have been fatal to their attempt to certify a punitive damages claim because "without an award of compensatory damages, there can be no award of punitive damages." *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649, 664 (Mont. 2009); *see also* Mont. Code Ann. §§ 27–1–220(1), 27–1–221(1), 27–1–221(5). However, Title VII specifically provides that plaintiffs can seek punitive damages under that statute without seeking or recovering traditional compensatory damages. *See* 42 U.S.C. § 1981a(b)(1); *Hennessy v. Penril DataComm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995).

59. *Dukes*, 222 F.R.D. at 170 (quoting *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003)).

60. *Id.* (quoting *Molski*, 318 F.3d at 950).

61. *Id.* at 171.

62. *Id.* at 173.

63. *Id.* (citing *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir. 2004) ("district courts have discretion to order notice and opt-out rights when certifying a Rule 23(b)(2) class"); *Robinson v.*

The district court also engaged in another detour from Rule 23(b)(2)'s text when it performed a "manageability" analysis, finding such a requirement implicit in any type of class certification.[64] Wal-Mart argued that the size of the putative class itself made the case unmanageable, but the district court concluded that the size alone did not preclude class treatment.[65] The district court observed that the standard approach to Title VII class actions was to bifurcate the adjudication into two stages: liability and remedy.[66] The district court concluded that the liability stage of the trial would not present manageability concerns because "once the court determines that there are sufficient common questions to justify proceeding as a class, the liability phase properly focuses on evidence that affects the class generally—not on individuals or other minor segments of the class."[67] While Wal-Mart would be entitled to introduce evidence challenging the alleged nationwide pattern and practice, "[i]t is not, however, entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members."[68]

The district court also concluded that the remedy stage did not present insurmountable manageability problems, even though Wal-Mart did not contend that injunctive relief would present manageability problems. The district court concluded that the back pay remedy for the equal pay class would be manageable and could be accomplished by using objective company records and then comparing pay for men and women in comparable positions.[69] With regard to the promotion class, the district court was confident that a formulaic approach for calculating a lump-sum back pay liability to the class could be developed in a manageable manner, at least for a limited segment of the class.[70] The district court observed that in promotion formula cases, there are usually additional proceedings to determine whether class members were both eligible and interested in the promotion, but plaintiffs had conceded that such additional proceedings would be unmanageable in this case.[71] The district court concluded that objective data from Wal-Mart eliminated the need for individualized hearings with respect to the eligibility component and that, therefore, the portion of the promo-

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Metro-N. Commuter R.R. Co., 267 F.3d 147, 165–166 (2d Cir. 2001) (notice and opt out can be afforded Rule 23(b)(2) class members with respect to non-incidental damage claims); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898–899 (7th Cir. 1999) (same)).

64. *Id.*

65. *Dukes*, 222 F.R.D at 173.

66. *Id.*

67. *Id.* at 174.

68. *Id.*

69. *Id.* at 183.

70. *Id.* at 178–179.

71. *Dukes*, 222 F.R.D. at 179–180.

tion-class back pay analysis would be manageable.[72] But there was no such objective data with regard to whether class members had interest in a particular promotion. The district court thus concluded that back pay could not be reasonably managed on a class basis for promotions that were not posted; only where promotional opportunities were posted could class members that had expressed an interest be identified.[73] The district court restricted certification of the promotion class accordingly.

c. The Ninth Circuit Opinions

Pursuant to Federal Rule of Civil Procedure 23(f), Wal-Mart appealed the district court's class certification to the Ninth Circuit, and the plaintiffs cross-appealed the district court's limitation of their proposed promotion back pay class. In a 2–1 decision, a panel of the Ninth Circuit affirmed the district court's decision, although it further limited the class to individuals who were Wal-Mart employees on June 8, 2001 when the lawsuit was filed because former employees lacked standing to pursue claims for the declaratory or injunctive relief sought by the class.[74]

With regard to commonality, the Ninth Circuit agreed that Rule 23(a)(2) had been construed permissively and concluded that the district court did not abuse its discretion in finding that commonality was satisfied by plaintiffs' evidence.[75] Applying Ninth Circuit precedent on the question of the availability of monetary relief for back pay and punitive damages in a Rule 23(b)(2) class, the court was satisfied that even without the possibility of a back pay recovery, reasonable plaintiffs would bring the suit to obtain the injunctive relief sought.[76] The Ninth Circuit majority did agree with Wal-Mart that putative class members who were no longer Wal-Mart employees at the time plaintiffs' complaint was filed did not have standing to pursue injunctive or declaratory relief and therefore remanded to the district court for a determination of the appropriate scope of the class.[77]

Wal-Mart petitioned the Ninth Circuit for re-hearing en banc, and plaintiffs cross-petitioned for re-hearing en banc. The Ninth Circuit granted the parties' petitions, and a deeply divided 6–5 court affirmed the district court's certification order, with certain modifications.[78] The Ninth Circuit en banc majority agreed with the district court that Rule 23(a)(2) has been "'construed permissively,'" and held that "[p]laintiffs' factual evidence, ex-

72. *Id.* at 180.
73. *Id.* at 182.
74. *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168, 1189, 1193 (9th Cir. 2007).
75. *Id.* at 1177–1178.
76. *Id.* at 1187–1188 (quoting *Molski*, 318 F.3d at 950).
77. *Id.* at 1189.
78. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010) (en banc).

pert opinions, statistical evidence, and anecdotal evidence provide sufficient support to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII."[79]

As to whether it was appropriate to certify a class seeking back pay under Rule 23(b)(2), the Ninth Circuit en banc majority observed that "[a]n interpretation of Rule 23(b)(2) that prevented any claim for monetary relief would render . . . redundant or irrelevant"[80] the advisory committee's note to Rule 23 that (b)(2) classes did "not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages."[81] The Ninth Circuit en banc majority decided to adopt a new test based upon the dictionary definition of "predominate": "[t]o be certified under Rule 23(b)(2) . . . a class must seek only monetary damages that are not 'superior [in] strength, influence, or authority' to injunctive and declaratory relief."[82]

Under this new test, the en banc majority held that the district court's decision to include claims for back pay in the Rule 23(b)(2) class was not an abuse of discretion, but the district court had abused its discretion by failing to analyze whether certifying plaintiffs' punitive damages claims caused monetary damages to predominate.[83] The en banc majority remanded the punitive damage issue to the district court to determine whether certification under Rule 23(b)(2) would cause punitive damages to "predominate" and, if so, to consider whether a "hybrid certification" of the (b)(2) class along with a (b)(3) class for punitive damages would be appropriate.[84] The majority opinion also agreed with Wal-Mart that putative class members who did not work for Wal-Mart as of the time of the filing of the lawsuit lacked standing to pursue injunctive or declaratory relief, and thus were not proper members of the (b)(2) class.[85]

The en banc majority also considered the question of manageability and it agreed with the district court's limitation of the promotion back-pay class to posted promotions where objective evidence of class member interest was available.[86] The en banc majority further observed:

> At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself), but simply note that, because there are a range of possibilities—which may or may not in-

79. *Id.* at 612, 615.
80. *Id.* at 615–616.
81. Fed. R. Civ. P. 23(b)(2) advisory comm. nn. (1966); *Dukes*, 603 F.3d at 615–616.
82. *Dukes*, 603 F.3d at 616.
83. *Id.* at 617.
84. *Id.* at 622.
85. *Id.* at 623.
86. *Id.* at 615.

> clude the district court's proposed course of action—that would allow this class action to proceed in a manner that is both manageable and in accordance with due process, manageability concerns present no bar to class certification here.[87]

The en banc majority pointed to the *Hilao v. Estate of Marcos*[88] decision as an example of a possible formulaic approach to class-wide damages that could provide a model to be followed with the *Wal-Mart* class. In *Hilao*, the Ninth Circuit had affirmed a Rule 23(b)(3) class-action judgment that had been rendered based upon a random sample of 137 out of 9,541 claims chosen and reviewed by a special master. Based upon that review, the special master recommended that an award to the class be determined by multiplying the number of valid claims in the sample (131) by the average award recommended for the valid claims.[89]

The special master's report and the testimony from the 137 sample claimants were introduced at a jury trial on compensatory damages. The jury was instructed that it could (a) accept, modify or reject the special master's recommendations, or (b) reach its own judgment, based upon the results of the random sample, as to the actual damages of those claimants and of the aggregate damages suffered by the class as a whole.[90] The en banc majority observed that "[b]ecause we see no reason why a similar procedure to that used in *Hilao* could not be employed in this case, we conclude that there exists at least one method of managing this large class action that, albeit somewhat imperfect, nonetheless protects the due process rights of all involved parties."[91]

d. The Supreme Court's Grant of Certiorari

Wal-Mart petitioned the United States Supreme Court for a writ of certiorari. Wal-Mart requested the Court to review two questions:

> I. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and if so, under what circumstances; and
>
> II. Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23.[92]

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87. *Id.* at 625.

88. *Hilao v. Est. of Marcos*, 103 F.3d 767 (9th Cir. 1996).

89. *Dukes*, 603 F.3d at 626.

90. *Id.*

91. *Id.* at 627.

92. Pet. Writ of Cert., *i, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010).

The Supreme Court granted Wal-Mart's petition, but only as to Question I.[93] The Court on its own initiative, however, added a second question for consideration: "[w]hether the class certification ordered under rule 23(b)(2) was consistent with Rule 23(a)."[94]

IV. FOUR LESSONS FROM *WAL-MART*

This article focuses upon four lessons to be learned from the Supreme Court's reversal of class certification in *Wal-Mart*, and the extent to which Montana law should embrace such lessons. First, the majority opinion swept away some forty years of reliance by the lower courts on *dicta* in *Eisen* that class certification was not to involve inquiry into the merits of the suit, making clear that Rule 23's requirements may require a court to make determinations of issues that overlap with the merits. For the most part, Montana law seems to have anticipated this development, and requires a rigorous analysis of the Rule 23 requirements, even if they overlap with merits issues.

Second, the *Wal-Mart* majority clarified that Rule 23(a)(2)'s "commonality requirement" was not satisfied by the mere identification of "common questions," but rather required questions that could generate common answers that would "resolve an issue central to the validity of each" class member's claim "in one stroke." In its post-*Wal-Mart* decisions, the Montana Supreme Court has not appeared to appreciate *Wal-Mart*'s clarification of the "commonality" standard, and it will be argued that it should do so.

Third, the unanimous *Wal-Mart* Court clarified that Rule 23(b)(2) only authorizes certification of claims for injunctive or corresponding declaratory relief, not for other forms of equitable relief or individualized monetary awards. Although the Montana Supreme Court has paid lip-service to this holding, the application of the holding will require further refinement by the Court in future cases.

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93. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010).

94. *Id.* It is not entirely clear from reading the Supreme Court's *Wal-Mart* decision what the purpose for this addition was, unless it was a signal that the Justices, or some of them, wanted to address the commonality requirement. Wal-Mart had not sought certiorari of the Ninth Circuit's commonality holding, and as pointed out *infra* part IV(b)(3), there was no court of appeals circuit split on Rule 23(a)(2)'s requirement that would have justified granting certiorari on that ground. Other than the Court's discussion of the commonality requirement, there is nothing else in the *Wal-Mart* decision that discusses Rule 23(a), and at least the majority's discussion of the commonality requirement is not tied to its "consistency" with Rule 23(b)(2) (although the dissent suggests that majority's new test is not consistent with Rule 23(b)(2), *see infra* part IV(b)(4)). While the Court did not grant certiorari with regard to the petition's second question, a portion of the unanimous Court's opinion did address whether the certification order conformed to the requirements of Title VII and the Rules Enabling Act. *See Wal-Mart*, 131 S. Ct. at 2560–2561; *see also infra* part IV(d)(3).

Finally, the unanimous *Wal-Mart* Court confirmed that the procedural class action device cannot be used to preclude a defendant's right to raise individual defenses on both liability and damages to individual class member's claims. Specifically, the *Wal-Mart* Court rejected the notion of a "Trial by Formula" approach to class actions that would prevent a defendant from raising defenses to individual class members' right to recover damages. This issue has not yet been squarely presented to the Montana Supreme Court, but it will be argued that Montana constitutional concerns regarding both due process and separation of powers should compel a similar conclusion.

a. Lesson 1: Courts Must Determine that Each of Rule 23's Requirements Have Been Proven, Even if that Analysis Overlaps with the Merits

*1. The Pre-*Wal-Mart *Reluctance to Resolve Disputed Issues of Fact that Touched on the Merits for Class Certification Purposes*

In 1974, the United States Supreme Court found in *Eisen* that "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[95] Eight years later, in *General Telephone Company of Southwest v. Falcon*,[96] the Court observed *in dictum* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." Reconciling these seemingly divergent commands had created a measure of confusion among the federal courts as to what a court could, or should, consider in determining whether to certify a class. Some courts read *Eisen* expansively to mean that no inquiry touching the merits of the underlying claims was permissible at all at the class-certification stage and that the allegations of the complaint had to be accepted as true for certification purposes.[97] Other courts read *Eisen* somewhat less expansively to mean that courts could not consider competing evidence (beyond the pleadings) when the dispute overlapped with the merits.[98]

The en banc Ninth Circuit majority in *Wal-Mart* reviewed more recent decisions and concluded that the "core holding across circuits" required dis-

95. *Eisen*, 417 U.S. at 177.

96. *Falcon*, 457 U.S. at 160.

97. *See e.g. Szabo v. Bridgeport Machs. Inc.*, 199 F.R.D. 280, 284 (N.D. Ind. 2001) ("since the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion."), *rev'd*, 249 F.3d 672, 677 (7th Cir. 2001).

98. *See e.g. In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999).

trict courts to determine Rule 23 compliance "*before* certifying a class, which will sometimes, though not always, require an inquiry into and preliminary resolution of disputed factual issues, even if those same factual issues are also independently relevant to the ultimate merits of the case."[99] Other courts had disagreed that there was such a concrete consensus.[100] The disagreement was understandable given that the interplay between the *Eisen* and *Falcon* directives had not been expressly addressed by the Supreme Court before *Wal-Mart*.

The *Wal-Mart* district court opinion itself reflected the tension between *Eisen* and *Falcon*. The district court recognized that it must conduct a "rigorous analysis" to determine compliance with Rule 23, including going behind the pleadings.[101] But the district court repeatedly genuflected toward the *Eisen* "no merits inquiry" concept.[102] As shown above, this led to the district court's refusal to resolve the "dueling experts" issues that touched on the merits or to perform the *Daubert* gate-keeping function.[103]

Ironically, this approach also led to the application of essentially a merits-based standard for certification of the class—an inverse summary judgment standard. If a Rule 23 requirement overlapped with a merits issue, certification was appropriate, in the district court's view, so long as plaintiffs came forward with enough evidence to raise a factual question

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99. *Dukes*, 603 F.3d at 583 (emphasis added).

100. For example, the First Circuit had observed that "[its] sister circuits agree that when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria, but how they articulate the necessary degree of inquiry ranges along a spectrum which suggests substantial differences." *In re New Motor Veh. Canadian Export Antitrust Litg.*, 522 F.3d 6, 24 (1st Cir. 2008). The First Circuit believed that requiring district courts to "make specific findings that each Rule 23 criterion is met" was at "the more rigorous end of [the] spectrum" and followed by the Second, Fourth, Fifth and Seventh Circuits. *Id.* By contrast, according to the First Circuit, "the Third and Eighth Circuits sometimes require an inquiry into and preliminary resolution of disputes, but they do not require findings and do not hold that such inquiry will always be necessary." *Id.*

101. *Dukes*, 222 F.R.D. at 143.

102. For example, the district court observed that while "'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' Nevertheless, '[the United States Supreme Court] find[s] nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *Dukes*, 222 F.R.D. at 144 (quoting *Falcon*, 457 U.S. at 160; *Eisen*, 417 U.S. at 177) (internal citations omitted). The district court further cited to *Caridad* without parenthetical explanation; however the page cited to in the *Caridad* decision contains the statement that "a motion for class certification is not an occasion for examination of the merits of the case." *Caridad*, 191 F.3d at 291. As the Ninth Circuit en banc majority opinion acknowledged, the *Caridad* decision was representative of a view that class certification was proper based on "'some showing' that the Rule 23 factors were met, obviating the need to assess conflicting expert testimony pertinent to the Rule 23 inquiries." *Dukes*, 603 F.3d at 583. The Second Circuit affirmatively repudiated such a standard in *In re Initial Pub. Offering Secs. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006).

103. *See Dukes*, 222 F.R.D. at 154–155 nn. 19–22.

with regard to the Rule 23 requirement.[104] It would then be left for the jury to decide whether the Rule 23 merits requirement was in fact proven at trial.[105] For example, in *Wal-Mart*, Rule 23's commonality requirement overlapped with the merits issue of whether Wal-Mart had a company-wide pattern and practice of discriminating against women. The Ninth Circuit en banc majority essentially endorsed the district court's approach, stating that "[t]he disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation."[106]

2. *The* Wal-Mart *Majority Clarifies that District Courts Must Look Behind the Pleadings and Determine Whether Plaintiffs Have Proven Compliance with Rule 23's Requirements, Even if it Overlaps with the Merits*

The *Wal-Mart* majority clarified that *Eisen* represents no bar to the consideration of the merits of the underlying claim if necessary to assess whether Rule 23's requirements have been satisfied. It also made clear that evidence—as opposed to mere allegations—is necessary for a plaintiff to establish compliance with Rule 23's requirements, and the district court

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104. *Id.* at 144. The district court cited with approval *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 670–680 (11th Cir. 1983) for the proposition that plaintiffs' burden at class certification "entails more than the simple assertion of [commonality and typicality] but less than a prima facie showing of liability." *Id.*

105. *See e.g. Dukes*, 222 F.R.D. at 154 ("Whether [Dr. Bielby's] opinions, if presented to a jury, are ultimately worthy of belief will be for a jury to decide. For present purposes, Dr. Bielby's testimony raises an inference of corporate uniformity and gender stereotyping that is common to all class members."); *id.* at 155 ("the Court delves into the substance of the expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create a common question as to the existence of a pattern and practice of gender discrimination."); *id.* at 159 ("The ultimate question of whether subjective decision-making and a uniform culture contribute to a nationwide pattern of gender discrimination will, of course, be for a jury to decide. At this stage, however, these factors are apparent enough to support Dr. Drogin's regional approach as at least a reasonable means of conducting a statistical analysis."); *id.* at 166 ("Together, this evidence raises an inference that Wal-Mart engages in discriminatory practices . . . the objections [to this evidence] are predominately of the type that go to the weight of the evidence, and thus should properly be addressed by a jury considering the merits.").

106. *Dukes*, 603 F.3d at 609; *see also id.* at 587 ("[I]t is the plaintiff's theory that matters at the class certification stage, not whether the theory will ultimately succeed on the merits."); *id.* at 590 ("[T]he district court's inquiry at [the class certification] stage remains focused on . . . common questions of law or fact under Rule 23(a)(2), not the proof of answers to those questions or the likelihood of success on the merits."); *id.* at 594 ("[W]hat must be satisfied for the commonality inquiry . . . is that plaintiffs establish common questions of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment."); *id.* at 603 ("At the class certification stage, it is enough that [plaintiffs' expert sociologist] presented scientifically reliable evidence tending to show that a common question of fact—*i.e.*, 'Does Wal-Mart's policy of decentralized subjective employment decision making operate to discriminate against female employees?'—exists with respect to all members of the class.").

must actually decide that the Rule 23 requirement has been proven, even if that requirement overlaps with a merits issue.

Although the Court in *Falcon* recognized that "*sometimes* it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," the *Wal-Mart* majority declared that "*[f]requently* that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim."[107] There was nothing unusual about that consequence in the *Wal-Mart* majority's view because "touching aspects of the merits in order to resolve [other] preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."[108]

As the *Wal-Mart* majority explained, *Eisen* was not to the contrary because there,

> the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rule 23(a) and (b) . . . but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other purpose, it is the purest dictum and is contradicted by our other cases.[109]

The *Wal-Mart* majority also made clear that "Rule 23 does not set forth a mere pleading standard."[110] A party seeking class certification must affirmatively demonstrate compliance with the rule—in other words, that "there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[111] The *Wal-Mart* majority's analysis of plaintiffs' inability "to prove" satisfaction of Rule 23(a)(2)'s commonality requirement strongly suggests that the evidence proffered must be admissible evidence. The *Wal-Mart* majority found that plaintiff's sociological expert's testimony was both not credible and perhaps inadmissible under Federal Rule of Evidence 702 and *Daubert*.[112] The Court eluded to the importance of basing class certification decisions upon admissible evidence by noting that, while the district court had concluded that *Daubert* did not apply to expert testimony at the class-certification stage,[113] "[w]e doubt that is so . . . ."[114] Requiring admissible evidence to substantiate compliance with Rule 23's requirements would be consistent with requirements for similar preliminary

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107. *Wal-Mart*, 131 S. Ct. at 2551 (emphases added).

108. *Id.* at 2552 (citing *Szabo*, 249 F.3d at 676–677).

109. *Id.* n. 6.

110. *Id.* at 2551.

111. *Id.* (emphasis in original).

112. *See Daubert*, 509 U.S. 579.

113. *Dukes*, 222 F.R.D. at 191.

114. *Wal-Mart*, 131 S. Ct. at 2554.

findings under Federal Rule of Civil Procedure 12(b)(1) and (b)(2), which the *Wal-Mart* majority found to be analogous.[115]

Insistence that the proponent of class certification "prove" compliance with Rule 23's requirements implies a corollary obligation upon the district court to actually "find" compliance by resolving, if necessary, competing factual assertions based upon the evidence presented.[116] In other words, if plaintiffs' theory of commonality was that there was a company-wide pattern and practice of discrimination, to certify a class the district court must find that such a company-wide policy actually exists by a preponderance of the evidence, even though the plaintiffs will have to prove that fact again at trial to prevail on the merits. As one commentator addressing the Ninth Circuit en banc majority's opinion explained:

> Class certification asks whether there is reason to think it more likely than not that the company-wide discrimination policy at the heart of [the case] actually exists. Only then are the individual instances of adverse employment actions as to pay and promotion connected together as instantiations of the same underlying wrong.[117]

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115. *See e.g. Gold River, LLC v. La Jolla Band of Luiseno Mission Indians*, 2011 U.S. Dist. LEXIS 142561, *5 (9th Cir. Dec. 9, 2011) ("where jurisdiction is specifically challenged . . . Gold River has the burden to demonstrate with admissible evidence that this court possesses subject matter jurisdiction over its claims."); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) ("When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff 'is obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.' "); *Wal-Mart*, 131 S. Ct. at 2552 ("The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.").

116. Pre-*Wal-Mart* courts had struggled in finding the proper terminology to describe the degree of inquiry that was to be applied at the class certification stage. Some courts had said that the district court was to make "findings" that the Rule 23 requirements had been satisfied. *See e.g. Unger v. Amedisys Inc.*, 401 F.3d 316, 319–320 (5th Cir. 2005). Others had stated that district courts must "determine" that the Rule 23 requirements were met. *See e.g. In re Initial Pub. Offering Sec. Litig.*, 471 F.3d at 40–44; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008). Another formulation was that district courts were required to "resolve" whether the Rule 23 requirements were met. *See e.g. Blades v. Monsanto Co.*, 400 F.3d 562, 566–567 (8th Cir. 2005). Although the Ninth Circuit en banc majority viewed these formulations as a matter of semantics rather than substance, the terminology used matters because it may imply a different appellate standard of review. *Dukes*, 603 F.3d at 585. A district court's "findings" of fact are usually reviewed under the "clearly erroneous" standard. *See In re Initial Pub. Offering Secs. Litig.*, 471 F.3d at 41. The Second Circuit's resolution of this issue makes the most sense: a district court's "determination" that Rule 23's requirements are satisfied is a mixed question of law and fact, involving three separate appellate review standards: (1) clearly erroneous, to the extent that the determination is based upon a finding of fact, (2) *de novo* for review of the district court's articulation of the legal standard governing each requirement, and (3) abuse of discretion for review of the ultimate ruling that applied the correct legal standard to the facts as found by the district court. *Id.* The *Wal-Mart* majority did not directly address this issue, but by requiring the proponent of class certification "to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." strongly suggested that the *In re Initial Pub. Offering Secs. Litig.* reasoning is sound. *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original).

117. Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 162 (2010).

The *Wal-Mart* majority's analysis of whether plaintiffs met their burden of proving commonality illustrates what the federal district courts are now required to do. Plaintiffs could prove a Title VII pattern and practice case either by showing that the employer used a biased testing procedure, or by providing "significant proof" that Wal-Mart operated under a general policy of discrimination. Wal-Mart had no testing procedure for hiring or promotions, so the first avenue of proof was unavailable. The *Wal-Mart* majority found that plaintiffs had provided "no convincing proof" of a discriminatory company-wide pay and promotion policy.[118]

To arrive at this conclusion, the *Wal-Mart* majority carefully scrutinized plaintiffs' sociological, statistical, and anecdotal evidence and expressly found none of it sufficient to establish a company-wide policy of discrimination.[119] The only evidence of a general policy of discrimination that plaintiffs produced was Dr. Bielby's testimony that Wal-Mart had a corporate culture that makes it "vulnerable" to gender bias.[120] But the *Wal-Mart* majority found that this testimony was inadequate because Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart were determined by stereotyped thinking. But the Court found that it was precisely such a determination that was at the heart of plaintiffs' theory of commonality.[121] For the *Wal-Mart* majority, "[i]f Bielby admittedly has no answer to the question, we can safely disregard what he has to say."[122]

Nor did Plaintiffs' statistical evidence prove commonality because it was predicated upon supposed regional pay disparities which could be attributable to only a small set of Wal-Mart stores, and did not by itself establish the uniform, store-by-store disparity.[123] Because merely proving that a discretionary system has produced a racial or sexual disparity is not enough to establish a Title VII violation, the plaintiff is required to identify the specific employment practice that is challenged.[124] The *Wal-Mart* majority found that "[o]ther than the bare existence of delegated discretion, respondents have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together."[125]

Plaintiffs' anecdotal evidence was found to suffer from similar defects and to be "too weak to raise any inference that all the individual, discretion-

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118. *Wal-Mart*, 131 S. Ct. at 2556.

119. *Id.* at 2555.

120. *Id.* at 2553 (internal quotations omitted).

121. *Id.* at 2554.

122. *Id.*

123. *Id.* at 2555.

124. *Wal-Mart*, 131 S. Ct. at 2255 (quoting *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).

125. *Id.* at 2255–2256.

ary personnel decisions are discriminatory."[126] Plaintiffs filed some 120 affidavits reporting instances of alleged discrimination, or "about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores."[127] But even if every single one of the affidavits was true, the *Wal-Mart* majority was unconvinced that such evidence would demonstrate that the entire company "'operate[s] under a general policy of discrimination' . . . which is what respondents must show to certify a companywide class."[128]

The *Wal-Mart* majority thus found for class-certification purposes that plaintiffs had not proven that Wal-Mart had a company-wide pattern and practice of discrimination. That issue was at the heart of the merits of the case. Still, the Court evaluated the evidence and found that plaintiffs' proof was lacking, making class certification improper.[129]

3. *Application of the* Wal-Mart *Majority's Analysis to Montana Class Action Practice*

With regard to the propriety of looking behind the pleadings and requiring the plaintiff to prove—rather than merely allege—compliance with Rule 23's requirements, the *Wal-Mart* majority is essentially in accord with current Montana law. In August 2009, the Montana Supreme Court clarified the standards to be applied at the class-certification stage in *Mattson v. Montana Power Company*,[130] a decision that in many ways anticipated the *Wal-Mart* majority's pronouncement.

Mattson involved an action brought by a group of landowners owning real property on the shores of Flathead Lake and Flathead River on behalf of themselves and a class of similarly situated landowners against Montana Power Company ("MPC") and PPL Montana, LLC ("PPL"). The plaintiffs claimed that the defendants had operated the Kerr Dam in a manner that had

126. *Id.* at 2556.

127. *Id.*

128. *Id.*

129. In affirming, in part, the district court's class certification order, the Ninth Circuit en banc majority noted the highly deferential "abuse of discretion" standard that has traditionally limited the scope of appellate review. *Dukes*, 603 F.3d at 579. The *Wal-Mart* dissent also observed that "[a]bsent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality." *Wal-Mart*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting). The words "abuse of discretion" do not appear at all in the *Wal-Mart* majority opinion on commonality, and in light of the penetrating review of the evidence engaged in by the *Wal-Mart* majority to find that plaintiffs had failed to establish commonality, a fair question arises as to whether the *Wal-Mart* majority was *sub silencio* announcing a new, stricter standard of appellate review. This seems unlikely, because the *Wal-Mart* majority essentially held that the district court had applied the wrong legal standard regarding commonality. It is well-established that a court abuses its discretion if its decision is premised upon a legal error. *See e.g. Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001).

130. *Mattson v. Mont. Power Co.*, 215 P.3d 675 (Mont. 2009).

caused erosion, loss of shoreline, and damage to their properties.[131] A motion to certify a class against MPC was granted by the district court.[132] Sometime thereafter, the plaintiffs filed a motion to certify a class against PPL, asserting that the district court's prior ruling applied with equal force to PPL.[133]

PPL responded that the motion lacked evidentiary support and asked the district court to stay ruling on the motion until further discovery had been completed.[134] PPL also requested an evidentiary hearing on the motion.[135] The district court denied the request to stay and the request for an evidentiary hearing, noting that PPL had filed a brief and affidavit in opposition to the motion, and the court could not "imagine what counsel could better present at an evidentiary hearing upon this relatively narrow issue . . . ." Thereafter in a separate order, the district court, citing *Eisen*, granted class certification noting that a court "is not allowed to engage in analysis of the merits of the plaintiffs' claims in order to determine whether a class action may be maintained" and that it was "required to take the Plaintiffs' allegations in support of the class action as true."[136]

The Montana Supreme Court reversed the district court's order granting class certification as to PPL and remanded the matter for further proceedings.[137] The Court held that district courts were not to "take the Plaintiffs' allegations in support of the class action as true" and were instead to allow discovery and hear evidence in order to answer "whatever factual and legal inquiries are necessary under Rule 23."[138] In arriving at its conclusion, the Court expressly adopted the guidelines for addressing class certification set forth in *Miles v. Merrill Lynch and Company*,[139] which include:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both

131. *Id.* at 679.
132. *Id.*
133. *Id.* at 692.
134. *Id.* at 692–693.
135. *Id.*
136. *Mattson*, 215 P.3d at 693 (internal quotations omitted).
137. *Id.* at 695.
138. *Id.* at 694–695.
139. *In re Initial Pub. Offering Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006).

> the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.[140]

Measured against these guidelines, the Court found that the district court had erred in concluding that it was required to take the plaintiffs' allegations as true, and vacated the order granting class certification as to PPL.[141]

The *Mattson* Court's statement that the district court should "hear evidence" at least implies evidence that is admissible under the Montana Rules of Evidence. Montana Rule of Evidence 101(a) provides that "[t]hese rules govern all proceedings in all courts in the state of Montana with the exceptions stated in this rule."[142] Class certification proceedings are not among the exceptions listed.[143] Although not directly addressed by the *Mattson* Court, presumably the Court would agree that the plaintiff seeking class certification has the burden of establishing each Rule 23 requirement by a preponderance of the evidence, as this is the standard endorsed by most federal courts.[144]

However, in its first post-*Wal-Mart* class-certification decision, the Montana Supreme Court in *Diaz v. Blue Cross & Blue Shield of Montana*,[145] seems to have slipped back into the same sort of confused understanding of *Eisen* that plagued courts prior to *Wal-Mart*. In *Diaz*, state employees, who had been injured in automobile accidents, sued the State and the administrators of its healthcare benefit plan alleging that the State systematically violated their "made-whole" rights by failing to conduct a made-whole analysis before exercising subrogation rights.[146] Plaintiffs sought to certify a class of individuals who had their benefits reduced under

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140. *Mattson*, 215 P.3d at 695 (quoting *In re Initial Pub. Offering Secs. Litig.*, 471 F.3d at 41).

141. *Id.*

142. Mont. R. Evid. 101(a).

143. *Id.* at 101(c) lists the following exceptions: "(1) preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) Grand jury. Proceedings before grand juries. (3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations and proceedings on applications for leave to file information in criminal cases; sentencing; dispositional hearings in youth court proceedings; granting or revoking probation or parole; issuance of warrants for arrest, criminal summonses and notices to appear, and search warrants; and proceedings with respect to release on bail or otherwise. (4) Summary proceedings. Proceedings, other than motions for summary judgment, where the court is authorized by law to act summarily. (5) Other miscellaneous proceedings. Ex parte matters; and proceedings, when authorized by law, which are uncontested or nonadversary."

144. *See e.g. In re Initial Pub. Offering Secs. Litig.*, 471 F.3d at 41; *Novella v. Westchester Co. N.Y. Carpenters' Pen. Fund*, 661 F.3d 128, 148–149 (2d Cir. 2011).

145. *Diaz v. Blue Cross & Blue Shield of Mont.*, 267 P.3d 756 (Mont. 2011).

146. *Id.* at 760. Montana public policy generally requires that an insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation, regardless of contract language to the contrary. *See e.g. Swanson v. Hartford Ins. Co. of Midwest*, 46 P.3d 584 (Mont. 2002).

the State plan.[147] The district court refused to certify a Rule 23(b)(2) class because it determined that individualized made-whole assessments were required in each case.[148]

In reversing the district court's order, the Montana Supreme Court seemed to adopt the *Wal-Mart* holding that individualized awards of monetary relief were not proper in a Rule 23(b)(2) class, but *Wal-Mart*'s pronouncement regarding the necessity of making factual determinations that may overlap with the merits if necessary to determine compliance with Rule 23 did not appear to resonate with the Court. The Court criticized the district court's assessment that individualized "made-whole" determinations would be required as an improper "delv[ing] into the merits."[149] The Montana Supreme Court seemed to recognize that inquiry into a Rule 23 requirement could overlap with a merits question when it acknowledged that "[i]n determining whether to certify a class, 'a district [court] should not assess any aspect of the merits unrelated to a Rule 23 requirement.' "[150] But the Court, citing *Eisen*, then appeared to make an about-face by declaring that "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[151] The Court concluded:

> The District Court, in determining that individualized made-whole determinations were necessary here, erroneously delved into the merits of Diaz and Hoffmann-Bernhardt's claim. In doing so, the District Court failed to recognize that there is no prerequisite for individualized, fact-specific determinations. The primary issue is whether the State's act of exercising its exclusion before conducting a made-whole analysis violates Montana's subrogation laws.[152]

This analysis is not consistent with *Wal-Mart*. It was argued in *Wal-Mart* that the primary issue was whether Wal-Mart had engaged in sexual discrimination. But that did not alter the fact that individualized back pay determinations would still have to be made, even if discrimination was proven. Examining the nature of the claim pleaded to determine what must be proven for the plaintiffs to obtain the relief requested is not "delving into the merits," but rather determining whether Rule 23(a)(2)'s and Rule 23(b)(2)'s requirements are met.

In *Diaz*, the district court was confronted with a complaint that, as Justice Rice observed in his dissent, plainly called for individualized determinations; as the *Diaz* plaintiffs themselves characterized it, the requested

147. *Diaz*, 267 P.3d at 760
148. *Id.* at 756, 763, 766.
149. *Id.* at 766.
150. *Id.* (quoting *Mattson*, 215 P.3d at 695).
151. *Id.* (quoting *Eisen*, 417 U.S. at 178).
152. *Id.*

injunctive relief would "compel the defendants to calculate the amount unlawfully withheld from each individual member of the class and then to pay that amount to the individual members of the class."[153] Faced with such requested relief, the district court acted properly in refusing to certify the Rule 23(b)(2) class because the requested relief necessitated individualized determinations of monetary relief. Observing that individualized determinations were required did not determine the "merits" of any class member's claim for improperly withheld benefits. It simply recognized that such claims existed and the individualized determinations that would be required to prove them, making Rule 23(b)(2) class certification improper.

Thus, while the Montana Supreme Court has clearly understood and adopted *Wal-Mart*'s directive that the courts delve behind the pleadings in determining compliance with Rule 23, it has not yet fully embraced *Wal-Mart*'s lesson that courts should not shy away from determining Rule 23 issues that may overlap with the merits. While, as shown above, the issue in *Diaz* in reality did not involve such overlap, if it had, *Wal-Mart* teaches that the district court should nonetheless determine actual compliance with Rule 23 in ruling upon class certification.

b. Lesson 2: Commonality Under Rule 23(a)(2) Turns on Whether a Common Question Central to the Validity of Each Class Member's Claim Can be Answered on a Class-Wide Basis

*1. The Status of Pre-*Wal-Mart *Law*

Rule 23(a)(2) provides that certification of a class is appropriate "only if . . . there are questions of law or fact common to the class."[154] There is essentially no drafting history regarding the intent of Rule 23(a)(2), apparently because the drafters believed that the provisions of Rule 23(a) were obvious and non-controversial.[155] Commentators and courts had been left to construe Rule 23(a)(2) with limited guidance from the United States Supreme Court until the *Wal-Mart* decision. In keeping with the then-current view of the commonality requirement, the *Wal-Mart* district court characterized the "common question" requirement as "permissive" and "minimal"[156] because all that was required was a single common question of law

153. *Diaz*, 267 P.3d at 769 (Rice, J., dissenting) (internal quotations and citations omitted).

154. Fed. R. Civ. P. 23(a)(2).

155. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 (1967) (requirements of Rule 23(a) described as a "well agreed proposition.").

156. *Dukes*, 222 F.R.D. at 145, 166 (quoting *Hanlon*,150 F.3d at 1020).

or fact to satisfy the rule.[157] The Ninth Circuit en banc majority confirmed that the requirement was "permissive."[158]

The Montana Supreme Court adopted this "permissive application" of the commonality requirement in *McDonald v. Washington.*[159] In *McDonald*, twenty-four named plaintiffs brought a putative class action against the Butte Water Company ("BWC") alleging that they were injured by the company's failure to provide adequate water and service.[160] The alleged injuries ranged from health problems associated with drinking tap water to increased costs for purchasing bottled water in lieu of drinking the allegedly tainted tap water.[161] The Silver Bow County District Court certified a class, and BWC pursued an interlocutory appeal to the Montana Supreme Court.[162] BWC argued that commonality had not been demonstrated because customers lived in different areas of Butte and their water sources may have been different from other class members, and customers "suffered varying health effects from varying amounts of BWC water usage . . . so that the injuries suffered from one putative plaintiff to another are so different that there are not sufficient questions of law or fact common to the class."[163] The Montana Supreme Court rejected this argument, quoting with approval from the Ninth Circuit's opinion in *Jordan v. County of Los Angeles* as follows:

> Rule 23(a)(2) does not require that every question of law or fact be common to every member of the class. The commonality requirement is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated". . . . Courts that have analyzed Rule 23(a)(2) have generally given it a permissive application in a variety of substantive law areas so that the commonality requirement is usually found to be satisfied.[164]

Thus, pre-*Wal-Mart*, Montana class action law was in line with federal authority in requiring a minimal showing to satisfy the commonality requirement.

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157. *See e.g.* James W.M. Moore et al., *Moore's Federal Practice* vol. 5, § 23.23[2], 23–72 (3d ed., Matthew Bender 2011) (stating that the Rule 23(a)(2) inquiry was "easily satisfied.").

158. *Dukes*, 509 F.3d at 1177.

159. *McDonald*, 862 P.2d at 1155.

160. *Id.* at 1152.

161. *Id.* at 1151.

162. *Id.*

163. *Id.* at 1155.

164. *Id.* (quoting *Jordan v. Co. of L.A.*, 669 F.2d 1311, 1320 (9th Cir. 1982) (citations omitted)).

2. *"Commonality" Requires Analysis of Whether a Significant Question Can Be Answered on a Class-wide Basis*

One of the most significant aspects of the *Wal-Mart* decision is that it breathes new life into the commonality requirement, departing from the prior "minimalist" approach. The *Wal-Mart* majority stated that the commonality requirement of Rule 23(a)(2) "is easy to misread since '[a]ny competently crafted class complaint literally raises common questions,'"[165] including, in the context of the *Wal-Mart* case, "do our managers have discretion over pay? Is that an unlawful employment practice?" But *Wal-Mart* makes clear that "[r]eciting these questions is not sufficient to obtain class certification."[166] Something more substantive is required to satisfy the Rule 23(a)(2) requirement. "Commonality requires the plaintiff to demonstrate"—not just allege—"that the class members 'have suffered the same injury'. . . . This does not mean merely that they have all suffered a violation of the same provision of law."[167]

The *Wal-Mart* majority explained "[q]uite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once."[168] To satisfy the Rule 23(a)(2) commonality requirement:

> Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> . . .
>
> 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.[169]

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165. *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *supra* n. 117, at 131–132).

166. *Id.*

167. *Id.* (quoting *Falcon*, 457 U.S.at 157). Some federal appellate courts had similarly recognized that any group of generalized allegations might be labeled as common or typical, but should be deemed to satisfy the requirements of Rule 23(a). For example, the Sixth Circuit had warned "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation." *Sprague v. Gen. Motor Co.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). To like effect is the Fifth Circuit's observation that commonality and typicality should not be satisfied by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury." *In re Fiberboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

168. *Wal-Mart*, 131 S. Ct. at 2551.

169. *Id.* (emphasis in original) (quoting Nagareda, *supra* n. 117, at 132).

As applied to the *Wal-Mart* case, "proof of commonality necessarily overlapp[ed] with respondents' merits contention that Wal-Mart engage[d] in a *pattern or practice* of discrimination" because "the crux of the inquiry is 'the reason for a particular employment decision.'"[170] "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*"[171] As shown in the preceding section, because the *Wal-Mart* plaintiffs had been unable to come forward with "significant" or "convincing proof" that Wal-Mart operated under a company-wide policy of discrimination, they had failed to satisfy Rule 23(a)(2)'s commonality requirement.

3. *The* Wal-Mart *Dissent's Critique of the Majority's New Commonality Requirement*

The *Wal-Mart* dissent took issue with the majority's formulation of Rule 23(a)(2)'s commonality requirement on two basic grounds. First, as a matter of linguistics, the Rule spoke of "questions of law or fact common to the class"—not common answers.[172] A "question" is ordinarily understood to be '[a] subject or point open to controversy,'" so "a 'question' 'common to the class' must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims."[173] Second, the dissent maintained that by focusing on dissimilarities within the proposed class, the majority had blended "Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3)."[174] An emphasis on differences between class members, the dissent argued, mimics the Rule 23(b)(3)'s requirement that common questions predominate over individual issues, meaning that "no mission remains for Rule 23(b)(3)."[175] The dissent contended that the Court's "dissimilarities" position was far reaching because Rule 23(a)(2) was a prerequisite for Rule 23(b)(1) and (b)(2) classes as well. "Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met."[176]

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170. *Id.* at 2552 (emphasis in original) (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

171. *Id.* (emphasis in original).

172. *Wal-Mart*, 131 S. Ct. at 2562 (Ginsburg, Breyer, Sotomayor, & Kagan, JJ., concurring in part and dissenting in part).

173. *Id*

174. *Id.* at 2565.

175. *Id.* at 2566.

176. *Id.* The dissent's suggestion that individual differences should not bar a Rule 23(b)(2) class so long as Rule 23(a)(2) has been satisfied ignored well-settled precedent that Rule 23(b)(2) rests on an "assumption of cohesiveness" within the class. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1156 (11th

4. Application of the New Commonality Requirement to Montana Class Action Law

The *Wal-Mart* majority's holding with regard to Rule 23(a)(2)'s commonality requirement is at odds with the Montana Supreme Court's prior "permissive application" to commonality. But the Montana Supreme Court did not adopt such an approach based upon anything idiosyncratic to Montana Rule 23. To the contrary, it adopted the approach because it was the prevailing approach under Federal Rule 23 at the time. Now that there is definitive guidance from the United States Supreme Court, the prior "permissive application" of Rule 23(a)(2) should be abandoned.

The question arises, however, whether the Montana Supreme Court's most recent decision in *Diaz* represents a rejection of the *Wal-Mart* majority's commonality holding. In *Diaz*, the Montana Supreme Court cited with approval *Wal-Mart*'s holding that individualized monetary awards were not appropriate for Rule 23(b)(2)'s certification.[177] But when addressing Rule 23(a)(2)'s commonality requirement, the Court completely ignored the *Wal-Mart* majority's holding on commonality, stating instead that "[c]ommonality is not a 'stringent threshold and does not impose an unwieldy burden on plaintiffs. . . . [A]ll that is necessary . . . is an allegation of a standardized, uniform course of conduct by defendants affecting plaintiffs.'"[178] Although the *Diaz* district court had determined that commonality was not satisfied because individualized made-whole assessments were required, the Montana Supreme Court held that "the class members here share a common issue of fact and/or law as to whether the State is programmatically breaching Montana's made-whole laws" by subrogating without making made-whole determinations.[179] There is nothing, however, in the *Diaz* opinion that indicates that the Montana Supreme Court considered and rejected the *Wal-Mart* majority's new commonality analysis. Briefing on the case was completed before the *Wal-Mart* decision was handed down, so none of the parties called the new test to the Court's attention. It seems far more likely that the *Diaz* commonality analysis is simply a carry-over from

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Cir. 1983). Almost every federal court of appeals has required that Rule 23(b)(2) classes be "cohesive," which in many ways mimics Rule 23(b)(3)'s predominance requirement. *See e.g. Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1988) (it is "well established that the class claims must be cohesive"); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (certification of a Rule 23(b)(2) class should be denied if "individualized issues . . . overwhelm class cohesiveness"); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121–1122 (8th Cir. 2005) ("Because 'unnamed members are bound by the action without the opportunity to opt out' of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class.").

177. *Diaz*, 267 P.3d at 765.

178. *Id.* at 763 (quoting *Ferguson v. Safeco Ins. Co.*, 180 P.3d 1164, 1169 (Mont. 2008)).

179. *Id.* at 763–764.

pre-*Wal-Mart* caselaw, and not a reasoned decision to either reject or adopt the *Wal-Mart* majority's holding.

Montana courts should follow the *Wal-Mart* majority's holding regarding commonality. Rule 23(a) is titled "Prerequisites." Requiring a question of law or fact common to the class as a prerequisite for class treatment makes sense because, at bottom, the purpose of Rule 23 is to determine whether a case may be tried on a representative basis for the defined class. If a proposed "common question" is not capable of being answered on a class-wide basis, or if answering the question will not significantly advance the ultimate resolution of the litigation, such a question should not satisfy the requirements of Rule 23(a)(2).

The United States Supreme Court has recognized that the typicality and adequacy of representation requirements of Rule 23(a)(3) and Rule 23(a)(4) tend to merge because both look to potential conflicts and to "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[180] The Court has also recognized that Rule 23(a)'s requirements, taken as a whole, "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'"[181] The analysis of Rule 23(a)(2)'s commonality requirement similarly should be interpreted to provide assurances that a class trial is possible.

Thus, the question which is common to the class must have some importance to the ultimate resolution of the litigation; otherwise, class treatment of the common issue is not worth the time or expense.[182] The *Wal-Mart* dissent seems to recognize this by reading "questions" to mean "disputed issues."[183] Second, the question must be capable of a class-wide answer because, otherwise, a class trial will degenerate into individualized determinations. The *Wal-Mart* dissent implicitly acknowledges this point when it says that the "question" must be one "the resolution of which will advance the determination of the *class members' claims*."[184] Determination of class members' claims can only be advanced if the proposed common question of law or fact can be answered on a class-wide basis.

By focusing on the *Wal-Mart*'s majority quotation from a law review article that stated that "[d]issimilarities within the proposed class are what

180. *Amchem Prods., Inc.*, 521 U.S. at 626 n. 20.

181. *Falcon*, 457 U.S. at 156 (quoting *Gen. Tel. Co. of N.W.*, 446 U.S. at 330).

182. For example, it took 10 years for the class certification decision to wind its way through the courts, lead plaintiffs' counsel spent $7 million in pursuit of class certification. *See* Leigh Jones, *U.S. Law Firm Spent $7 Million to Sue Wal-Mart*, http://www.reuters.com/article/2011/06/21/us-walmart-id USTRE75K77C20110621 (June 21, 2011).

183. *Wal-Mart*, 131 S. Ct. at 2562 n. 3 (Ginsburg, Breyer, Sotomayor & Kagan, JJ., concurring in part and dissenting in part).

184. *Id.* at 2562 (emphasis added).

have the potential to impede the generation of common answers,"[185] the dissent argued, that "no mission remains for Rule 23(b)(3)."[186] But this is not so. The *Wal-Mart* majority did not hold or state that the existence of "dissimilarities" invariably precluded the existence of a question of law or fact common to the class for Rule 23(a)(2) purposes; it merely quoted, with approval, the observation that "dissimilarities . . . *have the potential* to impede the generation of common answers."[187] In other words, "dissimilarities" should be considered in analyzing whether a question of law or fact can truly be answered on a class-wide basis. This makes sense because, if a proposed common question produces "dissimilar" answers, it cannot result in a determination that "will resolve an issue that is central to the validity of each one of the claims in one stroke."[188]

Rule 23(b)(3)'s predominance inquiry requires more, as it is designed to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[189] While there may be one question of law or fact common to the class that is capable of being answered on a class-wide basis, the existence of substantial non-common questions necessary to resolve absent class members' claims may counsel against certification because those questions could swamp a class trial.[190] While determining whether there are dissimilarities within the proposed class may inform both

185. *Id.* at 2551 (majority) (quoting Nagareda, *supra* n. 117, at 132).

186. *Id.* at 2566 (Ginsburg, Breyer, Sotomayor & Kagan, JJ., concurring in part and dissenting in part).

187. *Id.* at 2551 (majority) (emphasis added) (quoting Nagareda, *supra* n. 117, at 132).

188. *Id.*

189. *Amchem Prods. Inc.*, 521 U.S. at 623.

190. For example, courts have routinely refused to certify classes alleging underpayment of insurance claims arising from hurricanes because the individualized determinations necessary to show that each insurance claim was underpaid would dwarf any common questions. *See e.g. Franceschini v. Allstate Floridian Ins. Co.*, No. 6:06–cv–1283–Orl–31JGG (M.D. Fla. Feb. 27, 2007) (denying class certification of class of insureds whose claims were adjusted using Integriclaim because "[e]ach class member would have to present evidence of hurricane damage to their property, the value of the loss, their communications with Allstate regarding this loss, and the payment, if any, received by Allstate."); *Aguilar v. Allstate Fire & Cas. Co.*, No. 06–4660, slip op. at 3 (E.D. La. Mar. 6, 2007) (motion to strike class allegations granted; allegations that defendant had underpaid claims by repeatedly utilizing below market unit pricing could not be proven on a class-wide basis because "demonstrating a wrongful pattern and practice of failing to adjust claims will require an intensive review of the individual facts of each class member's damage claim, including the nature and extent of damage, the timing and adjustment of each class member's claim, how much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely."); *Henry v. Allstate Ins. Co.*, No. 07–1738, slip op. at 4 (E.D. La. Aug. 8, 2007) (striking class allegations and fraud claim regarding the use of Integriclaim, because "proving a questionable pattern and practice of undervaluing claims will require an intensive review of the individualized facts of each class member's damage claim."); *Melancon v. St. Farm Ins. Co.*, 2008 WL 4691685 at *5 (E.D. La. Oct. 22, 2008) (denying class certification of case alleging underpayment of insurance claims in part because inquiring into whether total amount paid was sufficient was an individualized inquiry); *Jones v. Nat'l Sec. Fire & Cas. Co.*, No. 06–1407, slip op. at 4 (W.D. La. Nov. 3, 2006) (dismissing class allegations because individual inquiries required to determine underpayment).

the "common question" and "predominance" inquiries, such dissimilarities are analyzed for different purposes. For Rule 23(a)(2), the analysis focuses on whether there are *any* questions common to the class that are "central to the validity of each one of the claims" that are capable of being answered on a class-wide basis.[191] For Rule 23(b)(3), the analysis focuses on whether such a common question "predominates" in the sense that it makes sense to try the case on a class-wide basis.

Nor does asking whether individual differences impede common adjudication duplicate Rule 23(b)(3)'s "superiority" requirement, as the dissent claimed. Rule 23(b)(3)'s "superiority" inquiry looks to questions about whether a class trial is practical and a wise use of judicial resources, going well beyond the existence of dissimilarities.[192]

The Montana Supreme Court's adoption of the *Wal-Mart* majority's commonality holding would likely overturn the Montana Supreme Court's holdings that Rule 23(a)(2) is satisfied if there is a "common core of salient facts coupled with disparate legal remedies within the class."[193] The notion that the existence of a "common core of salient facts" was sufficient to satisfy Rule 23(a)(2) first crept into Montana jurisprudence in the Court's decision in *Sieglock v. Burlington Northern Santa Fe Railway Company*.[194] In *Sieglock*, the Burlington Northern Santa Fe Railway Company ("BNSF") published a list of names of the top 300 overtime wage earners in its track department.[195] The list included personal information about these employees, including their city and state of residence and their Social Security numbers.[196] Several BNSF employees filed a class action suit claiming damages resulting from the release and circulation of the list.[197] The district court denied class certification in part because there were no common questions of law, as the law of 23 different states would apply to the claims of class members located in various states.[198] The Montana Supreme Court stated that "[t]he requirements of Rule 23(a)(2) are disjunctive, therefore the party seeking [certification] must have either common questions of law or fact."[199] It appeared that the district court had not "considered whether the plaintiffs shared a common core of salient facts, irrespective of its deci-

191. *Wal-Mart*, 131 S. Ct. at 2551.

192. *See e.g. Eisen*, 417 U.S. at 164 (superiority, which includes manageability analysis, encompasses the "whole range of practical problems that may render the class action format inappropriate for a particular suit.").

193. *Sieglock*, 81 P.3d at 498 (quoting *Hanlon*, 150 F.3d at 1019); *see also Ferguson*, 180 P.3d at 1168–1169.

194. *Sieglock*, 81 P.3d 495.

195. *Id.* at 496.

196. *Id.*

197. *Id.* at 497.

198. *Id.*

199. *Id.* at 498.

sion that there was no commonality of law."[200] The Court therefore reversed and remanded the matter for the district court's consideration of whether there was a common core of salient facts that would satisfy Rule 23(a)(2).[201]

The source of the *Sieglock* Court's "common core of salient facts" criterion was the Ninth Circuit decision, *Hanlon v. Chrysler Corporation*, a decision affirming the approval of a settlement class of owners of minivans with defective liftgates.[202] The Montana Supreme Court quoted with approval from the *Hanlon* decision for the proposition that "commonality will also be satisfied when there is a 'common core of salient facts coupled with disparate legal remedies within the class.'"[203] The *Hanlon* opinion expressly followed the "permissive" construction of Rule 23(a)(2) that had existed prior to *Wal-Mart*.[204] The Ninth Circuit did not cite a single federal precedent supporting the proposition that "a common core of salient facts" satisfied Rule 23(a)(2). It found commonality satisfied in that case because the class claims "stem from the same source: the allegedly defective designed rear liftgate latch installed in minivans manufactured by Chrysler between 1984 and 1995."[205] But this conclusion could be re-stated from the *Wal-Mart* perspective as follows: there was a common question of fact (Were the liftgate latches defectively designed?) that apparently could be answered on a class-wide basis (*e.g.*, it was a design defect common to all vehicles, since they were all manufactured to the same specifications).

Thus, properly understood, *Hanlon* does not support the existence of a separate "common core of salient facts" test for satisfying Rule 23(a)(2)'s requirement, and that line of analysis should be abandoned under Montana law. *Wal-Mart* teaches that whether there is a "common core of salient facts" among class members is irrelevant. The correct inquiry is whether there is a question of fact (or law) common to the class that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[206] That is the test that should be adopted by the Montana Supreme Court.

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200. *Sieglock*, 81 P.3d at 499.

201. *Id.*

202. *Hanlon*, 150 F.3d at 1019.

203. *Sieglock*, 81 P.3d at 498 (quoting *Hanlon*, 150 F.3d at 1019).

204. *Hanlon*, 150 F.3d at 1019 ("The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively.").

205. *Id.* at 1019–1020.

206. *Wal-Mart*, 131 S. Ct. at 2551.

c. *Lesson 3: Rule 23(b)(2) Does Not Authorize Certification of All Equitable Claims and Cannot Be Used as a Vehicle for the Recovery of Individualized Monetary Awards*

1. *The Status of the Pre-*Wal-Mart *Law*

Both federal and Montana Rule 23(b)(2) provide that a class action may be maintained if Rule 23(a) is satisfied and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[207] A Rule 23(b)(2) class is referred to as "mandatory class" because once certified, no notice is required to be sent to the class members, nor are class members permitted to "opt out" of the class.[208] This derives from the "indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none."[209] By contrast, Rule 23(b)(3) permits class certification if Rule 23(a) has been satisfied and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[210]

The United States Supreme Court had previously explained that Rule 23(b)(2) was designed to permit "class actions for declaratory or injunctive relief," whereas "Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages . . . ."[211] The Court had also expressed serious doubt that class certification under Rule 23(b)(2) would be appropriate when monetary relief is sought.[212] However, in the absence of definitive Supreme Court guidance, lower courts had permitted certain judicial glosses to be placed upon Rule 23(b)(2).

Some courts had assumed that notwithstanding Rule 23(b)(2)'s explicit reference to injunctive or declaratory relief, certification of classes for other forms of "equitable" relief, such as disgorgement or unjust enrichment, was

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207. Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2).

208. *Wal-Mart*, 131 S. Ct. at 2558.

209. Nagareda, *supra* n. 117, at 132.

210. Fed. R. Civ. P. 23(b)(3); Mont. R. Civ. P. 23(b)(3). Under both rules, in determining whether a class action is a superior method, the court is to consider: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

211. *Amchem Prods., Inc.*, 521 U.S. at 614.

212. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

permissible.[213] Several courts (including the *Wal-Mart* district court and en banc Ninth Circuit majority) had justified certifying back-pay classes, at least in part, because back pay "is recoverable as an equitable, make-whole remedy in employment class actions notwithstanding its monetary nature."[214] Before the Supreme Court, the *Wal-Mart* plaintiffs argued that their back pay claims were appropriate for Rule 23(b)(2) treatment because a back pay award is "equitable in nature."[215]

Another judicially created gloss on Rule 23(b)(2) had developed based upon the Advisory Committee Note to the Rule that a 23(b)(2) class "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages."[216] Seizing upon that language, some federal circuit courts of appeal, like the pre-*Wal-Mart* Ninth Circuit, had adopted a test to determine whether monetary relief was predominately focused on plaintiffs' subjective intent in bringing the lawsuit. If the injunctive or declaratory relief sought would have alone been sufficient to induce plaintiffs to bring the suit, the fact that other monetary relief was sought would not "predominate."[217] Other federal circuit courts of appeals had developed an "incidental damages" standard, under which monetary relief predominates over other forms of relief "unless it is incidental to requested injunctive or declaratory relief."[218]

Thus, notwithstanding Rule 23(b)(2)'s express language which limited certification under that section to classes seeking final injunctive or declaratory relief, judicial authorization of Rule 23(b)(2) classes for "equitable" monetary relief and "non-predominate" or "incidental" damages had crept into federal class action precedent.

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213. *See e.g. Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467 (E.D. Pa. 2007) (approving class settlement that included disgorgement of profits). Not all lower courts had agreed that other forms of equitable relief was permitted in a Rule 23(b)(2) class. *See e.g. Owner-Operator Indep. Drivers Assn., Inc. v. New Prime, Inc.*, 213 F.R.D. 537, 545 (W.D. Mo. 2002) (denying certification under Rule 23(b)(2) for disgorgement because it did not "qualify as injunctive relief" and "is not relief contemplated by Rule 23(b)(2)."); *Cason v. Nissan Motor Acceptance Corp.*, 212 F.R.D. 518, 522 (M.D. Tenn. 2002) (denying Rule 23(b)(2) certification for disgorgement because it was a monetary remedy, not injunctive or declaratory relief).

214. *Dukes*, 222 F.R.D. at 170 (citations omitted); *see also Dukes*, 603 F.3d at 618; (citations omitted); *But see Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011) (the Seventh Circuit rejected the notion that Rule 23(b)(2)'s "injunctive" relief should be read to mean all forms of "equitable" monetary relief).

215. *Wal-Mart*, 131 S. Ct. at 2560.

216. Fed. R. Civ. P. 23(b)(2) advisory comm. nn. to 1966 amends.; 39 F.R.D. 69, 102.

217. *See e.g. Molski*, 318 F.3d at 950.

218. *See e.g. Allison v. Citigo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Randall*, 637 F.3d at 825 (holding that monetary relief is "incidental" if it only requires a "mechanical computation" under the "clean-up" doctrine of equity).

2. Rule 23(b)(2) Cannot be Used to Certify Classes for "Equitable" Relief or for Individualized Monetary Awards

In *Wal-Mart*, the unanimous Court rejected the argument that Rule 23(b)(2) applies to all forms of equitable relief. While back pay may be an equitable remedy, the Court found that that fact was irrelevant.[219] "The Rule does not speak of 'equitable' remedies generally, but of injunctions and declaratory judgments. As Title VII makes pellucidly clear, back pay is neither."[220] The unanimous Court thus made clear that it will also not countenance "back-door" attempts to obtain monetary relief in a 23(b)(2) class by characterizing such relief (*e.g.*, "disgorgement" or "restitution") as "equitable" in nature.[221]

The unanimous *Wal-Mart* Court also held that claims for monetary relief may not be certified under Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."[222] The Court recognized that "[o]ne possible reading [of Rule 23(b)(2)] is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all."[223] But the Court did not reach that broader question because it determined that "at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule."[224] As the Court explained:

> Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.[225]

Combining individualized and class-wide relief under Rule 23(b)(2) was also contrary to the structure of Rule 23(b). Rule 23(b)(1) and (b)(2) classes are "mandatory classes" with no notice or opt-out required because of the class-wide nature of the relief sought.[226] Rule 23(b)(3) "allows class certification in a much wider set of circumstances but with greater procedu-

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219. *Wal-Mart*, 131 S. Ct. at 2560.

220. *Id.*

221. Other courts had previously rejected attempts to certify 23(b)(2) classes for "disgorgement" or "restitution" using a similar analysis. *See e.g. Owner-Operator Indep. Drivers Assn., Inc.*, 213 F.R.D. at 545 (denying 23(b)(2) certification of a class seeking "disgorgement" of profits); *Casson*, 212 F.R.D. at 521 (denying 23(b)(2) certification of a class seeking "disgorgement" of profits); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) (denying 23(b)(2) certification of a class seeking "restitution").

222. *Wal-Mart*, 131 S. Ct. at 2557.

223. *Id.*

224. *Id.*

225. *Id.* (emphasis in original).

226. *Id.* at 2558.

ral protections" for absent class members, including the "predominance" and "superiority" requirements, notice, and a right to opt-out of the class if they desire.[227] The Court noted that "[g]iven that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3)." As the Court explained:

> The procedural protections attending the (b)(3) class . . . are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. . . . But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority . . . .[228]

The Court observed that it had previously held that in a class action predominately seeking monetary relief, the absence of notice and opt-out violates due process.[229] "While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here."[230]

Although the Court expressly declined to hold that there was no circumstance under which monetary claims could be certified under Rule 23(b)(2), there are several indications in the unanimous portion of the Court's opinion that suggest that it would so rule if presented squarely with the question. The Court expressly rejected the respondents' argument that the "negative implication" from the Advisory Committee note is that a (b)(2) class "*does* extend to cases in which the appropriate final relief relates only partially or nonpredominately [sic] to money damages" because "it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text and that does obvious violence to the Rule's structural features."[231] In language that would seem to foreshadow the rejection of any predominance test, the Court declared "[w]e fail to see why the Rule should be read to nullify [the protections of Rule 23(b)(3)] whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction."[232] Indeed, the Court noted that a "predomi-

227. *Id.*; *see also* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances" and a right to withdraw from the class).

228. *Wal-Mart*, 131 S. Ct. at 2558–2259 (emphasis in original).

229. *Id.* at 2559; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

230. *Wal-Mart*, 131 S. Ct. at 2559.

231. *Id.* (emphasis in original).

232. *Id.*

nance" test would create "perverse incentives" for class representatives (or their counsel) to "place at risk potentially valid claims for monetary relief" in order to make it more likely that monetary relief would not "predominate."[233]

3. *The Montana Supreme Court Should Follow* Wal-Mart*'s Rejection of Certifying Rule 23(b)(2) Classes for Generally "Equitable" or Monetary Relief*

Prior to *Wal-Mart*, the Montana Supreme Court had not been confronted with a case that certified a Rule 23(b)(2) class for "equitable relief" that was not declaratory or injunctive relief. However, Montana should adopt the unanimous *Wal-Mart* Court's position that Rule 23(b)(2) is limited to declaratory or injunctive relief. *Wal-Mart*'s construction of Rule 23(b)(2) according to its plain meaning comports with long-standing principles of statutory construction. When the terms of a statute or rule are clear and unambiguous, a court's function is to "enforc[e] the terms of the statute as Congress has drafted it."[234] Rule 23(b)(2) speaks in terms of injunctive and declaratory relief, which are equitable remedies. But as the Fourth Circuit noted in a pre-*Wal-Mart* decision, "if the Rule's drafters had intended the Rule to extend to all forms of equitable relief, the text of the Rule would say so."[235] Under the maxim of statutory construction, *expressio unius est exclusio alterius* (the inclusion of one excludes others), a court should not read into Rule 23(b)(2) all equitable remedies when the language of the rule includes only declaratory and injunctive relief.[236] Montana follows similar rules of statutory consideration and thus should adopt this *Wal-Mart* holding.[237]

Prior to *Wal-Mart*, the Montana Supreme Court has not been called upon to address whether claims involving monetary relief can be certified under Montana Rule of Civil Procedure 23(b)(2), or if so, under what circumstances. The Montana Supreme Court's decision in *Ferguson v. Safeco*

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233. *Id.*

234. *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 305 (4th Cir. 2000); *see also Bus. Guides, Inc. v. Chromatic Communs. Enters., Inc.*, 498 U.S. 533, 540 (1991) (applying the plain meaning rule to Federal Rule of Civil Procedure 11).

235. *Thorn*, 445 F.3d at 331.

236. *See e.g. Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying maxim to the Federal Rules of Civil Procedure).

237. *See e.g. Shelby Distributors, LLC v. Mont. Dept. of Revenue*, 206 P.3d 899, 902 (Mont. 2009) ("We first attempt to construe a statute according to its plain meaning. If the language of the statute is unambiguous, no further interpretation is necessary."); *Dukes v. City of Missoula*, 119 P.3d 61, 64–65 (Mont. 2005) (applying *expressio unius est exclusio alterius* doctrine to enforcement of the Montana Scaffold Act).

Insurance Company[238] could be misunderstood as a case involving a Rule 23(b)(2) class that permitted the award of a class-wide disgorgement award. In fact, it did not. In *Ferguson*, a putative class sought a judicial declaration that Safeco had "breached its insurance contract and adjustment duties by a programmatic assertion of subrogation without first investigating and determining whether the insureds ha[d] received their 'made whole' rights."[239] The putative class also sought injunctive relief compelling the return of subrogation amounts previously recovered by Safeco to their source (not the class) until complying with the "made whole" standard.[240] No monetary relief going to the class was sought.

The Montana Supreme Court's recent decision in *Gonzales v. Montana Power Company*,[241] which reversed a district court's refusal to certify a punitive damage class, could also be misinterpreted to sanction monetary relief in a (b)(2) action because the opinion does not recite under what subsection of the rule certification was sought. However, review of the district court certification order clearly confirms that the certification in question was under Rules 23(b)(1) and (3), and not Rule 23(b)(2).[242]

In *Diaz*,[243] the Montana Supreme Court's first class certification decision citing *Wal-Mart*, the Court appeared to adopt *Wal-Mart*'s holding that cases requiring individualized awards of monetary damages are not appropriate in Rule 23(b)(2) actions, but whether the holding was properly applied is open to question. The *Diaz* Court recognized that, under *Wal-Mart*, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages, or when each class member would be entitled to a *different* injunction or declaratory judgment against the defendant."[244] The *Diaz* Court quoted with approval *Wal-Mart*'s explanation that "'[t]he key to the [Rule 23(b)(2)] class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[245]

The Montana Supreme Court found that, just as in *Ferguson*, the *Diaz* class was certifiable under Rule 23(b)(2) because a single question affects

238. *Ferguson*, 180 P.3d 1164.

239. *Id.* at 390–391.

240. *Id.* at 1170.

241. *Gonzalez v. Mont. Power Co.*, 233 P.3d 328 (Mont. 2010).

242. *See Or. Granting Certification of Class Action Except for Fraud and Granting Leave to File Sixth Amend. Compl.*, *Gonzalez v. Mont. Power Co.*, Cause No. DV–98–253 (Mont. 2d Jud. Dist. Oct. 2, 2009).

243. *Diaz*, 267 P.3d 756.

244. *Id.* at 765 (emphasis in original).

245. *Id.* (quoting *Wal-Mart*, 131 S. Ct. at 2557).

all class members: "Can the State, in compliance with the subrogation laws, programmatically exercise [subrogation] before conducting a made-whole analysis?"[246] The *Diaz* Court reasoned that, like *Ferguson*, "[a]ny individualized determinations regarding whether class members have been made whole will not occur in the context of this class action claim."[247]

But in an apparent effort to comply with the *Wal-Mart* holding rejecting individualized monetary awards, the *Diaz* Court appears to have misunderstood the *Diaz* record. As Justice Rice's dissent points out, the *Diaz* plaintiffs' pleadings did "not challenge the State's internal mechanism for applying the made whole doctrine. Rather it is the Plaintiffs' claim, repeatedly stated, that the State has 'illegally withheld' benefits, should be made to calculate the amount withheld for 'each member of the class,' should 'immediately pay' such benefits plus interest, and should pay punitive damages."[248] The *Diaz* complaint specifically sought "a declaratory judgment that the [State's] withholding of benefits violates the 'made whole' law."[249] The complaint also sought orders "*requiring the [State] to calculate the amounts they have unlawfully withheld* and to pay those amounts to the plaintiffs," as well as "all other *damages* allowed by Montana law."[250] Thus, as Justice Rice pointed out in his dissent, the *Diaz* case—at least as pleaded—did seek individualized monetary awards that *Wal-Mart* held were inappropriate for Rule 23(b)(2) certification.

The *Diaz* Court's reliance on *Ferguson* is also arguably misplaced. The *Diaz* Court characterized the *Ferguson* case as seeking "an injunction requiring the insurer to return *to her* any amounts it had illegally subrogated until it completed the requisite made-whole adjustments."[251] In fact, *Ferguson* involved Safeco's alleged improper collection of subrogated amounts from third parties;[252] the plaintiff requested in addition to class-wide declaratory relief, an "injunctive order compelling the *return* of subrogation amounts until such time as adjustments under the 'made-whole' standard had been completed by Safeco."[253] The "return" of such subrogated amounts was to the source from which the amounts had been received (*i.e.*,

246. *Id.* at 765.

247. *Id.* at 766.

248. *Id.* at 769 (Rice, J., dissenting) (citations omitted).

249. *Diaz*, 267 P.3d at 769.

250. *Id.* (internal quotations and citations omitted) (emphasis in original).

251. *Id.* at 766 (majority) (emphasis added).

252. *Ferguson*, 180 P.3d at 1165–1166; Appellants' Br., 25, *Ferguson*, 180 P.3d 1164 ("Safeco's program recovers subrogation . . . by asserting and collecting subrogation directly from third-party insurers without any analysis of whether Safeco's insured has been made-whole.").

253. *Ferguson*, 180 P.3d at 1170 (emphasis added).

third-party insurers), not a return to the plaintiff or the class.[254] In *Ferguson*, unlike *Diaz*, individualized "make whole" awards were never sought.[255]

It therefore appears that while the Montana Supreme Court has signaled a willingness to adopt the *Wal-Mart* holding that individualized monetary awards are not appropriate for Rule 23(b)(2) certification, the application of this holding will require greater attention in future cases. Rather than ignore requested monetary relief and recast a case into one never pleaded, the proper course of action is to recognize that class certification should be denied in such cases, and Rule 23(b)(2) certification should be restricted to cases actually seeking only final declaratory or injunctive relief.

d. Lesson 4: Class Certification Cannot Be Used to Strip a Defendant of Its Right to Litigate Its Defense to Individual Monetary Claims

*1. The Status of Pre-*Wal-Mart *Law*

Before the *Wal-Mart* decision, some courts confronting difficulties in determining precisely which Title VII claimants in a Rule 23(b)(2) class would have been given a better job absent discrimination resorted to a formulaic approach to calculate a lump sum amount that represented the employer's total back pay to the class.[256] As the Ninth Circuit put it, "'[w]hen the class size or the ambiguity of promotion or hiring practices or the illegal practices continued over an extended period of time calls forth [a] quagmire of hypothetical judgment . . . a class-wide approach to the measure of back-pay is necessitated.'"[257] In such cases, courts had recognized that it was "not a choice between one approach more precise than another. Any method is simply a process of conjectures."[258]

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254. This is confirmed from review of the plaintiff's briefs before the Montana Supreme Court. *See* br. of Appellants at 26–27, *Ferguson*, 180 P.3d 1164; Br. of Appellants at 6–7, *Ferguson*, 180 P.3d 1164.

255. Class relief prayed for in *Ferguson* included punitive damages, (*see* Compl., Prayer for Relief, ¶ 14), but that was not a claim upon which plaintiffs sought certification. The propriety of certification of a Rule 23(b)(2) punitive damage class is all but foreclosed by the *Wal-Mart* decision.

256. *See e.g. EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872, 879–880 n. 9 (7th Cir. 1994) (approving district court's use of formula approach); *Hameed v. Int'l Assn. of Bridge Workers, Loc. 396*, 637 F.2d 506, 520–521 n. 18 (8th Cir. 1980) (citing cases approving formula approach to class-wide damages); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452–453 (7th Cir. 1976) (citing cases approving formula approach to class-wide damages); *EEOC v. Chi. Miniature Lamp Works*, 668 F. Supp. 1150, 1151–1152 (N.D. Ill. 1987).

257. *Domingo v. New Eng. Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974)).

258. *Pettway*, 494 F.2d at 261.

In such cases, once a formula was employed to calculate a lump sum back pay award to the class, the additional steps of determining which class members would be eligible to share in the award and in what amount was required. Awarding back pay to all potential victims of discrimination has the effect of generating a "windfall for some employees who would have never been promoted" even absent discrimination and "undercompensat[ing] the genuine victims of discrimination by forcing them to share the award with their undeserving brethren."[259] Such "rough justice" was "better than the alternative of no remedy at all for any class member."[260] However, no federal appellate court (other than the en banc Ninth Circuit majority) had approved of the use of a formula in a Title VII case where the defendant objected to such approach.

Formulaic approaches to class-wide recoveries were not unique to the Title VII arena, nor to Rule 23(b)(2) classes. As discussed above, the Ninth Circuit en banc majority cited the *Hilao*[261] decision as an example of the proper use of a formula-type approach to class-wide damage calculations, and *Hilao* was a Rule 23(b)(3) class. Class-wide damage calculations based upon formulas or the trial of random sample claims had been approved in mass tort Rule 23(b)(3) actions as well.[262] In each instance, courts justified such approaches because the realities of litigating thousands of individual damage claims on a claim-by-claim basis would be essentially impossible as a practical matter.[263]

2. *The Unanimous* Wal-Mart *Court's Rejection of "Trial by Formula"*

In its analysis of why the monetary claims for back pay were not suitable for Rule 23(b)(2) certification, the *Wal-Mart* Court recognized:

> [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, [the] class could not be certified even assuming, *arguendo*, that "incidental" monetary relief can be awarded to a Rule 23(b)(2) class.[264]

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259. *Stewart*, 542 F.2d at 452–453.

260. *Dukes*, 222 F.R.D. at 177.

261. *Hilao*, 103 F.3d 767.

262. *See e.g. Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 659–667 (E.D. Tex. 1990) (adopting a sampling approach in mass asbestos Rule 23(b)(3) class action); *see also* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89 (1989).

263. *See e.g. Cimino*, 751 F. Supp. at 652 ("If the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing. Transaction costs would be astronomical.").

264. *Wal-Mart*, 131 S. Ct. at 2561.

In reaching this conclusion, the unanimous Court expressly rejected the notion that class-wide back pay could be awarded based upon a "Trial by Formula," a concept embraced by the Ninth Circuit en banc majority.[265] With regard to the random sampling approach of *Hilao*, the Court specifically disapproved of such a "novel project."[266] Such an approach ran afoul of the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[267] To comply with the Rules Enabling Act, a Federal Rule of Civil Procedure may affect "only the process of enforcing litigants' rights and not the rights themselves."[268] This requirement tracks the United States Constitution's separation of powers, and a broader delegation of power to the judiciary to make or modify substantive rights would constitute an improper delegation of legislative authority, which constitutionally is within the exclusive purview of Congress.[269] Wal-Mart's right to litigate its statutory defense to individual claims thus could not be abrogated by the procedural device of awarding class-wide damages based upon formulas or sampling.

3. Montana Should Also Reject Formulaic Class-Wide Damages Approaches

The same concerns that drove the unanimous *Wal-Mart* Court to reject "Trial by Formula" in federal class actions applies with equal force to Montana class action law. Although Montana does not have an exact analog to the Rules Enabling Act, the Montana Constitution, like the United States Constitution, requires separation of powers. Article III of the Montana Constitution directs that the state's governmental power is divided into three distinct branches: legislative, executive, and judicial. That Article provides that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."[270] Article VII of the Constitution clearly limits the Montana Supreme Court's rule making powers to, *inter alia*, "practice and procedure for all other courts."[271]

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265. *Id.*

266. *Id.*

267. *Id.* (quoting 28 U.S.C. § 2072(b)).

268. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987).

269. *See e.g. I.N.S v. Chadha*, 462 U.S. 919, 951 (1983).

270. Mont. Const. art. III, § 1.

271. *Id.* at art. VII, § 2(3) ("It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation."). The language of this rule is substantively similar to language originally proposed by the minority report to the Montana Constitutional Convention. The minority report noted that "[t]he second class of rule-

The promulgation of Montana Rule of Civil Procedure 23 by the Montana Supreme Court was thus not intended to abridge or enlarge substantive legal rights, and as a Constitutional matter, could not do so. This necessarily means that class-wide damages approaches, whether based upon formulas or random sampling, should be rejected in Montana if the use of such devices would frustrate a defendant's right to raise individual common law or statutory defenses to class member's claims. Such a result is also compelled by the Montana Constitution's guarantee that no citizen will be deprived of life, liberty or property without Due Process of law.[272] A defendant's Due Process right to challenge individual class members' entitlement to monetary, declaratory or injunctive relief cannot be abrogated by the procedural device of class certification. As the Montana Supreme Court has recognized, Due Process requires that a defendant be afforded "an opportunity to present every available defense."[273]

V. CONCLUSION

Class actions are an exception to the general rule that a lawsuit only determines the rights of the parties before the Court.[274] In Montana, this exception is permitted "only if" all of the requirements of Montana Rule of Civil Procedure 23 are met.[275] Because the Montana rule is identical to Federal Rule 23(a) and (b), the *Wal-Mart* decision's lessons should be adopted and applied in the continuing development of Montana class-action law. District courts in Montana should be required to "find" or "determine" that each of Rule 23's requirements have been proven by a preponderance of the evidence, even if that means addressing and resolving an issue that will have to be proven again at a trial on the merits. Applying the *Wal-Mart* majority's clarification regarding determining commonality, class actions should not be certified if a common question capable of generating a common answer for the entire class likely to drive resolution of the lawsuit is absent. Rule 23(b)(2) actions should be limited to claims for injunctive or declaratory relief, and cannot be used for the recovery of individualized monetary recovery. Finally, formulaic approaches to class-wide damages should be rejected if they impede a defendant's right to individually challenge the right of class members to recover money damages.

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making power is restricted to rules of procedure and is intended to include both civil and criminal codes, but is specifically limited and qualified . . . meaning, of course, that the rule-making power is actually reserved to the plenary power of the legislature as the lawmaking body of the State." Montana Constitutional Convention Proceedings vol. I, 516 (Mont. Legis. & Legis. Council 1972).

272. Mont. Const. art. II, § 17.

273. *Seltzer v. Morton*, 154 P.3d 561, 599 (Mont. 2007) (quoting *Phillip Morris U.S.A. v. Williams*, 127 S. Ct. 1057, 1063 (2007); *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

274. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

275. Mont. R. Civ. P. 23(a).