



Class Action Update:

Are the Pennsylvania Class Action Rules Really As “Liberal” As Some Courts May Believe?

Standing in stark contrast to the US Supreme Court’s recent decision reversing class certification in *Wal-Mart Stores, Inc. v. Dukes*, is the Pennsylvania Superior Court’s recent decision in another class action involving Wal-Mart—*Braun v. Wal-Mart Stores, Inc.* In an opinion, dated June 10, 2011—a mere ten days before the *Dukes* decision—the *Braun* opinion illustrates the significantly different and more liberal standard Pennsylvania courts are applying to this Commonwealth’s class certification rules than the rigorous analysis and proof necessary to obtain class certification under the federal class certification rules. This distinction becomes even more significant when considered against the fact that Pennsylvania’s class certification rules are either taken verbatim or derived from their federal class certification counterparts. In fact, Rule 1702 of the Pennsylvania Rules of Civil Procedure, which governs the commonality requirement, is identical to the Federal Rule of Civil Procedure at the heart of the *Dukes* opinion, namely Rule 23(a)(2). Although it remains to be seen whether the Pennsylvania Supreme Court will accept an appeal in the *Braun* matter, one can expect that plaintiffs likely will attempt to exploit this “liberal” or stated differently, “lenient” class certification procedure in Pennsylvania state courts for the foreseeable future.

In *Braun*, the Pennsylvania Superior Court held that the Philadelphia Court of Common Pleas’ certification of a class of approximately 187,000 current and former Wal-Mart employees was proper. After obtaining certification of that massive class and following a thirty-two day trial, the plaintiff class obtained a judgment of more than \$187 million on their claims for breach of contract, unjust enrichment, and statutory violations of Pennsylvania’s Wage Payment and Collection Law and Minimum Wage Act. The claims stemmed from allegations that Wal-Mart failed to compensate the class members for rest breaks and off-the-clock work as mandated in Wal-Mart’s employment policies. Although the trial court evaluated hundreds of exhibits at two class certification hearings regarding Wal-Mart’s policies, practices and record-keeping, the trial court certified the class by relying primarily on the analyses of plaintiffs’ experts. Using that one-sided evidence, the trial court concluded that the plaintiff class demonstrated a “prima facie” basis that they had suffered a systematic loss of contractual break time. The trial court expressly refused to consider testimony submitted by Wal-Mart, asserting that considering such evidence involved “credibility” issues and was not proper on a motion for class certification.

Affirming the trial court's class certification and judgment in *Braun*, the Pennsylvania Superior Court repeatedly cited to and relied upon the notion that the Pennsylvania class certification rules are to be applied liberally. In fact, the Superior Court disregarded precedent cited by Wal-Mart in support of the proposition that individual employees, and not simply an expert, needed to be questioned regarding whether managers forced them to work through or cut their break short, merely noting that the cases cited were distinguishable because they "did not liberally construe class action rules."

Yet, Pennsylvania courts routinely recognize that federal class certification decisions are instructive in construing Pennsylvania's class action rules. What's more, in certifying the class, the Philadelphia Court of Common Pleas stated that the "merits of the action and the plaintiffs' right to recover" are excluded from class consideration. Stated differently, the trial refused to consider the merits of the claims or any of the plaintiff's right to recover in deciding whether class certification was appropriate. Essentially, the trial court accepted the plaintiffs' allegations and expert testimony as true. It was only ten years ago when the federal courts began to recognize that such a liberal view of the class certification procedure was improper. See, e.g., *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001). The Supreme Court's

decision in *Dukes* is the final culmination of years of this growing body of jurisprudence explaining that the class certification rules are not "a mere pleading standard" and that a court's consideration of whether class certification is appropriate frequently involves a consideration of the "merits of the plaintiff's underlying claim."

Given the definitive and significant decision of the Supreme Court in *Dukes*, it will be interesting to see how Pennsylvania courts continue to analyze this Commonwealth's class certification requirements. One would expect, if appealed, that the *Dukes* decision could have an enormous impact on the Pennsylvania Supreme Court's analysis of this Commonwealth's class certification rules and procedures, including for example, that courts may be required to consider evidence submitted by a defendant (including from any defense experts), the applicability of *Frye* to challenge a plaintiff's experts, and overall, delving into the merits of the dispute, where necessary, prior to certifying a class. If *Braun* is not taken up by the Pennsylvania Supreme Court, Pennsylvania courts—applying rules modeled after the federal rules—will undoubtedly continue to adhere to this "liberal" almost "based-on-the-pleadings" standard for class certification that the Supreme Court has now specifically and expressly rejected.

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