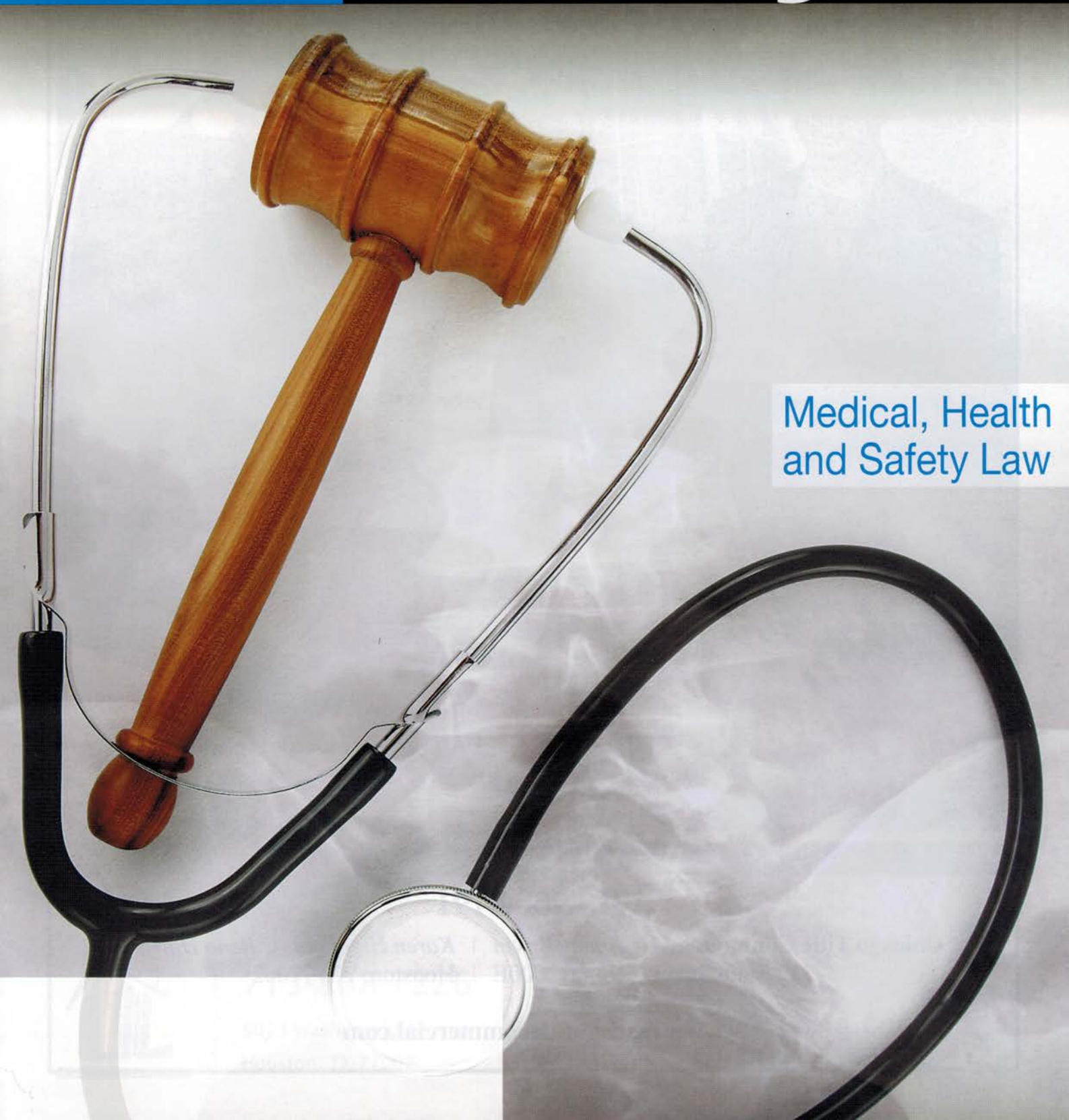
THE HOUSTON lawyer

Volume 49 – Number 5

March/April 2012



Medical, Health and Safety Law

to drill 700 acre-feet of water to irrigate a 300-acre tract and stock a 50-acre lake but, after several hearings, the EAA found that Day and his partner were entitled only to a permit to drill 14 acre-feet of water. After a trial court found for Day on his permitting claim but dismissed his constitutional claims, the Court of Appeals affirmed the Authority's decision to issue the permit for 14 acre-feet but held that "... landowners have some ownership rights in the groundwater beneath their property... entitled to constitutional protection." Thus, the court held that Day's constitutional claims should not have been dismissed by the trial court. The Supreme Court affirmed this finding in all respects, specifying that Day, indeed, "... has a constitutionally protected interest in the groundwater beneath his property... " and directing that the issue of the amount of damages due to Day as a result of this governmental "taking" must be determined by the trial court in further proceedings.

The court held:

"Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently."

Indeed, the court's opinion closely examines its 1948 decision in *Elliff v. Texas Drilling Co.*, 210 S.W.2d 558 (Tex. 1948) where it restated the law regarding ownership of oil and gas in place as follows:

"In our state the landowner is regarded as having absolute title and severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value."

Elliff at p. 561.

In *Day*, the court holds that this statement of law "... correctly states the common law regarding the ownership of groundwater in place."

Finally, having found that the landowner Day possessed an ownership right in the groundwater beneath his property, the court examined whether or not the EAA could regulate Day's drilling of that groundwater and whether its permitting process was a "taking" under the Texas Constitution. The court conducted a detailed examination of the history of groundwater regulation in Texas noting that there are currently 96 groundwater districts within the state covering all or part of 173 counties, all of which, in some fashion, regulate the drilling and use of groundwater within their boundaries.

Since the court noted that the EAA's permit issued to Day would, most likely, have the result of making it more expensive, if not impossible, for him to raise crops and graze cattle on his land, this raised the constitutional question of whether or not the governmental entity has deprived the landowner of all economically beneficial use of his property. The court held that a more complete development of the record was necessary on this issue and that it may demonstrate that the EAA's regulations were too restrictive of Day's groundwater rights and without justification in the overall regulatory scheme. Thus, the case was remanded to the trial court for a determination of those and other issues.

The court's decision has set off a groundswell of commentary regarding the wisdom of treating groundwater in the same legal capacity as the state has always treated oil and gas in place and whether or not, particularly in this time of drought, it is good public policy to potentially require groundwater districts and other governmental entities such as the Edwards Aquifer Authority and the Harris-Galveston Subsidence District to be required to compensate landowners for their regulation of groundwater pumping.

The answers to these questions will come only after the lower court's consideration of the Day case and, undoubtedly, after further litigation on these issues. Without a doubt, however, the authority of governmental entities in Texas to regulate the drilling and use of groundwater has been brought into significant question by the Supreme Court's opinion.

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The Post-*Wal-Mart v. Dukes* World: Class Actions with a Twist

By N. JILL YAZIJI

In a much anticipated decision just a few months ago, the U.S. Supreme Court denied class certification to past and current women employees complaining of sex-based discrimination at Wal-Mart stores nationwide. *Wal-Mart Stores, Inc. v. Dukes*[1] was a milestone decision in the law governing employment-based class actions, with far reaching consequence on plaintiffs' practice. The class action involved every single store of the retail giant, where 1.5 million women argued that Wal-Mart's managers used their discretion in hiring and promoting based on a corporate culture of gender-based stereotypes. But with no stated or implicit policy of discrimination, unreliable statistical evidence, and scant anecdotal evidence, the class was doomed, and so, it seemed, all other class actions based on employment discrimination in the aftermath of that decision.

So "perverse" seemed the quest for em-

ployment-based class certification in the post-*Wal-Mart* world, that Judge Gettleman of the Northern District of Illinois denied such status to 700 black brokers alleging racial discrimination at Merrill Lynch, while *admitting* that plaintiffs had a "good argument" for class action and *encouraging* an appeal from his denial of class certification because the issue "deserves to be put to rest one way or the other."

Not so perverse, said the Seventh Circuit Court of Appeals in *McReynolds v. Merrill Lynch*, ____ F.7th _____, No. 11-3639, which reversed denial of class certification in an opinion by Judge Posner issued February 24, 2012, that is sure to clarify, or at least help reorganize, the post-*Wal-Mart* landscape.

Contra the plaintiffs' class in *Wal-Mart*, the *McReynolds* class sought certification under Federal Rule 23(c)(4) to discover if Merrill Lynch engaged in practices that resulted in disparate impact on its black brokers, and under Federal Rule 23(b)(2) and to seek injunctive relief.[2] In *McReynolds*, Merrill Lynch had 135 supervisors, or "complex directors," each controlling several of the company's 600 branch offices. Each complex director had a "good deal of autonomy," hence the similarity to *Wal-Mart*, wrote the court of appeals, but "only within a framework established by the company." It was this "framework established by the company" that convinced the *McReynolds* court that this case was eligible for class action treatment. Specifically, in *McReynolds* two company-wide policies were at issue: the "teaming" policy and the "account distribution" policy. The teaming policy authorized brokers (not managers) to form and staff their own team; the account distribution policy required the transfer of departing brokers' accounts to the teams with the best performance record as measured by the ability to generate revenue and retain large accounts, again a company-wide policy.

Why are these policies discriminatory? The plaintiffs claimed that members of each team tend to associate with people like themselves and exclude others who are different. Yes, there is always a bottom line of performance, and all teams will most likely be colorblind toward star brokers. But when there is uncertainty as to who is effective, wrote the court of appeals, stereotypes and prejudice kick in. Likewise, if racial stereotypes made it hard for Merrill Lynch's black employees to join the "better teams," then the company's financial distribution policy based on past success of brokers will inevitably play out in favor of the white brokers, since the accounts are usually distributed to the best performing teams. "A vicious cycle will set in," the court wrote, with black brokers not being able to join "good teams, and as a result don't generate as much revenue or attract or retain as many clients as white brokers do, then they do not do well in the competition for account distribution either."

These common questions, whether or not ultimately decided in favor of the plaintiffs, provided the class glue that Justice Scalia found missing among Wal-Mart's employees. In *Wal-Mart*, there was not a single company-wide policy, except Wal-Mart's no-discrimination policy. This decision, then, should hardly be seen as undermining *Wal-Mart*. Indeed, it is the distinctions that the plaintiffs drew between themselves and the Wal-Mart class that ultimately resulted in their success in this case. Nonetheless, this case clarifies that simply alleging a localized decision-making process alone will not preempt the existence of company-wide policies that merit class treatment. Conversely, proving common questions of fact or law will not preempt a meritorious defense, since gaining class certification is a far cry from proving a disparate impact case.

Yet, as the Seventh Circuit noted from the outset, "because class actions are cumbersome and protracted, an early appellate

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decision whether a suit can be maintained as class action can speed the way to termination of litigation by abandonment, summary judgment, or settlement." Hence, the far-reaching consequences of this decision on class actions practitioners on both sides of the docket.

***N. Jill Yaziji** is the principal of Yaziji Law Firm, a firm specializing in civil litigation, and a member of* The Houston Lawyer *editorial board.*

Endnotes

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2451 (June 20, 2011). For a summary of this opinion see *The Houston Lawyer*, September/October 2011, p. 44.
2. Here, class counsel did not ask for certification under 23(b)(3) for damages, such as back pay or punitive damages, although she suggested that if the circuit court were to find class action appropriate, it should order the district court to consider on remand "the extent to which damages issues also could benefit from class treatment..."