

The IADC Amicus Brief Program: Its Increasing Success and Influence

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○ NCE rare, amicus curiae or “friend of the court” briefs are now filed in the majority of appellate cases heard by the United States Supreme Court and various state supreme courts.

In the United States Supreme Court, amicus briefs were filed in thirty-five percent of the Court's cases in the 1965–66 term; by 1995, one or more amicus briefs were filed in nearly ninety percent of the Court's cases.¹ An analysis of the 1999 to 2008 terms showed that in civil cases the average filing rate for amicus briefs was 92.4% (with a high of 100% amicus

participation in all civil cases in the 2007 term).² The number of civil cases before the Court each term ranged from thirty-nine to sixty-one; the total number of amicus briefs filed each term in those cases ranged from 344 to 627.³

“Historically, state courts were more likely than the U.S.[.] Supreme Court to limit the role of amicus participation in appeals.”⁴ Nonetheless, the number of amicus briefs filed in state high courts

¹ See Mary-Christine Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study*, 8 S. CAL. REV. L. & WOMEN'S STUD. 187, 188, nn. 4–6 (1999) (citing data from Supreme Court advocate Bruce Ennis, a respected Supreme Court treatise, and a news report in the ABA Litigation News).

² See Mary-Christine Sungaila, *A Friend in Need is a Friend Indeed: The Increased Prevalence and Influence of Amicus Briefs*, IADC Appellate Practice Committee Newsletter (March 2010).

³ *Id.*

⁴ Sarah F. Corbally, Donald C. Bross, and Victor E. Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000*, 25 JUST. SYS. J. 39, 43 (2004).

tripled in the 1980s.⁵ The growth in use of amicus briefs has not been uniform across all states, however. The frequency of amicus participation between 1960 and 2000 was highest, according to one study, before the Florida, Massachusetts, North Carolina and Washington high courts; two previous studies revealed the top five states for amicus participation to be California, Michigan, New Jersey, New York, and Ohio.⁶

My own survey of amicus filings in the California Supreme Court reveals high amicus participation in the past decade. The amicus filing rate was 59.7% from 2000 to 2009 in civil cases; out of 707 cases decided by the court, 422 had one or more amicus briefs.⁷ The average number of amicus briefs filed in each case is also increasing. In the California Supreme Court, 1,868 amicus briefs were filed in 422 of the 707 civil cases decided by the court between 2000 and 2009.⁸ Indeed, the California Supreme Court has even invited the submission of amicus briefs in some cases.⁹

With increased amicus participation has come increased amicus influence. Amicus briefs have repeatedly provided the United States Supreme Court with information and legal theories that have influenced the Court's decisions. The majority opinion in *Roe v. Wade*¹⁰ ex-

pressly referred to positions urged by amicus groups and relied heavily on historical, social, and medical data provided by amici. In the companion case of *Doe v. Bolton*,¹¹ the majority expressly relied on data provided by amici showing that facilities other than hospitals are adequate to perform abortions, and rejected the state's contrary argument. In *Grutter v. Bollinger*,¹² the Court upheld the race-based admissions policy of the University of Michigan Law School; at oral argument and in the Court's decision, the justices referred to and relied on the amicus brief of retired military officers.¹³ And, in the 2013 term, the Court advised counsel for parties in a case in advance of oral argument that they should be prepared to address an argument made in an amicus brief filed in the case.

The Court's citation of amicus briefs has also increased. According to one study, United States Supreme Court justices directly mentioned at least one amicus brief in eighteen percent of the cases in which amicus briefs were filed between the 1969 and 1981 terms.¹⁴ Another study reveals that, "of all [United States Supreme Court] opinions published between 1986 and 1995, approximately fifteen percent

¹¹ 410 U.S. 179, 195 (1973).

¹² 539 U.S. 306 (2003).

¹³ See Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 523–524 & n.4 (2003). The California Supreme Court has also discussed the argument of amici at length in its opinions. See *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 991–992 (1993); *In re Marriage Cases*, 43 Cal.4th 757 (2008).

¹⁴ Karen O'Connor and Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 42–43 (1983).

⁵ *Id.* at 44.

⁶ *Id.* at 46.

⁷ *A Friend in Need is a Friend Indeed*, *supra* note 2, at 2–3.

⁸ *Id.* at 3.

⁹ *Cf. High Profile Cases*, California Courts: The Judicial Branch of California (Sept. 27, 2013, 3:11 PM), available at <http://www.courts.ca.gov/2964.htm>.

¹⁰ 410 U.S. 113, 148–152 (1973).

cited at least one amicus brief by name, and thirty-seven percent referred to at least one amicus brief¹⁵ without citing or naming it.¹⁵ More than sixty-five percent of the amicus briefs filed in the United States Supreme Court in 1992 contained information not found in the briefs of the direct parties.¹⁶

A survey of amicus brief filings in State supreme courts showed that amicus briefs were acknowledged or cited in thirty-one percent of cases, and arguments made in amicus briefs discussed in eighty-two percent of the cases sampled.¹⁷ When they were asked what percentage range “most accurately describes the number of amicus curiae briefs in your court which are influential,” “27 percent of the justices regarded fewer than a quarter influential, 32 percent considered between a quarter and one-half influential, and 36 percent considered between one half and three quarters influential.”¹⁸

I. The IADC Amicus Program

Against this backdrop, beginning in the mid-2000’s, the IADC formalized its amicus program and began to increase its amicus participation. Under the leadership of Texas appellate lawyer Lauren Harris, the Amicus Curiae Committee began participating in cases before State supreme courts. The IADC has since grown the

program to include cases before the United States Supreme Court and some courts of appeal. As the Appendix to this Article shows, since 2007, the IADC has participated in twenty-three cases: thirteen cases at the merits and/or certiorari stage, and ten cases at the review or certiorari stage alone.

The IADC has an overall record of prevailing in 70 percent of the merits cases in which it has participated, and a 100 percent win rate in merits cases it has participated in during the last four years. In the process, the IADC has helped shape the law surrounding product liability, arbitration, class actions, attorney client privilege, punitive damages, civil discovery, standing, jurisdiction, and tort reform. The IADC has also built alliances with other organizations, often joining briefs alongside PLAC, the American Chemistry Council, the National Association of Manufacturers, the Washington Legal Foundation, and the Atlantic Legal Foundation.

This Article reviews two State appellate court decisions and one U.S. Supreme Court decision to demonstrate the depth, breadth, and influence of IADC amicus briefs in cases in which it participates.

II. Case Studies: State Appellate Court Victories

At the Court of Appeal’s invitation, the IADC participated as amicus curiae in a California case with a broad impact on discovery against corporate defendants.¹⁹ Plaintiffs in the case filed a product liability action arising from an accident

¹⁵ Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 35 (2004).

¹⁶ Victor E. Flango, Donald C. Bross, and Sarah Corbally, *Amicus Curiae Briefs: the Court’s Perspective*, 27 JUST. SYS. J. 180, 181 (2006).

¹⁷ Corbally, Bross & Flango, *supra* note 4, at 53.

¹⁸ Flango, Bross & Corbally, *supra* note 16, at 185.

¹⁹ *Toyota Motor Corp. v. Superior Court (Stewart)*, 197 Cal.App.4th 1107 (Cal. App. Ct. 2011).

that took place in Idaho, and sought to depose in California five employees of Toyota who were Japanese residents.²⁰ They were designated as individual employees, not as corporate representatives. Toyota responded that the depositions could take place in Japan, but not California, and cited a California statute that limits the power of California trial courts to compel the attendance of nonresidents at deposition and trial. The trial court granted the motion to compel. Toyota filed a writ petition. The Court of Appeal agreed to hear it on the merits, held argument, invited amicus briefing from interested parties (including the IADC), and then granted the petition and remanded to the trial court to vacate the order compelling the depositions to take place in California.²¹

“Code of Civil Procedure section 1989,” the appellate court observed, “provides that a nonresident of California is not obliged to attend as a witness in this state. After a careful review of the relevant statutes and related legislative history, we conclude that this residency limitation applies not only to trials, but also to discovery. As a result, the trial court has no authority to compel Japanese residents to come to Los Angeles to attend depositions. Neither the legislative history nor the meager case authority on this issue persuasively provide otherwise.”²² The appellate court unanimously concluded that “[t]he plain language of the statutory scheme and the legislative history of that language fully support the conclusion that a trial court cannot order a non-resident to appear at a California deposition. This

conclusion is not limited to individual witnesses, but also applies to a court order directing that a party produce for deposition a specifically named non-resident witness (e.g., an employee, office, or director of a corporation).”²³

Nor could California courts independently gain authority to compel in-state depositions of nonresidents. As the IADC pointed out in its amicus brief,²⁴ while the California Supreme Court has recognized that courts have “fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them,”²⁵ that power “may only be exercised to the extent not inconsistent with the federal or state Constitutions, or California statutory law.”²⁶ Moreover, while the matter

²³ *Id.* at 145–146.

²⁴ The IADC and the National Association of Manufacturers jointly filed an amici brief in the case. Amici Curiae Brief in Support of Petitioners Toyota Motor Corporation, Toyota Motor North America, Inc., and Toyota Motor Sales, U.S.A., Inc. (“Amicus Brief”), *Toyota Motor Corp. v. Superior Court*, 197 Cal.App.4th 1107, No. B225393, 2011 WL 1360169 (Cal.App. Ct. 2011). The amicus brief showed that (1) California courts lack inherent authority to compel nonresidents to attend depositions within state borders because English courts of equity, from which California courts’ inherent powers are drawn, ordered depositions to be taken abroad rather than force a foreign deponent to come to England and (2) even if the trial court did have discretionary authority under Code of Civil Procedure section 2025.260 to order Toyota’s individual Japanese employees to attend depositions in California, that discretion must be exercised consistent with principles of international comity as well as the factors enumerated in section 2025.260 itself. *Id.* at 3–6, 6–12.

²⁵ *Id.* at *3 (citing *Rutherford v. Owens-Illinois, Inc.* 16 Cal.4th 953, 967 (1997)).

²⁶ *Id.* (citing *Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal.App.4th 736, 762 (2007)).

²⁰ *Id.* at 133–134.

²¹ *Id.* at 145–146.

²² *Id.* at 133.

of taking depositions was a frequent proceeding in courts of equity in England, those courts routinely issued commissions to depose foreign witnesses abroad, rather than requiring them to come to England. Accordingly, even absent the statutory scheme, the traditional power of equity courts was consistent with the method urged by Toyota and followed by the appellate court: taking the deposition of foreign witnesses in their home country, rather than compelling them to visit the United States to provide testimony.

A year later, the Illinois Supreme Court issued an attorney-client privilege ruling that appeared to track many of the arguments made in the brief filed by the IADC in the case. At the heart of *Center Partners, Ltd. v. Growth Head GP, LLC*,²⁷ was whether the attorney-client privilege would survive the extrajudicial subject-matter waiver doctrine. In a case of first impression,²⁸ the Illinois Supreme Court was faced with choosing between two alternative approaches: one that limited subject-matter waiver to judicial disclosures and another that expanded waiver to include disclosures made outside of litigation.²⁹

Defendants (Center Partners) were independent real estate companies that owned and operated retail shopping malls throughout the United States.³⁰ In 2001–2002, Defendants negotiated to jointly

purchase a majority interest in Urban Shopping Centers, L.P. (“Urban”).³¹ The Plaintiffs were minority limited partners in Urban.³² During the course of the purchase, the Defendants conducted negotiations with each other, sharing financial and legal documents concerning the transaction.³³ The attorneys for each of the Defendants also shared with each other their legal concerns and legal conclusions about the structure of the partnership agreement and how it would operate.³⁴

The Plaintiffs first brought suit in 2004, alleging that Defendants had breached fiduciary and contractual duties to Urban and the Plaintiffs as limited partners.³⁵ Plaintiffs filed motions to compel production of documents and information associated with the transaction, arguing that any attorney-client privilege had been waived.³⁶ The Plaintiffs’ third motion to compel became the motion at issue upon appeal. This motion sought over 1,500 documents identified in the Defendants’ privilege logs.³⁷ Plaintiffs argued that Defendants could not both disclose some legal advice with each other outside of any confidential relationship and then object during litigation that the advice was privileged.³⁸ Defendants argued in response that disclosure of privileged attorney-client communications in a business negotiation does not result in a “subject matter waiver” of all other

²⁷ 981 N.E.2d 345 (Ill. 2012).

²⁸ *Id.* at 359.

²⁹ See generally Mary-Christine Sungaila and Andrew Kopon, *The Perils of Oversharing: Can the Attorney-Client Privilege be Broadly Waived by Partially Disclosing Attorney Communications During Negotiations?*, 79 DEF. COUNS. J. 265 (2012).

³⁰ *Ctr. Partners*, 981 N.E.2d at 349.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 350.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 350–351.

³⁷ *Id.* at 351.

³⁸ *Id.* at 353.

undisclosed communications a party has with its attorney.³⁹ After conducting an in camera review of some of the documents, the trial court granted the motion to compel.⁴⁰

The intermediate appellate court affirmed the trial court's ruling on the motion to compel, finding that there was "no reason to distinguish between a waiver occurring during the course of litigation or during a business negotiation."⁴¹ The court held that when, in 2001 and 2002, defendants "disclosed privileged attorney-client communications among one another regarding the purchase [of the shopping centers]. . . those disclosures resulted in a subject-matter waiver of all privileged communications regarding the purchase."⁴²

Defendants then sought review from the Illinois Supreme Court, arguing that the "subject matter waiver doctrine should not apply to compel production of undisclosed, privileged communications where the disclosed communications were extrajudicial in nature and were not used to gain an advantage in litigation."⁴³ The court granted leave to appeal.⁴⁴ It then allowed the IADC and Illinois Association of Defense Counsel to file a joint amici curiae brief. The Illinois State Bar Association and Association of Corporate Counsel also filed amicus briefs.

The IADC brief sought a Supreme Court holding that extrajudicial disclosure of attorney-client communications does not waive the privilege as to the undis-

closed communications.⁴⁵ The brief emphasized the importance of the doctrine and reviewed how courts have historically found the privilege to be waived, noting that Illinois in particular "has carefully preserved the privilege by circumscribing the scope and circumstances under which it may be waived."⁴⁶

The brief also explained the logical underpinnings of the subject-matter waiver doctrine, and why the doctrine should be limited to judicial disclosures: the doctrine is meant to prevent a litigant from using the doctrine as both a "sword" and a "shield" in litigation.⁴⁷ Thus, extension of the subject-matter waiver doctrine to disclosures prior to any litigation ignores the distinctions between the litigation process and other circumstances under which a client may seek legal advice,⁴⁸ such as a collaborative business deal, in which parties are expected to share certain information.⁴⁹ If disclosing any attorney-client communications during negotiations could waive all such communications in later litigation, this could stifle negotiations and prevent deals from being reached. The brief surveyed approaches taken by courts in other jurisdictions and concluded that a distinction between judicial and extrajudicial disclosures was consistent with the weight of precedent.⁵⁰

³⁹ *Id.*

⁴⁰ *Id.* at 353–354.

⁴¹ *Id.* at 354.

⁴² *Id.* (quoting *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 957 N.E.2d 496, 502 (Ill. App. Ct. 2011)).

⁴³ *Ctr. Partners*, 981 N.E.2d at 349.

⁴⁴ Ill. S. Ct. R. 315 (eff. Feb. 26, 2010).

⁴⁵ Brief of the International Association of Defense Counsel and Illinois Association of Defense Counsel as Amici Curiae in Support of the Defendants/Appellants ("Brief of the IADC"), 2012 WL8264363 at *4-5 (Ill. 2011).

⁴⁶ *Id.* at *6.

⁴⁷ *Id.* at *9.

⁴⁸ *Id.* at *10.

⁴⁹ *Id.* at *11.

⁵⁰ *Id.* at *13–18.

The brief then discussed relevant policy considerations – including whether expansion of the subject-matter waiver doctrine might threaten to swallow the attorney-client privilege and impede matters in a variety of settings, including settlement negotiations, business and other negotiations, grand jury investigations, public/media disclosures, patent disputes, and compliance with SEC filing requirements. Each of these settings involves circumstances in which clients may be called upon to make “limited or partial disclosures of privileged information for purposes other than to gain a tactical advantage in litigation.”⁵¹ At the very least, the IADC brief argued, if the court were to find that the subject matter waiver doctrine applied, the court should place clear limits on the scope of that waiver and identify a test that would safeguard the bounds of the attorney-client privilege.

In a unanimous opinion, the Illinois Supreme Court agreed. The organization of the opinion, as well as its coverage of policy considerations and the development of the law, tracked arguments made only in the IADC brief. The Illinois Supreme Court addressed the history, scope, and purpose of the attorney-client privilege.⁵² The Court then explained that under the subject-matter waiver doctrine, once a client offers testimony as to a specific communication to the attorney, it acts as a waiver as to all other communications to the attorney on the same matter.⁵³ Once a client offers testimony as to part of any communication to the attorney, the whole of that communication is waived, “on the

analogy of the principle of completeness.”⁵⁴ The purpose behind the doctrine of subject matter waiver is to prevent partial or selective disclosure of favorable material while sequestering the unfavorable.⁵⁵

Recognizing that this was a case of first impression in Illinois, the Supreme Court reviewed two federal cases⁵⁶ that limited subject-matter waiver strictly to judicial disclosures. Notably, these were the same two cases the IADC brief analyzed in depth to support its conclusion that other jurisdictions recognized a distinction between judicial and extrajudicial disclosures. The Court rejected the plaintiffs’ contention that the subject-matter waiver doctrine should apply only to extrajudicial disclosures.⁵⁷ The Court found the “line of cases declining to extend subject matter waiver to extrajudicial disclosures more persuasive.”⁵⁸ The Court held that “subject matter waiver does not apply to the extrajudicial disclosure of attorney-client communications not thereafter used by the client to gain an adversarial advantage in litigation.”⁵⁹

⁵⁴ *Id.* at 357 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2327, at 638 (McNaughton rev. ed. 1961)).

⁵⁵ *Ctr. Partners*, 981 N.E.2d at 357 (quoting *Graco Children’s Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.*, No. 95 C 1303, 1995 U.S. Dist. LEXIS 8157, 1995 WL 360590 (N.D. Ill. June 14, 1995)).

⁵⁶ *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987); *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16 (1st Cir. 2003).

⁵⁷ *Ctr. Partners*, 981 N.E.2d at 361–362.

⁵⁸ *Id.* at 362.

⁵⁹ *Id.*

⁵¹ *Id.* at 18.

⁵² *Ctr. Partners*, 981 N.E.2d at 355–356.

⁵³ *Id.* at 356–357.

III. Case Study: U.S. Supreme Court

The IADC has been an increasingly robust participant in U.S. Supreme Court cases as well, particularly in the areas of class certification and arbitration. For example, the IADC participated in one of the most closely watched cases of the 2010 term, *Wal-Mart v. Dukes*,⁶⁰ in which the U.S. Supreme Court rejected a nationwide Title VII class action filed by more than 1.5 million current and former female Wal-Mart employees. The IADC brief explained why, given the level of organizational and cultural change plaintiffs claimed was needed, a class action was unlikely to provide the kind of sustained structural change plaintiffs were seeking.

The decision in *Wal-Mart* was a landmark. In a 5-4 majority ruling, the Court held that plaintiffs failed to provide proof of a common company-wide policy of discrimination necessary to certify a class under Rule 23(a)(2). Justice Scalia, writing for the majority, concluded that the necessary “glue holding the alleged reasons” for all of the individual employment decisions at issue together was missing.⁶¹ A separate unanimous ruling by the Court held that the plaintiffs’ claims for back pay were also improperly certified.

Although decided in the context of a Title VII claim, the *Wal-Mart* holding applies with equal force to other types of class actions. It also provides important guidelines for companies defending against class actions, as well as bases for decerti-

fying federal class actions that might run afoul of the standards set by the case.

Betty Dukes started her career at Wal-Mart as a cashier and was later promoted to a customer service manager. When she was subsequently demoted, Dukes contended the demotion was the result of gender discrimination. She filed suit on behalf of a purported class of female employees against Wal-Mart in the U.S. District Court in San Francisco in June 2001, claiming a pattern and practice of discrimination in pay and promotion of female workers. The proposed class, which encompassed a projected 1.6 million current and former Wal-Mart employees, sought, among other things, declaratory relief, injunctive relief, and monetary relief in the form of back pay.

The district court certified the class and a three-judge panel of the Ninth Circuit affirmed. In turn, a divided Ninth Circuit, sitting en banc, affirmed the district court’s certification of this nationwide class of female workers. As Judge Kozinski, dissenting from the en banc determination, pointed out, the class posed a number of concerns about class representation and commonality of issues. The class included members who “held a multitude of jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member’s job, location and period of employment.”⁶² The U.S. Supreme Court agreed with Judge Kozinski’s assessment, in the process clarifying the commonality standards under FRCP 23(a) and the

⁶⁰ *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

⁶¹ *Id.* at 2552.

⁶² *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010).

standards for certifying classes under FRCP 23(b)(2), the injunctive and declaratory relief provision.

In determining that the necessary commonality requirements for FRCP 23(a) had not been met, the majority also made clear that, in determining commonality, courts will necessarily have to engage in some analysis of the merits of the claims. Here, proof of commonality necessarily overlapped with the plaintiffs' contention that Wal-Mart engaged in a pattern or practice of discrimination: "[w]ithout some glue holding the alleged reasons" for "literally millions of employment decisions together," Justice Scalia wrote, "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*."⁶³

Certainly, Wal-Mart is the nation's largest employer, which made the class in this case particularly unwieldy. Even more detrimental to the class was the lack of evidence tying the allegedly discriminatory hiring practices together at a company-wide level, as required in a pattern and practice discrimination case like the one the plaintiffs had filed.

Moreover, because plaintiffs were proceeding under a "policy of discrimination" theory, they were required to present "significant proof" of the policy's existence. Plaintiffs presented three methods of proving there was a pattern or practice of discrimination. First, plaintiffs presented experts to show that regionally Wal-Mart's pay and promotion decisions disproportionately favored men and that Wal-Mart promoted fewer women as compared with its competitors. The experts said the only

explanation was bias. But the regional pay disparities were at most attributable to a small set of Wal-Mart stores and therefore could not establish the existence of a general policy that affected the entire company.

Second, plaintiffs offered anecdotal evidence in the form of 120 affidavits of class members who detailed their experiences of discrimination. The affiants represented one for every 12,500 class members and worked in 235 of Wal-Mart's 3,400 stores. Operations in 14 of the fifty states were not represented at all in the affidavits. The majority found that this evidence could not demonstrate that the entire company operated under a general policy of discrimination. "A few anecdotes selected from literally millions of employment decisions prove nothing at all," the majority concluded.⁶⁴

Third, the plaintiffs presented a sociological expert who opined that Wal-Mart's culture was vulnerable to bias using a "social framework analysis," but the majority dispensed with this evidence regardless of its reliability or admissibility under *Daubert*. The sociologist could not determine with any specificity how often bias played into pay or promotion decisions. Specifically, he could not opine whether bias played a role in one-half percent or 95 percent of the pay or promotion decisions implicated in the lawsuit. Since the expert "admittedly ha[d] no answer to that question," the majority felt they could "safely disregard what he ha[d] to say" because it was "worlds away from 'significant proof that Wal-Mart operated under a general policy of discrimination.'"⁶⁵

A unanimous Court held that claims for *individualized* damages—such as the

⁶⁴ *Id.* at 2556 n.9.

⁶⁵ *Id.* at 2545.

⁶³ *Dukes*, 131 S.Ct at 2552.

back pay claims sought—could not be certified as part of a (b)(2) class. Rather, claims for individualized monetary relief may only be certified as a (b)(3) class, which includes due process safeguards not available in a (b)(2) class. These safeguards included notice, an opt-out procedure and the additional requirements of predominance and superiority.

The Court also rejected the “Trial by Formula” method endorsed by the Ninth Circuit, citing due process concerns. Under the Rules Enabling Act, the full Court observed, the Federal Rules of Civil Procedure can neither expand, nor restrict, substantive rights. The Court noted that Wal-Mart must be allowed to present its defenses to individual class member claims and the proposed statistical sampling would deprive it the right to due process.

While the Court did not cite to the IADC’s amicus brief in its opinion, court observers took note of the brief. The National Law Journal showcased the IADC brief (one among several amicus briefs filed in the case) and defendants in subsequent high-profile class action cases have contacted the IADC about amicus participation in their cases based on the strength of the IADC’s *Wal-Mart* brief.

IV. Conclusion

The IADC Amicus Program continues to grow and gain influence. In so doing, it plays an important role in the practices of IADC members and our clients and, much like the Trial Academy, may soon be perceived as another “jewel in the crown” of the IADC.

Appendix: IADC Amicus Curiae Briefs

Case	Court	Brief Issue	Win/Loss	Stage of Decision
<i>Sears, Roebuck & Co. v. Butler; Whirlpool Corp. v. Glazer</i> , Nos. 13-430 and 130-431	US Supreme Court	Supporting the first issue in the petitions: Whether the predominance requirement of Rule 23(b)(3) is satisfied by the purported "efficiency" of a class trial on one abstract issue, without consideration of the host of individual issues that would need to be tried in order to resolve liability and damages, and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.	Petitions pending	Cert Stage
<i>Novo Nordisk A/S v. Werner</i> No. 13-214.	US Supreme Court	Whether a U.S. court can exercise personal jurisdiction over a foreign corporation based solely on product sales in the forum state by the foreign corporation's indirect U.S. subsidiary.	Certiorari denied.	Cert Stage
<i>Liu v. Superior Court</i> , 2013 Cal. LEXIS 6790 (Cal. Aug. 14, 2013)	CA Supreme Court	Whether expert opinion opposing summary judgment that is found to be inadmissible at trial may be used to defeat summary judgment.	Petition for Review Denied.	Petition Stage
<i>Bostic v. Georgia-Pacific Corp.</i> , 2013 Tex. LEXIS 99 (Tex. Feb. 15, 2013).	Texas Supreme Court	Whether a showing of "but for" causation is required in asbestos mesothelioma litigation.	Awaiting Decision.	Merits Stage
<i>Am. Express Co. v. Italian Colors Rest.</i> , 133 S. Ct. 2304 (2013).	US Supreme Court	Whether the Federal Arbitration Act permits courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.	Win Judgment for Petitioners. Reversed Second Circuit decision 5-3.	Merits Stage
<i>Tincher v. Omega Flex, Inc.</i> , 64 A.3d 626 (Pa. 2013).	Pennsylvania Supreme Court	Whether Pennsylvanian courts will adopt the Restatement, Third Torts: Products Liability in design defect cases to replace the strict liability standard of the Second Restatement.	Awaiting Decision.	Merits Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
<i>Garrett v. Stryker Howmedica Osteonics Corp.</i> , 2013 Cal. LEXIS 4892 (Cal. June 12, 2013).	CA Supreme Court	Whether parties may oppose summary judgment with evidence that would not be admissible at trial.	Petition for Review Denied.	Petition Stage
<i>Hoosier Racing Tire Corp. v. Race Tires Am., Inc.</i> , 133 S. Ct. 233 (2012)	US Supreme Court	How to resolve emerging split among the circuits on the scope of recovery of e-discovery costs.	Certiorari Denied.	Cert Stage
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013).	US Supreme Court	Whether certification of class was proper under Federal Rule of Civil Procedure 23(b)(3), because the Third Circuit erred in refusing to decide whether the class's proposed damages model could show damages on a classwide basis.	Win Judgment reversed in 5-4 Decision.	Merits Stage
<i>Std. Fire Ins. Co. v. Knowles</i> , 133 S. Ct. 1345 (2013).	US Supreme Court	Whether stipulation by a class-action plaintiff that he and the class that he purports to represent will seek damages that are less than the threshold for jurisdiction under the Class Action Fairness Act of 2005 does not defeat federal jurisdiction under the Act.	Win 9-0 Decision for Petitioner. Judgment vacated and remanded.	Merits Stage
<i>Toyota Motor Corporation and Toyota Motor Sales USA, Inc. v. Certain Economic Loss Plaintiffs</i> . No. 11-57006	US Court of Appeals for the Ninth Circuit	Whether a district court may grant Plaintiffs both Article III and statutory standing to assert various "unfair competition" claims under California law.	Settled	Merits Stage
<i>Center Partners, Ltd. v. Growth Head GP, LLC</i> , 2012 IL 113107 (Ill. 2012)	Illinois Supreme Court	Whether the subject matter waiver doctrine applies to compel production of undisclosed, privileged communications where the disclosed communications were extrajudicial in nature and were not used to gain an advantage in litigation.	Win Judgments reversed. Cause remanded.	Merits Stage
<i>Centocor, Inc. v. Hamilton</i> , 372 S.W.3d 140 (Tex. 2012).	Texas Supreme Court	Whether a direct-to-consumer advertising exception applies to the learned intermediary doctrine in Texas.	Win Reversed Court of Appeal's judgment (in part).	Merits Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
<i>First Am. Fin. Corp. v. Edwards</i> , 132 S. Ct. 2536 (2012).	US Supreme Court	Whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.	Granted, but later Dismissed as Improvidently Granted	Merits Stage* (But Dismissed)
<i>Pippins v. KPMG LLP</i> , 279 F.R.D. 245 (S.D.N.Y. 2012)	US District Court – Second District of NY	Whether order to preserve thousands of hard-drives in purported class action was in error.	Motion Denied.	Merits Stage
<i>Toyota Motor Corp. v. Superior Court</i> , 197 Cal. App. 4th 1107 (Cal. App. 2d Dist. 2011).	CA Court of Appeals, Second District	Whether the court can order a corporation to bring out-of-state employees to California for deposition	Win Petition granted and remanded with directions.	Merits Stage
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).	US Supreme Court	(1) Whether class certification was consistent with the requirements of Federal Rule of Civil Procedure rule 23(a); (2) Whether claims for monetary relief, as opposed to injunctive relief, can be certified at all under Federal Rule of Civil Procedure rule 23(b)(2).	Win Judgment for Petitioner. Reversed Ninth Circuit 5-4.	Merits Stage
<i>British Am. Tobacco (Invs.) Ltd. v. United States</i> , 2010 U.S. LEXIS 5450 (2010).	US Supreme Court	Whether the presumption against extraterritoriality applies when foreign conduct has domestic effects.	Petition for Certiorari Denied	Cert Stage
<i>Saller v. Crown Cork & Seal Co., Inc.</i> , 187 Cal. App. 4th 1220, (Cal. App. 2d Dist. 2010).	CA Supreme Court	When the “consumer expectations” test should be applied in a design defect case.	Petition for Review Denied	Cert Stage
<i>Shell Oil Co. v. Hebble</i> , 131 S. Ct. 822 (2010).	US Supreme Court	Whether a \$53 million punitive damage award in light of a \$750,000 breach of contract award is unconstitutional.	Petition for Certiorari Denied	Cert Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
<i>Shell Oil Company v. United States of America</i> Consolidated with: <i>Burlington N. & Santa Fe Ry. v. United States</i> , 556 U.S. 599, 129 S. Ct. 1870 (2009).	US Supreme Court	Whether Petitioner is an “arranger” under an expanded liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).	Win (Cert Granted) Win(Merits) Judgment for Petitioners. 8-1 on Merits	Cert Stage and Merits Stage
<i>Jamison v. Morris</i> , 385 S.C. 215, (S.C. 2009).	South Carolina Supreme Court	Whether a franchisor-franchisee relationship alone creates agency liability.	Win Directed Verdict in favor of Appellant, Texaco.	Merits Stage
<i>Kedy v. A.W. Chesterton Co.</i> , 946 A.2d 1171 (R.I. 2008).	Rhode Island Supreme Court	Whether <i>forum non conveniens</i> is recognized in Rhode Island.	Win Formally recognized <i>forum non conveniens</i> ; Ordered Superior Court to dismiss case	Merits Stage
<i>Bullock (Jodie) v. Philip Morris USA, Inc.</i> (Piuze), 2008 Cal. LEXIS 4848 (Cal. Apr. 30, 2008).	California Supreme Court	Whether a substantial punitive damages award can be justified based on the wealth of the defendant.	Petition for Review Denied.	Petition Stage
<i>Jennings v. Baxter Healthcare Corp.</i> , 331 Ore. 285 (Or. 2008)	Oregon Supreme Court	Whether allowing opinion testimony of plaintiff’s expert witness on the issue of causation was reversible error.	Loss Affirmed Court of Appeal’s Judgment.	Merits Stage
<i>Arbino v. Johnson & Johnson</i> , 116 Ohio St. 3d 468, (Ohio 2007).	Ohio Supreme Court	Whether two recent tort reform statutes enacted by the General Assembly violate the constitutional rights of plaintiffs in personal injury lawsuits.	Win Statutes Upheld as Constitutional	Merits Stage

Appendix Continued

Case	Court	Brief Issue	Win/Loss	Stage of Decision
<i>Brown v. Crown Equip. Corp.</i> , 2008 ME 186 (Me. 2008).	Certified Question from First Circuit of Appeals to Maine Supreme Court	Whether there is a post-sale duty to warn customers regarding a product that was not defective when made, and whether such a duty extends to remote purchasers.	Loss Entry of Certified Question Against Petitioner Crown	Merits Stage
<i>Starrh & Starr Cotton Growers v. Aera Energy LLC</i> , 2007 Cal. LEXIS 12027 (Cal. Oct. 24, 2007).	CA Supreme Court	Whether a nuisance or trespass may be found to be continuing for the purpose of applying the statute of limitations, but permanent for purposes of calculating damages.	Petition for Review Denied	Petition for Review Stage
