Recent Developments in Class Certification and Decertification After *Dukes* as the Supreme Court's Composition Changes

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Introduction

When the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes* in 2012,[1] many heralded it as the end of large nationwide employment discrimination class actions. Two years later, the Supreme Court again waded into the class action fray, albeit not in the employment context, in *Comcast Corp. v. Behrend*.[2] While *Dukes* was obviously a monumental decision, it hardly ended employment class actions. *Comcast* has also failed to bring certainty to class action litigation, receiving almost as many interpretations as there are judges (and commentators).

In light of Justice Antonin Scalia's passing and the confirmation of Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to replace him, some suggest that class action jurisprudence will continue to follow an increasingly pro-employer trend.[3] This Article examines the impact of these recent developments and provides practical guidance for addressing class actions.

In some ways, *Dukes* has lived up to its billing. Most courts, including courts facing "mini-*Dukes*" cases following the Supreme Court's

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1. 564 U.S. 338 (2011).

2. 133 S. Ct. 1426 (2013).

3. *See* Thomas J. Barton, *Trump's Supreme Court Nominee Gorsuch Will Likely Be Key Vote in Class Action Waiver Dispute*, Nat'l L. Rev. (Feb. 16, 2017), http://www.natlawreview.com/article/trump-s-supreme-court-nominee-gorsuch-will-likely-be-key-vote-class-action-waiver.

decision, no longer certify large-scale discrimination class actions based on the exercise of discretion from many different managers. In other areas, however, *Dukes* has not had its expected impact.

The Supreme Court appeared to change the class action landscape once again in *Comcast*, holding that Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement was not met when the plaintiffs' damages model failed to match their only viable theory of class-wide liability.[4] However, the reaction of lower courts to *Comcast* has been wildly inconsistent. The plaintiffs' bar has also shifted strategies in response to *Dukes* and *Comcast*.[5] One such challenge arose in the context of mandatory arbitration agreements prohibiting employee class actions. Plaintiffs' counsel have argued successfully in some cases that such provisions violate the National Labor Relations Act (NLRA), but circuit courts are divided and results have not been uniform.[6]

Plaintiffs' counsel increasingly utilize Rule 23(c)(4) to certify classes under Rule 23(b)(3) for liability purposes, without applying the predominance requirement to damages. Decisions on this topic may set the stage for a significant Supreme Court decision in the class action context. A pronouncement regarding the proper use of Rule 23(c)(4) could be forthcoming now that Justice Gorsuch is serving on the Court. Justices Ruth Bader Ginsburg and Stephen Breyer's dissent in *Comcast*, joined by Justices Sonia Sotomayor and Elena Kagan, suggests that those four Justices would approve of the approach, even in the Rule 23(b)(3) context.[7] If the Supreme Court permits the liberal use of Rule 23(c)(4) to certify classes, class actions that can overcome *Dukes*'s robust commonality requirement will likely continue to be certified.

This Article provides a detailed look at existing case law, an analysis of where employment class actions may be headed, and practical strategies employers can use in the current legal landscape. Part I examines significant developments in employment class action jurisprudence since *Dukes*. The authors analyze decisions applying or distinguishing *Dukes*'s holding while devoting particular attention to *Comcast*, the Court's "follow-up" to *Dukes*. Part II explores the future

4. *Comcast*, 133 S. Ct. at 1433.

5. *See* Dustin Massie, Note, *Too Soon for Employers to Celebrate?: How Plaintiffs Are Prevailing Post-*Dukes, 29 ABA J. LAB. & EMP. L. 177, 183–98 (2014) (examining plaintiffs' changing litigation strategies post-*Dukes*).

6. *Compare* Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016) (upholding arbitration agreement with class-action waiver), *and* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) (same), *with* Morris v. Ernst & Young LLP, 834 F.3d 975, 990 (9th Cir. 2016) (invalidating arbitration agreement with class-action waiver), *and* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016) (same).

7. *Comcast*, 133 S. Ct. at 1436–37 (Ginsburg & Breyer, JJ., dissenting) ("[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.").

of employment discrimination class actions. The authors consider the increasing use of various tactics to defeat class certification, including pre-discovery motions, discovery limitations, expert testimony and statistics, and arbitration agreements.

I. The Legal Landscape Five Years After *Wal-Mart v. Dukes*

Dukes was undeniably a watershed employment discrimination class action case. It was not, however, the end of company-wide employment class actions as some predicted.[8] *Dukes* has certainly made it easier for employers to argue that a class action fails to satisfy Rule 23's requirements, but creative plaintiffs have found ways around *Dukes*—or at least convinced courts to grant them discovery before deciding class certification. While many courts followed or expanded upon *Dukes*, others distinguished it on grounds that range from arguably principled to questionable.

A. Cases Denying Class Certification Under Dukes

Numerous courts followed *Dukes* and denied class certification in discrimination and wage-and-hour class actions, although most have done so only after allowing extensive discovery.[9]

1. *Bell v. Lockheed Martin*

Bell v. Lockheed Martin Corp.,[10] one of the first decisions to follow *Dukes*, was a putative gender discrimination class action.[11] Shortly after *Dukes*, Lockheed moved to deny class certification.[12] Although the parties had conducted significant discovery, the discovery period was not yet concluded.[13] Accordingly, Lockheed focused its motion to deny class certification on the face of the pleadings, arguing that

8. *See* Massie, *supra* note 5, at 180–82.

9. *See, e.g.*, Davis v. Cintas Corp., 717 F.3d 476, 487 (6th Cir. 2013) (affirming denial of class certification in Title VII gender discrimination action); Tabor v. Hilti, Inc., 703 F.3d 1206, 1230 (10th Cir. 2013) (same); Bolden v. Walsh Constr. Co., 688 F.3d 893, 899 (7th Cir. 2012) (reversing class certification order in Title VII racial discrimination case); Bennett v. Nucor Corp., 656 F.3d 802, 816 (8th Cir. 2011) (affirming denial of class certification in Title VII racial discrimination case); Odle v. Wal-Mart Stores Inc., No. 3:11-cv-2954-O, 2012 WL 5292957, at *11 (N.D. Tex. Oct. 15, 2012) (dismissing mini-*Dukes* case based on tolling issue and not reaching commonality), *rev'd on other grounds*, 747 F.3d 315 (5th Cir. 2014); Hagler v. True Mfg. Co., No. 4:12CV328MLM, 2012 WL 1025672, at *5 (E.D. Mo. Mar. 26, 2012) (refusing to certify Family Medical Leave Act class action because plaintiffs could not plausibly satisfy commonality requirement); *see also, e.g.*, Wong v. AT&T Mobility Servs. LLC, No. CV 10-8869-GW(FMOx), 2011 U.S. Dist. LEXIS 125988, at *5 (C.D. Cal. Oct. 20, 2011) (common issues did not predominate in wage-and-hour action); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 2682967, at *9 (N.D. Cal. July 8, 2011) (reversing certification in wage-and-hour misclassification case based on *Dukes*).

10. No. 08-6292 (RBK/AMD), 2011 WL 6256978 (D.N.J. Dec. 14, 2011).

11. *Id.* at *1.

12. *Id.* at *2.

13. *Id.*

Dukes prevented the plaintiffs from establishing commonality.[14] Because *Lockheed* was filed before *Dukes*, the plaintiffs made no effort to distinguish their case's theory from that of the plaintiffs in *Dukes*. The plaintiffs in *Lockheed* challenged policies affording managers discretion to deviate from recommendations for starting salary, merit increases, and promotional increases, as well as a discretionary posting policy.[15] The court concluded that these policies did not create common questions "subject to common answers":

> The women in the proposed class worked in different geographic locations, were in different departments, had different titles, and reported to different supervisors . . . . [They] attempt to raise discrimination claims that depend on the discretion of individual managers in each of Lockheed's facilities. . . . This is precisely the type of allegation that the *Dukes* Court rejected when it explained that for a plaintiff to satisfy the commonality standard, the claim "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the *same* supervisor."[16]

Lockheed counsels that employers should move to dismiss class allegations based on the face of the pleadings at the earliest stage of the case at which a legal argument for dismissal becomes viable.

2. *Dukes* on Remand

On remand to the Northern District of California,[17] the *Dukes* plaintiffs asked Judge Charles Breyer to certify a smaller class of approximately 150,000 women working in Wal-Mart's "California Regions."[18] Judge Breyer denied an early motion to dismiss the plaintiffs' revised motion for class certification, finding the plaintiffs were entitled to initial discovery based upon the new allegations, coupled with the evidentiary burden the Supreme Court created in *Dukes*.[19]

After another year of discovery, the parties briefed class certification again.[20] Relying heavily on *Dukes*, Judge Breyer denied class certification for several reasons.[21] First, the plaintiffs' attempt to use aggregated statistics across the challenged regions, instead of store-level statistics, was inconsistent with *Dukes*.[22] Drilling down on the statistics revealed no proof of any discrimination in many stores and districts and no "significant proof" of a "general policy of discrimination"

14. *See id.* at *5.
15. *Id*. at *6.
16. *Id.* at *8 (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (emphasis added)).
17. Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115 (N.D. Cal. 2013).
18. *Id.* at 1117.
19. *Id.* at 1118.
20. *Id.*
21. *Id.* at 1127.
22. *Id.* at 1120.

when viewed as a whole.[23] Second, the plaintiffs' additional anecdotal evidence regarding Wal-Mart's "common culture" did not constitute significant proof of a general policy of discrimination.[24] For example, the small group of "top level" management identified by the plaintiffs had fifty-six members, and there was no evidence to suggest that more than a few of those managers were biased.[25] Third, the "specific employment practices" identified by the plaintiffs in support of their disparate impact claims were either (1) not common policies that applied across the class; or (2) not truly policies at all, but simply attempts to "repackage" the delegated discretion argument rejected by the Supreme Court.[26]

Throughout his opinion, Judge Breyer noted that, while there were now fewer plaintiffs, there was no rhyme or reason why this new group had been selected and nothing to tie them together.[27] He explained, "[r]ather than identify an employment practice and define a class around it, Plaintiffs continue[d] to challenge the discretionary decisions of hundreds of decision makers, while arbitrarily confining their proposed class to corporate regions that include[d] stores in California, among other states."[28] Because simply reducing the number of plaintiffs and confining them to a single region could not resolve the problems the Supreme Court identified, Judge Breyer denied class certification on both plaintiffs' disparate treatment and disparate impact claims.[29]

3. *Ladik v. Wal-Mart Stores, Inc.*

In *Ladik v. Wal-Mart Stores, Inc.*,[30] Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin faced another "mini-*Dukes*" class action on behalf of all female Wal-Mart employees in the region.[31] As in the California mini-*Dukes* action, Wal-Mart filed a motion to dismiss the class allegations as incapable of satisfying Rule 23(a)(2)'s commonality requirement based on the face of the complaint.[32] Unlike Judge Breyer, however, Judge Crabb held that the plaintiffs' class allegations failed as a matter of law and dismissed them without permitting discovery.[33] Judge Crabb found that, despite decreasing the size of the proposed class, the plaintiffs had merely "created a smaller version of the same problem" present in *Dukes* by

23. *Id.* at 1120–21.
24. *Id.* at 1122–24.
25. *Id.* at 1123.
26. *Id.* at 1125–27.
27. *Id*. at 1127.
28. *Id.*
29. *Id.*
30. 291 F.R.D. 263 (W.D. Wis. 2013).
31. *Id.* at 264.
32. *Id.*
33. *Id.* at 264–65.

failing to identify any common question capable of resolution on a class-wide basis.[34] Instead, the plaintiffs essentially claimed that Wal-Mart permitted its managers to exercise subjective discretion in making promotion and compensation decisions.[35] While the plaintiffs argued that it was premature to decide class certification without discovery, Judge Crabb held that *Ladik* was the "rare case in which it is clear from the pleadings that the plaintiffs may not proceed as a class."[36]

Lockheed and the mini-*Dukes* cases are somewhat unique in that their allegations are nearly identical to the specific claims rejected in *Dukes*. By contrast, plaintiffs who have filed class action claims after *Dukes* generally try repackaging allegations similar to those in *Dukes* (i.e., individual discretion as the cause of discrimination) into a common question that can pass Supreme Court muster.

B. Cases Distinguishing Dukes

While *Dukes* increased the frequency with which courts deny class certification, some judges have distinguished *Dukes* and certified employment class actions. The cases certifying classes after *Dukes* include at least one effectively ignoring the Supreme Court's holding, and others articulating at least an arguable basis for distinguishing *Dukes*, most notably *McReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc.*[37]

1. Effectively Ignoring *Dukes*

In *Ellis v. Costco Wholesale Corp.*,[38] a salient case effectively ignoring *Dukes*, the district court initially certified a company-wide gender discrimination class action under Rule 23(b)(2).[39] On appeal, the Ninth Circuit vacated in part and remanded the certification order for further consideration in light of *Dukes*.[40]

Like *Dukes*, *Ellis* primarily alleged that certain Costco policies resulted in disproportionately fewer women being hired into two positions: general manager (GM) and assistant general manager (AGM).[41] The court's attempts to distinguish Costco's policies from the policies at issue in *Dukes* are unconvincing. For example, the court distinguished Wal-Mart's lack of a policy requiring posting of positions from Costco's policy that all management positions other than GM and AGM must be posted, which the court equated with a policy against posting for the GM and AGM positions.[42] The court further distinguished *Dukes* on the questionable grounds that there were

34. *Id.* at 270.
35. *Id.* at 270–71.
36. *Id.* at 272–73.
37. 672 F.3d 482 (7th Cir. 2012).
38. 285 F.R.D. 492 (N.D. Cal. Sept. 25, 2012).
39. *Id.* at 496.
40. *Id.* at 496–97.
41. *Id.* at 496.
42. *Id.* at 511 n.7.

fewer class members—approximately seven hundred—and fewer positions at issue, and thus found the class would be more cohesive.[43] Next, the court relied on the same type of expert "social framework" analysis rejected in *Dukes* to determine that Costco's centralized culture could result in various managers exercising discretion in a common way to disadvantage women.[44] Finally, the district court examined aggregate, nationwide statistics to determine that a gender disparity existed, while refusing to consider region-by-region analysis or Costco's proffered alternative reasons for the disparity.[45] Despite *Dukes*, the court did not require the plaintiffs to tie statistical disparities to specific challenged policies.[46] Based on the above reasoning, the district court determined that the plaintiffs had satisfied Rule 23(a)'s commonality requirement.[47] The district court then certified the class for the plaintiffs' disparate impact and disparate treatment claims, including their compensatory and punitive damages claims, using a Rule 23(b)(2) and (b)(3) hybrid approach.[48]

The Ninth Circuit declined defendant's interlocutory request for Rule 23(f) review of the class certification decision.[49] There can be no question that *Ellis* contradicts both *Dukes* and *Comcast*. While *Ellis* may be an outlier, it is a cautionary tale for any employer that believes *Dukes* spelled the end of company-wide discrimination class actions.

2. Distinguishing *Dukes*

Some courts distinguished *Dukes* and granted motions for class certification in employment cases.[50] For example, *McReynolds v. Mer-*

43. *Id.* at 509.
44. *Id.* at 520–21.
45. *Id.* at 521–28.
46. *Id.* at 531–33.
47. *Id.* at 533.
48. *Id.* at 545.
49. Order Denying Appeal, Ellis v. Costco Wholesale Corp., No. 12-80188 (9th Cir. Jan. 16, 2013).
50. *See, e.g.*, Brown v. Nucor Corp., 785 F.3d 895 (4th Cir. 2015) (discussed below); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 487–92 (7th Cir. 2012) (discussed below); Parra v. Bashas', Inc., 291 F.R.D. 360, 373–76 (D. Ariz. 2013) (distinguishing *Dukes* based on existence of specific compensation policies); Cronas v. Willis Grp. Holdings, LTD, No. 06-Civ-15295, 2011 WL 6778490, at *5 (S.D.N.Y. Dec. 19, 2011) (granting Rule 23(b)(2) class certification in settlement context based on apparent conclusion that monetary relief provided pursuant to settlement agreement was "calculable by formula" and thus distinguishable from *Dukes*); Delagarza v. Tesoro Ref. & Mktg. Co., No. C-09-5803, 2011 WL 4017967, at *5–8, *15 (N.D. Cal. Sept. 8, 2011) (distinguishing *Dukes* and granting class certification in a wage-and-hour class action); United States v. City of New York, 276 F.R.D. 22, 33–34 (E.D.N.Y. 2011) (refusing to decertify Rule 23(b)(2) liability class based on *Dukes* in Title VII case because "[t]he Supreme Court did not have occasion to decide whether a district court may order (b)(2) certification, under Rule 23(c)(4), of particular issues raised by disparate impact or pattern-or-practice disparate treatment claims that satisfy (b)(2)'s requirements").

rill Lynch, Pierce, Fenner & Smith, Inc.[51] was a putative class action on behalf of African American financial advisors alleging racial discrimination in violation of Title VII and section 1981. The district court denied class certification, and the plaintiffs appealed to the Seventh Circuit.[52] The plaintiffs alleged that they suffered racial discrimination and racially disparate impact from Merrill Lynch's "teaming" and "account distribution" policies.[53] Merrill Lynch's teaming policy allowed financial advisors in the same office to form teams at their own discretion.[54] The account distribution policy governed how accounts were redistributed when a financial advisor left Merrill Lynch.[55] It considered a financial advisor's revenue, clients, and retained investments to determine who would receive transferred accounts.[56] The plaintiffs alleged that these policies disparately affected African American financial advisors because they frequently led to their exclusion from successful teams, and the account distribution policy resulted in successful teams receiving accounts.[57] The court described the plaintiffs' theory as a "vicious cycle."[58]

Merrill Lynch argued that (1) individual managers had discretion regarding application of the teaming and account distribution policies and (2) any discrimination would have resulted from individual decisions by brokers forming teams and managers distributing accounts.[59] Judge Richard Posner acknowledged that managers had some discretion,[60] and that absent the teaming and account distribution policies, "there would be racial discrimination by brokers or local managers, like the discrimination alleged in *Wal-Mart*."[61] However, Judge Posner continued his analysis:

> But assume further that company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination. The incremental causal effect (overlooked by the district judge) of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis.[62]

Judge Posner distinguished *Dukes* by holding that the teaming and account distribution policies were company-wide and applied to all

51. 672 F.3d 482 (7th Cir. 2012).
52. *Id.* at 484.
53. *See id.* at 489.
54. *See id.* at 488.
55. *Id.*
56. *Id.* at 488–89.
57. *Id.* at 489–90.
58. *Id.* at 490.
59. *See id.* at 489–90.
60. *Id.* at 489.
61. *Id.* at 490.
62. *Id.*

members of the purported class.[63] Therefore, he concluded, whether those policies had a disparate impact on African American financial advisors was a common question capable of class-wide resolution.[64]

The plaintiffs in *McReynolds* originally moved for certification pursuant to both Rule 23(b)(2) and (b)(3) and asked for issue certification under Rule 23(c)(4) regarding existence of a disparate impact.[65] On appeal, the plaintiffs temporarily abandoned their request for 23(b)(3) certification, and Judge Posner did not disturb the district court's holding on the issue.[66] Further, Judge Posner acknowledged that the plaintiffs' individual requests for backpay could not be certified under Rule 23(b)(2).[67] Nonetheless, he granted class certification pursuant to Rule 23(b)(2) and (c)(4) to determine whether challenged policies had a disparate impact and if injunctive relief was warranted.[68]

Judge Posner explained why his issue certification approach overcame the district court judge's concerns about the "feasibility and desirability of class action treatment":

> Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained—and remember that the class has 700 members. But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful.[69]

Judge Posner concluded by stating that "[w]e have trouble seeing the downside" of the issue certification approach.[70]

In 2015, the Fourth Circuit reversed a decision to decertify an action under similar circumstances to *McReynolds*. The court placed significant weight on statistical and broad-sweeping anecdotal evidence.[71] In *Brown v. Nucor Corp.*,[72] African American steel workers brought claims under section 1981 and Title VII alleging a racially hostile work environment and discriminatory job promotion practices. The plaintiffs based their claims on a pattern or practice of racially disparate treatment and facially neutral policies causing a disparate im-

63. *Id.* at 489.
64. *Id.* at 491.
65. *Id.* at 483.
66. *Id.*
67. *Id.* at 492.
68. *Id.* at 491.
69. *Id*. at 490–91.
70. *Id*. at 492.
71. *See* Brown v. Nucor Corp., 785 F.3d 895, 914 (4th Cir. 2015).
72. *Id.*

pact.[73] The District Court for South Carolina decertified the class, citing *Dukes* to demonstrate a lack of commonality.[74] In particular, the court determined that statistical evidence was insufficiently rigorous and that common issues did not predominate.[75] The Fourth Circuit disagreed:

> Here, for a liability determination in a disparate treatment claim, the workers' statistical and anecdotal evidence, especially when combined, thus provide precisely the "glue" of commonality that *Wal-Mart* demands. Such a claim requires proof of a "systemwide pattern or practice" of discrimination such that the discrimination is "the regular rather than the unusual practice." The required discriminatory intent may be inferred upon such a showing.[76]

The Fourth Circuit also noted that the class at issue was significantly smaller than in *Dukes*.[77]

Notably, *Nucor Corp.* included a strongly worded dissent from Judge Steven Agee.[78] Judge Agee was particularly skeptical of the plaintiffs' statistical evidence. He said courts must test relevant statistical evidence at the certification stage and not "defer to Plaintiffs' experts and assume legal significance because the statistical evidence crosses the two-standard-deviation threshold."[79] He also dismissed the difference in class size, noting that such a distinction was not at the heart of *Dukes*.[80] Much like *Ellis*, which cautions that courts may choose to ignore *Dukes*'s key holding to allow certification of employment class actions, these cases demonstrate how courts may go to great lengths to distinguish *Dukes* to allow plaintiffs to proceed with discovery.

C. *The Supreme Court's Follow-Up to* Dukes: Comcast Corp. v. Behrend

While the lower courts wrangled with *Dukes*, the Supreme Court reentered the class action fray in an antitrust case, *Comcast Corp. v. Behrend*.[81] Unlike *Dukes*, *Comcast* left open as many questions as it answered. Commentators widely expected the Court to "decide the issue of the applicability of *Daubert* in class certification proceed-

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73. *Id.* at 898.

74. Brown v. Nucor Corp., No. 2:04-22005-CWH, 2012 WL 12146620, at *12–16 (D.S.C. Sept. 11, 2012), *rev'd,* 785 F.3d. 895 (4th Cir. 2015).

75. *See Nucor*, 785 F.3d at 908–09.

76. *Id.* at 914 (citations omitted).

77. *Id.* at 909–10.

78. *See id.* at 922 (Agee, J., dissenting).

79. *Id.* at 935 (emphasis omitted). "The duty to test the relevant statistical evidence attaches at the class certification stage." *Id.* at 936.

80. *Id.* at 943.

81. 133 S. Ct. 1426 (2013).

ings."[82] Instead, the Supreme Court decided the case based on its application of Rule 23(b)(3)'s predominance requirement to the damages model of the plaintiffs' expert.[83] The Court held that, because the damages model did not match the plaintiffs' theory of liability and could not establish damages on a class-wide basis, the plaintiffs failed to meet Rule 23(b)(3)'s predominance requirement.[84] The dissent thought the Court should never have decided the case, that the decision was wrong, and that the majority opinion "br[oke] no new ground on the standard for certifying a class action" under Rule 23(b)(3).[85]

Some courts have embraced a broad understanding of *Comcast*. The D.C. Circuit's interpretation, for example, is as succinct as it is sweeping: "No damages model, no predominance, no class certification."[86] Other courts found *Comcast* readily distinguishable, agreeing with the dissent that the decision broke no new ground[87] and that a class-wide damages model is not a prerequisite to class certification under Rule 23(b)(3).[88] Finally, some courts found a middle ground, certifying classes despite *Comcast*, by addressing only liability and leaving damages determinations for subsequent proceedings.[89]

A closer look at *Comcast* helps explain how it fosters divergent judicial interpretations. *Comcast*'s dissent has additionally become extremely important in light of the Court's changing composition. It may offer the strongest look into how class certification issues will play out in a post-Scalia Supreme Court.

1. The District Court Decision

In 2003, cable subscribers brought a class antitrust action against Comcast in the Eastern District of Pennsylvania on behalf of all cus-

82. Ellen Meriwether, Comcast Corp. v. Behrend*: Game Changing or Business as Usual?*, 27 ANTITRUST 57, 60 (2013).

83. *Comcast*, 133 S. Ct. at 1432–33.

84. *Id*. at 1433–34.

85. *Id*. at 1435–36 (Ginsburg & Breyer, JJ., dissenting).

86. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 253 (D.C. Cir. 2013).

87. *See* Johnson v. Nextel Commc'ns, 780 F.3d 128, 139 n.11 (2d Cir. 2015) ("*Comcast* did not alter this Circuit's Rule 23(b)(3) predominance inquiry.").

88. *See, e.g.*, Leyva v. Medline Indus. Inc., 716 F.3d 510 (9th Cir. 2013) (distinguishing *Comcast* in a wage-and-hour case because individual damages would be easily calculable).

89. *See In re* Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014), *reh'g denied*, 756 F.3d. 320 (5th Cir. 2014) ("[N]othing in *Comcast* mandates a formula for classwide measurement of damages in all cases. Even after *Comcast*, therefore, this holding has no impact on cases such as the present one, in which predominance was based not on common issues of damages but on the numerous common issues of liability."); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800–01 (7th Cir. 2013) (distinguishing *Comcast* in a consumer class action because class could be certified for purposes of liability, leaving damages for individual determination); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859–60 (6th Cir. 2013) (same); Jacob v. Duane Reed, Inc., 293 F.R.D. 578, 592–93 (S.D.N.Y. 2013) (similar decision in wage-and-hour context).

tomers in the Philadelphia region.[90] The plaintiffs alleged that Comcast engaged in various unfair business practices to monopolize the area[91] and then exploited the monopoly by charging higher prices in the region than it would have been able to otherwise.[92]

When the plaintiffs moved for class certification, the district court held that, to satisfy Rule 23(b)(3)'s predominance requirement, they needed to demonstrate "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis."[93] Through their experts, the plaintiffs presented four different theories of antitrust impact.[94] The district court thoroughly analyzed each theory[95] and determined that only one, the "overbuilder" theory, was capable of proof on a class-wide basis.[96]

The district court next examined whether the plaintiffs met their burden to show a common methodology for determining damages.[97] The plaintiffs' damages expert submitted a damages model incorporating all four theories of anti-trust impact.[98] Comcast argued that because the damages model did not study the effects of the "overbuilder" theory separately from the other theories, it could not prove that a common methodology existed to determine damages on a class-wide basis.[99] The district court held, however, that this difficulty did not undermine the expert's methodology.[100] Accordingly, the district court found that the plaintiffs demonstrated the existence of a "common methodology available to measure and quantify damages on a class-wide basis."[101] Based on this determination, the district court held that the plaintiffs met Rule 23(b)(3)'s predominance requirement and certified the class.[102]

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90. *See* Behrend v. Comcast Corp., 264 F.R.D. 150, 153, 157 (E.D. Pa. 2010).
91. *Id.*
92. *Id.* at 157.
93. *Id.* at 153–54. The district court had already held in an earlier opinion that the class met all of the other Rule 23(a) and 23(b)(3) requirements.
94. *Id*. at 162.
95. *Id.* at 162–81.
96. *Id*. at 174.
97. *Id.* at 181–91.
98. *See id.* at 190.
99. *Id.*
100. *Id.*
101. *Id.* at 191.
102. *Id.* ("The [plaintiffs have] demonstrated that the appropriate geographic market can be the Philadelphia [designated marketing area], as well as at least one theory of antitrust impact, and a common damages methodology.").

2. The Third Circuit's Decision and Comcast's Petition for Certiorari

On appeal to the Third Circuit, Comcast argued, inter alia, that the district court "made clearly erroneous factual findings by relying on Plaintiffs' expert for proof of class-wide antitrust impact."[103] Comcast attacked the expert's damages model and the fact that it did not isolate the "overbuilder" theory from the three other theories the district court rejected.[104] The Third Circuit was not persuaded. The court held that Comcast's arguments were "attacks on the merits of the methodology with no place in the class certification inquiry."[105] The Third Circuit explained that the plaintiffs need only "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."[106] The Third Circuit affirmed the district court's order certifying the class.[107]

Comcast petitioned the Supreme Court to review "whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)."[108] The Supreme Court granted certiorari, but to resolve a different issue: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[109]

3. The Supreme Court's Decision

The Supreme Court reversed the certification and remanded to the Third Circuit.[110] While this outcome was not a surprise, the basis of the decision was unexpected. After the Supreme Court restated the question presented to focus on the admissibility of expert testimony, the parties' submissions revealed that admissibility of the plaintiffs' damages expert's report was not a proper issue for review because Comcast had not raised such a challenge.[111] The Court held, however, that it could still evaluate whether the plaintiffs' damages

103. Behrend v. Comcast Corp., 655 F.3d 182, 191 (3d Cir. 2011).
104. *Id.* at 202.
105. *Id*. at 206–07.
106. *Id*. at 206.
107. *Id*. at 207.
108. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) (Ginsburg & Breyer, JJ., dissenting) (citation omitted).
109. *Id.* at 1431 n.4 (citation omitted).
110. *Id.* at 1435.
111. *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting).

model satisfied Rule 23(b)(3)'s predominance requirement, even if Comcast had conceded admissibility of the model.[112]

The Court found that the expert's model could not establish a common methodology for determining damages on a class-wide basis because it was inconsistent with the plaintiffs' only valid theory of class-wide liability.[113] The Court found it dispositive that the expert admitted that his model could not distinguish damages caused by the "overbuilder" theory and by the three rejected theories.[114] While the model need not provide exact calculations at the class certification stage, "any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anti-competitive effect of the violation.'"[115] The Supreme Court rejected the lower court's conclusion that the plaintiffs need only offer some method of measuring damages, "no matter how arbitrary the measurements may be."[116] The Court explained that adopting such a low bar to establish a methodology for proving class-wide damages "would reduce Rule 23(b)(3)'s predominance requirement to a nullity."[117] Therefore, the Supreme Court rejected the Third Circuit's holding that the validity of the expert's model was a merits question not resolvable at the class certification stage.[118] The Supreme Court thus reversed and remanded the case.[119]

4. The Dissent

In dissent, Justices Ginsburg and Breyer, joined by Justices Sotomayor and Kagan, asserted that the majority was not only wrong on the merits, but should not have heard the appeal.[120] The dissent maintained that because admissibility of the expert's damages report was not properly before the Court, it should have "dismiss[ed] the writ as improvidently granted."[121]

The dissent's analysis of the lower court's holding that damages must be measurable on a class-wide basis to meet Rule 23(b)(3)'s predominance requirement became more important after Justice Scalia's death.[122] The majority adopted the lower court's premise because neither party contested the issue on appeal, although it stopped short of adopting it as a correct statement of the law.[123] The dissent thought

112. *Id.* at 1431 n.4.
113. *Id*. at 1433.
114. *Id*. at 1433–34.
115. *Id.* at 1433 (citation omitted).
116. *Id*.
117. *Id*.
118. *Id.*
119. *Id.* at 1435.
120. *Id.* at 1435–36 (Ginsburg & Breyer, JJ., dissenting).
121. *Id*. at 1435.
122. *Id.*
123. *Id*. at 1430.

this premise contradicted the "'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."[124] The dissent listed numerous appellate decisions and treatises standing for the proposition that "individual damages calculations do not preclude class certification under Rule 23(b)(3)."[125] The dissent concluded that the plaintiffs' failure to challenge the district court's predominance standard was an "oddity" unique to this case and another reason the Court should have dismissed the writ of certiorari.[126] The dissent sought to limit the precedential impact of *Comcast*, stating that it "breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)."[127]

5. Interpretations of *Comcast* in the Lower Courts

Thus far, *Comcast* has functioned like an inkblot test for the lower courts.[128] Their analysis of the majority and dissent has led to remarkably disparate interpretations.[129] Lower court interpretations are generally divisible into three categories: (1) interpretations of *Comcast* as foreclosing Rule 23(b)(3) class actions unless damages for all class members can be demonstrated by a single model; (2) decisions distinguishing *Comcast* and requiring plaintiffs demonstrate only that damages arising from the defendant's illegal conduct are readily calculable; and (3) decisions recognizing that *Comcast* raised the bar for demonstrating individual damages questions, which do not predominate over questions common to the class, but instead rely on Rule 23(c)(4) to grant class certification on liability.

D. Courts Interpreting Comcast *Broadly*

Some courts have interpreted *Comcast* to hold that a class cannot be certified under Rule 23(b)(3) unless a single model can prove damages for all class members without requiring individual calculations.[130] In the antitrust context, the D.C. Circuit took *Comcast* to mean, "[n]o damages model, no predominance, no class certification."[131] Likewise, in *Johnson v. Nextel Communications*,[132] the Second Circuit vacated a class certification for lack of commonality.[133]

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124. *Id*. at 1437.
125. *Id.*
126. *Id*.
127. *Id.* at 1436.
128. *But see* Alex Parkinson, Comment, Comcast Corp. v. Behrend *and Chaos on the Ground*, 81 U. Chi. L. Rev. 1213 (2014).
129. *See generally id.*
130. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 253 (D.C. Cir. 2013).
131. *Id.*
132. 780 F.3d 128 (2d Cir. 2015).
133. *Id.* at 132.

Johnson involved a putative class action against a law firm for breach of fiduciary duty, malpractice, and breach of contract.[134] The defendant law firm had represented putative class members alleging employment discrimination and challenging the propriety of an agreement mandating a dispute resolution process.[135] The Second Circuit vacated the district court's class certification, finding that class members would require a case-by-case inquiry to determine whether each had waived protections against conflicts of interest, whether state law governed each retainer agreement, and whether damages needed to be calculated individually.[136] The court held that "[b]ecause liability for a significant bloc of the class members and damages for the entire class must be decided on an individual basis, common issues do not predominate over individual ones and a class action is not a superior method of litigating the case."[137] Other courts deciding wage-and-hour and similar claims have denied certification based on similar reasoning.[138] Employers and other defendants will continue to argue for this broad interpretation of *Comcast*.

E. Courts Interpreting Comcast *Narrowly*

Other courts took both *Comcast*'s majority and dissent at their words that the decision "turns on the straightforward application of class-certification principles" and "breaks no new ground."[139] These courts rely on pre-existing precedent permitting certification of Rule 23(b)(3) classes if damages are easily ascertainable and their calculation would not predominate over common questions. For example, in *Leyva v. Medline Industries, Inc.*,[140] a wage-and-hour matter, the Ninth Circuit distinguished *Comcast* based on a determination that individual damages would be easily calculable, albeit not through a single class-wide model.[141] In overturning the district court's decision, the Ninth Circuit noted that "damages determinations are individual in nearly all wage-and-hour class actions" but courts nonetheless routinely certify such classes.[142] Plaintiffs primarily advance the argument that *Comcast* did not alter pre-existing precedent.

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134. *Id.* at 133.
135. *Id.* at 132.
136. *Id.* at 146 (discussing predominance).
137. *Id*. at 148.
138. *See, e.g.*, Cowden v. Parker & Assocs., No. 5:09-323, 2013 WL 2285163, at *7 (E.D. Ky. May 22, 2013) (denying certification to class of insurance agents seeking to recover commissions and fees); Forrand v. Fed. Express Corp., No. 08-1360, 2013 WL 1793951, at *4 (C.D. Cal. Apr. 25, 2013) (denying certification to class of FedEx workers claiming they were not paid for all hours worked).
139. Comcast Corp. v. Behrend, 133 S. Ct.1433, 1437 (2013).
140. 716 F.3d 510, 514 (9th Cir. 2012).
141. *Id.*
142. *Id.* at 513; *see also* Parra v. Bashas', Inc., 291 F.R.D. 360, 393 (D. Ariz. 2013) (distinguishing discrimination case from *Comcast* because plaintiffs could determine their backpay "through a computer program" based on objective factors); Barbosa v. Car-

F. Courts Avoiding Comcast *with Rule 23(c)(4)*

While *Comcast*'s meaning is debatable, it is clear—except to courts that treat it as a nullity—that the holding raised the Rule 23(b)(3) predominance bar regarding individual damages. Recognizing this reality, many courts adopted a third approach to *Comcast* that avoids damage considerations as part of Rule 23(b)(3)'s predominance requirement. The courts use Rule 23(c)(4) to certify only the liability issue.[143] Both *In re Whirlpool Front-Loading Washer Products Liability Litigation*[144] and *Butler v. Sears Roebuck*[145] were consumer class actions alleging that certain washing machines were defective. In both cases, the courts recognized that *Comcast* precluded them from certifying a Rule 23(b)(3) class if questions regarding individual damages would predominate over common questions regarding washing machine design. Accordingly, both courts in both cases used Rule 23(c)(4) to certify the issue of liability without considering whether individual damages questions prevented certification under Rule 23(b)(3).[146] In *Jacob v. Duane Reade, Inc.*,[147] another wage-and-hour misclassification case, the court followed *Whirlpool* and *Sears Roebuck* and certified a class action on the issue of liability under Rule 23(c)(4), but de-certified the class for purposes of determining damages in light of *Comcast*.[148]

This third approach has generated a great deal of attention, but there are serious questions about its continued viability. First, circuits are already split on whether it is appropriate to use Rule 23(c)(4) for this purpose.[149] Second, the Supreme Court provided some indirect guidance on the scope of *Comcast* by vacating and remanding several circuit court rulings for further consideration in light of *Comcast*, including *Whirlpool*, *Sears Roebuck*, and a wage-and-hour class and collective action.[150] If the Supreme Court grants certiorari in a lawsuit presenting the Rule 23(c)(4) issue, the resulting decision may be an-

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gill Meat Sol. Corp., 297 F.R.D. 431, 443 n.2 (E.D. Cal. July 2, 2013) (distinguishing *Comcast* to certify settlement class in wage-and hour-case).

143. *See* Butler v. Sears Roebuck, 727 F.3d 796, 800 (7th Cir. 2013); *In re* Whirlpool Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 860–61 (6th Cir. 2013); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 593–94 (S.D.N.Y. 2013).

144. 722 F.3d 838, 860–61 (6th Cir. 2013).

145. 727 F.3d 796, 800 (7th Cir. 2013).

146. *See id.* at 800, 802–03; *Whirlpool*, 722 F.3d at 860–61.

147. 293 F.R.D. 578, 593–94 (S.D.N.Y. 2013).

148. *Id.* at 593.

149. *See* Hohider v. United Parcel Service, Inc., 574 F.3d 169, 200–01 n.25 (3d Cir. 2009) (split between circuits holding Rule 23(c)(4) applies only if entire matter satisfies Rule 23(b)(3)'s predominance requirement and circuits holding that only the individual issue identified must meet predominance requirement).

150. Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012). There was no subsequent decision by the lower courts because the parties settled and the appeal was voluntarily dismissed. Ross v. RBS Citizens, N.A., No. 10-3848 (7th Cir. July 3, 2014), Dkt. No. 58.

other watershed for employment law class actions, and class actions in general.

G. The Supreme Court's Post-Scalia Opinions

During the October 2015 term, the Supreme Court addressed several cases challenging class certification, in each refusing to impose additional restrictions on the process. These decisions make evident that, following Justice Scalia's passing, the Supreme Court lacks a majority voting bloc on the issue and only further emphasize Justice Gorsuch's importance to class action jurisprudence.

1. *Tyson Foods, Inc. v. Bouaphakeo*

In *Tyson Foods, Inc. v. Bouaphakeo*,[151] a class of employees sought compensation for time spent "donning and doffing" workplace protective gear. The Supreme Court granted certiorari to address whether an expert witness's estimate of overtime hours constituted a representative sample upon which class certification could rest.[152] Writing for the Court, Justice Anthony Kennedy found that representative proof from a sample, based on an expert witness's estimation of average time employees spent donning and doffing protective gear, could show predominance of common questions of law or fact.[153] The Court refused to "announce a broad rule against the use in class actions of representative evidence," noting that the permissibility of such evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable to prove or disprove the elements of the relevant cause of action."[154] In this case, the Court allowed statistical evidence because "respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records."[155] The Court noted that in cases of employers' failure to keep records, the Fair Labor Standards Act allowed the use of averages and representative evidence.[156] The Court further distinguished *Tyson Foods* from other recent cases by noting that *Dukes* "does not stand for the broad proposition that a representative sample is an impermissible means of establishing class wide liability."[157]

Notably, *Tyson*, maintaining a circuit split, failed to address whether uninjured class members could recover damages as part of

151. 136 S. Ct. 1036 (2016); *see also* Thomas R. Goldstein, *Supreme Court Review*, 32 ABA J. LAB. & EMP. L. 157, 160 (2017) (discussing *Tyson Foods* and its implications).
152. *Tyson Foods Inc.*, 136 S. Ct. at 1042–43.
153. *Id.* at 1045.
154. *Id*. at 1046.
155. *Id*. at 1047.
156. *Id.*
157. *Id*. at 1048.

the class action.[158] Justice Kennedy acknowledged that "the question whether uninjured class members may recover is one of great importance," but stated that it was not "a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed."[159] In a concurring opinion, however, Chief Justice John Roberts expressed "concern that the district court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury."[160]

2. *Campbell-Ewald Co. v. Gomez*

In *Campbell-Ewald Co. v. Gomez*,[161] the Supreme Court ruled that an unaccepted offer of judgment did not render the plaintiff's complaint and petition for class certification moot.[162] The plaintiff's putative class action against an advertiser alleged that it violated the Telephone Consumer Protection Act by instructing or allowing a third-party vendor to send unsolicited text messages to his cell phone.[163] Prior to the deadline for the plaintiff's motion for class certification, the defendant proposed to settle the plaintiff's individual claim and filed an offer of judgment pursuant to Rule 68.[164] The plaintiff did not accept the offer.[165] Writing for the Court, Justice Ginsburg held that "an unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."[166]

H. Mandatory Arbitration Agreements and the NLRA

One of the most salient tactics plaintiffs' attorneys have recently utilized involves challenging mandatory employee arbitration agreements containing class and collective action waivers. Following a 2012 ruling by the National Labor Relations Board (NLRB), multiple courts have addressed the propriety of such waiver agreements.[167]

158. *See, e.g.*, Erwin Chemerinsky, *A Class Action Shift*, 52-SEP TRIAL 54, 54 (Sept. 2016).

159. *Tyson Foods*, 136 S. Ct. at 1050.

160. *Id.* (Roberts, C.J., concurring).

161. 136 S. Ct. 663 (2016).

162. *Id.* at 666.

163. *Id*. at 667.

164. *Id*.; *see* FED. R. CIV. P. 68 (defendant may offer to allow judgment on specified terms instead of going to trial).

165. *Gomez*, 136 S. Ct. at 668.

166. *Id*. at 670 (citation omitted).

167. The National Labor Relations Board (NLRB) held that employees' collective pursuit of legal claims is "concerted activity for mutual aid or protection" protected by Section 7 of the National Labor Relations Act. D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277, 2288–89 (2012). Accordingly, the NLRB found that an employer cannot, as a mandatory condition of employment, require employees to agree to arbitration agreements that waive their ability to join claims or pursue class or collective actions. *Id.* at 2289. The Second, Fifth, and Eighth Circuits explicitly rejected the NLRB's position on mandatory arbitration agreements. *See* Patterson v. Raymours Furniture Co., No. 15-2820-cv,

This resulted in a circuit split concerning whether class action waiver clauses violate Section 7 of the NLRA and its provisions protecting employees' rights to engage in concerted activities for collective bargaining or other mutual aid or protection.[168] Until the Supreme Court rules on the NLRB's position, employers face uncertainty, and plaintiffs' choice of forum will determine the enforceability of class action waivers in mandatory arbitration agreements.

II. Class Actions in the Current Legal Landscape: What Does the Future Hold for Employment Class Actions?

The future of class action litigation depends largely upon the composition of the Supreme Court. The critical role of Justice Gorsuch cannot be understated, as the Supreme Court's rulings from this term demonstrate. While *Tyson Foods* and *Campbell-Ewald* left multiple issues open to future interpretation, neither opinion can be deemed a defeat for class action plaintiffs. With Justice Gorsuch's arrival, employers can expect further favorable rulings.

The following sections briefly discuss litigating class actions in this new legal environment, including early motions to dismiss or deny certification of, or to strike class claims, planning and conducting discovery, and handling statistical and other expert evidence to defeat class certification. We also offer some best practices in preparing arbitration agreements for employees. These strategies will certainly need to be adjusted as case law continues to develop.

A. Pre-Discovery Motions to Dismiss or Strike Class Claims or Deny Certification

Employers have encountered mixed results filing pre-discovery motions to dismiss, deny certification, or strike plaintiffs' class claims.[169]

2016 WL 4598542 (2d Cir. Sept. 14, 2016); Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013). However, the Ninth and Seventh Circuits largely accepted the NLRB's position. *See* Morris v. Ernst & Young, LLP, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

168. *See* 29 U.S.C. § 157 (2012).

169. There are multiple ways to style an early motion targeting class claims. Defendants can label them as motions to strike class claims pursuant to Rule 23(d)(1)(D), as motions to deny class certification pursuant to Rule 23(c)(1)(A), or as motions to dismiss class claims pursuant to Rule 12(b)(6). The title of the motion does not matter unless the jurisdiction or judge prefers a certain mechanism. It may be sensible to include all of these procedural bases in the body of the brief. Employers must clarify, however, that they seek to eliminate the class claims as legally insufficient on the face of the pleadings, with no need for discovery. In turn, plaintiffs will argue these procedural avenues are inappropriate for use at such an early pre-discovery stage.

Some courts have granted these motions based on *Dukes*.[170] Other courts, relying on *Dukes*, allowed plaintiffs discovery before responding to the motions.[171]

By virtue of its focus on expert evidence and damages models, *Comcast* does not naturally lend itself to use in an early motion to dismiss. In some cases, however, especially those involving compensation discrimination, *Comcast* may support arguments that individual damages questions predominate over any common questions. Plaintiffs (and many courts) will believe this argument is premature; in some cases predominance problems will be apparent from the nature of the claim on the face of the pleadings.

Despite these difficulties, it is certainly worth pursuing pre-discovery motions to eliminate class claims because they present employers an opportunity to avoid years of expensive discovery that could lead to enhanced or redefined claims and filing of unrelated lawsuits (e.g., wage-and-hour claims). It is important to plaintiffs' class action litigation to use potentially high discovery costs to pressure employers to settle, so employer tactics that preclude discovery are especially useful.

Just because a class is smaller or less geographically expansive than *Dukes* does not mean employers cannot attack it in an early motion to dismiss.[172] At its core, *Dukes* was not about the size or scope of the class; it was about the specific policies at issue.[173] Employers should attack the complaint as insufficient if plaintiffs fail to identify specific policies or how policies caused alleged discrimination.[174] It is

170. *See, e.g.*, Ladik v. Wal-Mart Food Stores, Inc., 291 F.R.D. 263, 272–73 (W.D. Wis. 2013) (dismissing class claims without discovery in mini-*Dukes* case, but describing decision as a "rare case" in which early dismissal was appropriate); Semenko v. Wendy's Int'l, Inc., No. 12-cv-0836, 2013 WL 1568407, at *11 (W.D. Pa. Apr. 12, 2013) (granting motion to strike class claims prior to allowing discovery); Hagler v. True Mfg. Co., No. 4:12CV328MLM, 2012 WL 1025672, at *5 (E.D. Mo. Mar. 26, 2012) (dismissing class claims based on *Dukes* despite plaintiffs' claim of entitlement to discovery).

171. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115, 1125–26 (N.D. Cal. 2013) (denying motion to dismiss class claims because *Dukes* rested on rejection of plaintiffs' evidence of commonality); Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 119 (S.D.N.Y. 2012) (denying in part motion to strike class allegations and allowing discovery); Barghout v. Bayer Healthcare Pharm., No. 11-cv-1576, 2012 WL 1113973, at *11 (D.N.J. Mar. 30, 2012) (denying motion to strike class allegations as premature, in part because discovery had not been conducted).

172. *See Dukes*, 964 F. Supp. 2d at 1117–18 (denying class certification because "though Plaintiffs insist that they have presented an entirely different case from the one the Supreme Court rejected, in fact it is essentially a scaled-down version of the same case with new labels on old arguments").

173. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355 (2011) (policy of allowing discretion by local supervisors "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action").

174. *See, e.g.*, Barrett v. Forest Labs., Inc., No. 12-CV-5224 (S.D.N.Y. Feb. 4, 2013), Dkt. No. 29 at 24–26 (moving to dismiss class claims in part based on plaintiffs' failure to identify specific policies or how policies affected them).

also beneficial to analyze whether the plaintiffs' central allegation merely repackages the individual discretion theory at the heart of *Dukes*.[175] If the plaintiffs' case focuses on the individual discretion theory, their class claims should be subject to dismissal without discovery.

Pre-discovery motions to dismiss or to deny certification of class claims, even if denied, can still serve a purpose. *Dukes* and *Comcast* have very specific requirements regarding the types of claims that can be certified. An early motion gives employers the opportunity to (1) educate the judge regarding these requirements, (2) force the plaintiffs to amend pleadings to state claims that at least facially pass muster, and (3) eliminate claims (and discovery on those claims) that do not satisfy *Dukes* and *Comcast*.[176] An early motion limiting discovery or forcing plaintiffs to identify a specific theory of the case advances resolution of the claim.

B. Structuring or Controlling Fact Discovery

If an early motion fails, employers should look to benefit from the Rule 16 conference and the case management order. Employers should aim to structure discovery in stages to target alleged common policies and attempt to build a record early to support denial of class certification. To the extent possible, or if resolution of a key factual dispute can be staged first, employers should seek a more structured case management order that provides for early, targeted discovery before broad nationwide discovery can commence.[177] Nothing prevents a court from deciding a motion to deny certification before discovery ends if an employer can show that no further discovery is necessary or that discovery on a targeted issue demonstrates class certification will not be warranted.[178]

Dukes requires specificity in identifying company-wide policies that could have a disparate impact on employees, and this holding should persuade a judge to structure discovery in an orderly fashion

175. *See Dukes*, 964 F. Supp. 2d at 1126–27 (rejecting plaintiffs' argument that claims were based on common policies establishing subjective criteria because they merely repackaged delegated discretion); Bolden v. Walsh Constr. Co., 688 F.3d 893, 898 (7th Cir. 2012) (numerous policies identified by plaintiffs were all merely policies allowing individual manager discretion).

176. *See Barrett*, No. 12-CV-5224, Dkt. No. 38 at 1–3 (plaintiffs required to amend pleadings to be more specific in response to early motion to dismiss).

177. *See, e.g.*, Barnes v. Hershey Co., No. 3:12-cv-01334 (N.D. Cal. July 24, 2013), Dkt. No. 95 (in collective action context, employer using joint case management plan to limit discovery to single issue common to members of class, which, if decided early in employer's favor, would require decertification).

178. *See, e.g.*, Bell v. Lockheed Martin Corp., No. 08-6292 (RBK/AMD), 2011 WL 6256978, at *8 (D.N.J. Dec. 14, 2011) (court dismissed class claims when it was clear they could not be sustained after plaintiffs completed significant discovery into employer policies, even though discovery period had not ended).

designed to test specific policies or practices.[179] Plaintiffs often rely on aggregated statistical disparities, without identifying specifically any policies that allegedly cause them. Plaintiffs should have to identify specific policies at issue and present a causal link between the policies and the alleged disparity. More importantly, targeted discovery can expose whether the true policy at issue is only an exercise of managerial discretion.[180]

Employers should focus on individual plaintiffs' claims. If individual plaintiffs' claims are not consistent with their theory of a class-wide disparate impact or pattern and practice of discrimination, they cannot establish commonality or typicality. If the plaintiffs point to a policy that allegedly has a disparate impact, employers should develop a record to show that the policy did not cause harm or affect all named plaintiffs in the same way.[181] In *Jones v. National Council of Young Men's Christian Associations*, for example, the employer argued that the promotion-based class claims should be dismissed because one named plaintiff received both promotions for which she applied, while another named plaintiff had never even applied for a promotion.[182] Similarly, if specific managers take the allegedly discriminatory action against named plaintiffs, employers should develop a factual record that the managers acted within their discretion.

Finally, employers should attack all potential common questions, especially if they are in a circuit that permits liberal use of Rule 23(c)(4). A court invoking Rule 23(c)(4) can effectively ignore the argument that claims for backpay cannot be certified based on *Dukes*, or that individualized damages inquiries destroy predominance, per *Comcast*, if there is even one common question.[183] It is beneficial to develop a record that allows an analysis of each question individually. Many supposedly common questions are simply repackaged individual discretion arguments, while others are not applicable to the entire class.[184]

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179. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) ("Other 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. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.").

180. *See, e.g.*, *Bolden*, 688 F.3d at 898 (reviewing fourteen policies plaintiffs identified, but determining they "boil down to the policy affording discretion" to individual supervisors).

181. *See, e.g.*, Jones v. Nat'l Council of Young Men's Christian Ass'ns, No. 09 C 6437, slip op. at 62–64 (N.D. Ill. Sept. 5, 2013) (magistrate's report recommending dismissal of class claims).

182. *Id*.

183. *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012); Jacob v. Duane Reed, Inc., 293 F.R.D. 578 (S.D.N.Y. 2013).

184. *See* Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115, 1125–26 (2013).

C. Statistics and Use of Experts to Defeat Certification

If an employer cannot eliminate a class case on a pre-discovery motion or an early motion to deny certification based on plaintiffs' failure to identify common policies or practices, statistical evidence will be crucial to defeating class certification at the close of discovery. Statistical evidence has always been very important to employment class actions, but *Dukes* and *Comcast* reinforce its significance.

Dukes counsels employers to drill down to the local level when examining supposed effects of policies and practices that plaintiffs have challenged:

> Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." *A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends*.[185]

If the plaintiffs claim that a nation-wide policy or practice affected all class members in the same way, employers can and should use data to test that assertion. On remand in *Dukes*, Judge Breyer noted that while some store districts within the class showed large disparities, other districts showed none, destroying the claim that any practice or policy commonly affected class members.[186] If a policy affects multiple stores differently, it cannot supply a common answer to a classwide contention. Thus, the plaintiffs would fail to show commonality. Using an expert report to show differences among various regions, hierarchies, stores, supervisors, or other subdivisions will undermine plaintiffs' attempt to rely on aggregate statistics to establish existence of a common policy or practice.

Employers should also study the effects of specific challenged policies because plaintiffs often rely on aggregated bottom-line numbers. *Dukes* and *Comcast* both require greater specificity. If an employer can demonstrate that other factors, and not the challenged policy, create

185. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356–57 (2011) (emphasis added) (internal citations omitted).

186. *See Dukes*, 964 F. Supp. 2d at 1120–21.

the statistical disparity, employers' counsel can break the causal link.[187]

Employers can also use *Comcast* to force plaintiffs to match their liability theory to their damages theory. Despite the many different interpretations of *Comcast*, one undeniable holding is that to certify a class under Rule 23(b)(3), plaintiffs must demonstrate that their damages theory is congruent with their liability theory. Employers should argue for the broadest interpretation of *Comcast*—that it requires a single class-wide damages model. Even if a court adopts a more limited interpretation of *Comcast*, however, demonstrating that plaintiffs cannot separate damages based on their theory of liability from effects of other factors creates a strong argument that the case cannot be certified under Rule 23(b)(3).[188]

D. Drafting Employee Arbitration Agreements

While it is impossible to determine how the circuit split regarding mandatory arbitration agreements for employees will play out, there are several factors employers should consider in drafting such provisions. As an initial matter, it is important to remember that arbitration should be an alternate forum allowing the parties to pursue all substantive claims and remedies that they could otherwise pursue in court. The employer should pay for all costs associated with arbitration, with the exception of a modest contribution by the employee for the filing fee (e.g., $200). These agreements should also rely on the rules of a respected arbitration tribunal (Judicial Arbitration and Mediation Services or American Arbitration Association) with only limited exceptions. Agreements should include multi-step alternative dispute resolution with voluntary internal claim resolution processes, sometimes including mediation, before allowing arbitration.

Employers should consider how accessible to make the arbitration agreements for employees' review. It should be clear and conspicuous to employees. Inclusion of such provisions in employee handbooks may be deemed insufficient. While an employee signature may not be required, it is better to have employees sign the agreement. Depending on state law, consideration is often necessary, whether in the form of continued at-will employment or additional consideration. Further, any arbitration agreement should be mutually binding on employers and employees. This mutuality must be explicit. Finally, em-

187. *See* Tabor v. Hilti, Inc., 703 F.3d 1206, 1229 (10th Cir. 2013) (holding that even if policy had an overall disparate impact on women, company's "haphazard" application of policy meant that plaintiffs could not establish commonality).

188. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) ("In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.").

ployers should consider permitting employees to opt out of arbitration because such provisions make such agreements appear voluntary and less coercive. Yet, employers must keep in mind that optional arbitration provisions may ultimately cover far fewer employees, undermining the very purpose of having an arbitration agreement.

Conclusion

The Supreme Court's decisions in *Dukes* and *Comcast* unquestionably changed employment discrimination litigation. Lower courts have inconsistently applied these cases and their progeny, leading to irregular employment class action jurisprudence. Clarification will likely come only through further Supreme Court guidance.

Regardless of the Court's direction, employers already possess an arsenal of strategies to protect their interests in the face of employment class actions. Employers can position themselves to defeat class certification by using pre-discovery motions, strategic discovery, expert witnesses, statistical evidence, and arbitration agreements. Of course, employment class action jurisprudence is rapidly changing, and the full impact of *Dukes*, *Comcast*, and other decisions—and their impact on employers and plaintiffs—will become clearer over time.