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Expert Analysis

Wal-Mart v. Dukes: Supreme Court Announces Stricter Class-Certification Standards

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The U.S. Supreme Court's June 20 decision in *Wal-Mart Stores Inc. v. Dukes et al.*[1] dealt a huge blow to plaintiffs seeking to certify employment discrimination class actions under Federal Rule of Civil Procedure 23, as well as consumer, antitrust and other class actions. The heavily publicized case involved a proposed 1.5 million-person class of female Wal-Mart employees seeking to bring disparate-impact and pattern-or-practice claims for discrimination in promotions and compensation.

In a 5-4 decision, the court found that allegations that Wal-Mart had a "common" policy of permitting local managers to use discretion to make employment decisions based upon subjective factors did not satisfy the commonality requirement of Rule 23(a)(2). The court held that the commonality requirement is not met by generalized questions that do not meaningfully advance the litigation and is not met where named plaintiffs and putative class members have not suffered the "same injury."[2] In addition, in a unanimous decision, the court found "individual monetary claims" including for back pay, could not be certified under Rule 23(b)(2).[3]

The *Dukes* decision raises the bar for plaintiffs seeking to certify large class actions involving disparately situated individuals and provides class-action defendants with a variety of tools to defeat such efforts.

COURT MUST CONSIDER CERTAIN MERITS ISSUES IN DECIDING CLASS-CERTIFICATION MOTIONS

The court reached several conclusions that addressed, and rejected, arguments that plaintiffs have made for years in support of certifying broad class actions in all contexts. For example, the court rejected the argument that a district court must accept plaintiffs' allegations as true and avoid any factual considerations of the "merits" in ruling on class certification.[4] The court made it clear that a district judge must engage in a "rigorous analysis" before certifying a class action and must consider the merits of plaintiffs' claims if they overlap with issues related to certification.[5]

The court also suggested that a district court must scrutinize supposedly expert opinions offered in support of class certification. In making this ruling, the court suggested that the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*[6] likely applies to expert evidence used in the class-certification process.

SIGNIFICANT COMMON QUESTIONS REQUIRED TO SATISFY 'COMMONALITY' ELEMENT

While acknowledging that even a single common question could be sufficient to establish commonality, the court held that reciting basic common questions, such as whether Title VII was violated, is not enough. A plaintiff must identify common questions that depend on the same contention, and the resolution of that contention must "resolve an issue that is central to the validity of each one of the claims in one stroke."[7]

For example, the court acknowledged that the case before it presented common questions like "do our managers have discretion over pay?" but held that "reciting [such] questions is not sufficient to obtain class certification."[8] Rather, it held that "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."[9]

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The court then addressed the "wide gap" between an individual claim of discrimination and the existence of a company policy of discrimination that creates a class of individuals with the same injury.[10] It noted that such a gap could be bridged, and commonality found, in two ways:

- A uniform biased testing procedure that impacted all test takers in the same way.
- By presenting "significant proof" that an employer "operated under a general policy of discrimination."[11]

In discussing the second way, the court made clear that "the bare existence of delegated discretion" is insufficient to establish commonality.[12]

The court rejected three arguments routinely made by plaintiffs seeking class certification. First, the court rejected the testimony of the plaintiffs' social science expert who claimed that Wal-Mart's culture was susceptible to gender bias, finding the testimony useless to the salient question whether the plaintiffs could prove a general policy of discrimination. In doing so, the court suggested that the *Daubert* standard applies to expert witness testimony used in support of class certification.

Second, the court rejected the use of aggregate statistical analyses and the mere existence of gender disparities in pay, promotion or representation as insufficient to meet the commonality burden. Instead, the court suggested that to show commonality, a plaintiff would at least need to demonstrate store-by-store disparities.

Third, the court found that affidavits from 120 individuals, or one out of every 12,500 class members, did not constitute "significant proof" that Wal-Mart operates under a general policy of discrimination.

While these rejections occurred in the context of an employment discrimination claim, purported class plaintiffs in many other cases frequently attempt to rely on similar evidence to support class certification. For example, antitrust plaintiffs attempt to use aggregate statistical analyses of costs and prices and consumer-

class-action lawyers use surveys, regression analyses and purported social science analyses to establish the existence of commonality. The *Dukes* decision makes clear that courts may not merely accept plaintiffs' efforts to homogenize individual issues through unreliable expert testimony.

RULE 23(B)(2) CERTIFICATION UNAVAILABLE FOR INDIVIDUALIZED CLAIMS FOR MONETARY RELIEF

The court next ruled, unanimously, that individualized claims for monetary damages cannot be certified under Rule 23(b)(2) and instead must be certified, if at all, under the more onerous requirements of Rule 23(b)(3). In so ruling, the court noted that Rule 23(b)(3), unlike Rule 23(b)(2), mandates notice to the class and an opportunity for class members to opt out of the lawsuit, necessary safeguards to preserve the constitutional due process rights of class members whose individual claims for monetary damages would be adjudicated if a class were certified.

The court rejected the "predominance test" established by the 9th Circuit, which permitted the certification of claims for monetary damages as long as claims for injunctive relief "predominated" over the claims for monetary damages.[13] It cited favorably to the "incidental damages" test first adopted by the 5th Circuit in *Allison v. Citgo Petroleum Corp.*,[14] which permits certification of claims for monetary relief as long as that relief "flow[s] directly from liability to the class as a whole," which "should not require additional hearings."[15] While seeming to express skepticism that monetary damages could ever be incidental to injunctive and declaratory relief, the court declined to adopt a bright-line rule prohibiting all money damages from ever being certified under Rule 23(b)(2).

This ruling has widespread implications for class actions because Rule 23(b)(3) requires plaintiffs to prove that common questions predominate over individual ones and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Given the court's cynicism regarding the use of discretionary decision making as grounds for the less-stringent commonality standard, this burden should be extremely difficult for plaintiffs' attorneys to meet in employment class actions without significantly altering the types of class actions they bring.

The Supreme Court rejected three forms of evidence on which plaintiffs routinely have relied when seeking class certification:

- The court disregarded testimony by a social science expert that Wal-Mart's culture was susceptible to gender bias, finding the testimony useless to the salient question whether Wal-Mart "operated under a general policy of discrimination."
- The court dismissed the use of aggregate statistical analyses and the mere existence of gender disparities in pay, promotion or representation as insufficient to meet the commonality burden.
- The court found that affidavits from 120 individuals, representing one for every 12,500 class members, did not constitute "significant proof" of a general policy of discrimination.

A plaintiff must identify common questions that depend on the same contention, and the resolution of that contention must "resolve an issue that is central to the validity of each one of the claims in one stroke."

Dukes also ends the practice of distinguishing back pay from monetary damages and thereby obtaining Rule 23(b)(2) certification for claims seeking huge back-pay amounts. In a far-reaching ruling that effectively requires plaintiffs who bring class-action employment discrimination lawsuits to meet Rule 23(b)(3)'s standards (except those solely for class-wide injunctive relief), the court held that back pay, regardless of whether it is characterized as equitable, cannot be certified under Rule 23(b)(2).

Central to this holding was the court's rejection of the 9th Circuit's proposed sampling or "trial by formula" approach to determining back-pay awards.[16] The approach did not permit Wal-Mart to defend its employment decisions regarding each individual class member. The court held that Wal-Mart was "entitled to individualized determinations of each employee's eligibility for back pay."[17]

This ruling not only precludes certification of the claims for money damages under Rule 23(b)(2), but also will make it difficult for plaintiffs to certify claims for monetary damages under Rule 23(b)(3).

EARLY CASES APPLYING *DUKES*

The* Dukes *decision makes clear that courts may not merely accept plaintiffs' efforts to homogenize individual issues through unreliable expert testimony.

Courts have already begun to grapple with the ramifications of the *Dukes* decision in employment discrimination, wage-and-hour and other cases. A number of lower courts have acknowledged *Dukes*, citing various aspects of the opinion when denying class certification.

For example, in *Cruz v. Dollar Tree Stores Inc.*,[18] a wage-and-hour case, the court explained that *Dukes* "provides a forceful affirmation of a class-action plaintiff's obligation to produce common proof of class-wide liability in order to justify class certification."[19] The *Cruz* court eventually held that the plaintiffs failed to provide any common proof to serve as the "glue" to determine how class members spent their time on a weekly basis.[20]

In another wage-and-hour case, *MacGregor v. Farmers Insurance Exchange*,[21] the court, en route to denying collective treatment, described *Dukes* as "illuminating" and "clearly reasoned."[22] The court concluded that collective treatment is improper in cases involving multiple employment locations, decentralized policies or practices, or multiple supervisors with independent decision-making authority.

In *Rodriguez v. National City Bank*,[23] a Fair Housing Act and Equal Credit Opportunity Act case, the court denied certification, observing that, as in *Dukes*, the plaintiffs impermissibly relied on the disparate-impact theory to show that the defendants' policy of granting discretion to decision makers resulted in discrimination.

In *Cruz*, the court cited *Dukes*' rejection of a "trial by formula" approach as a basis to deny Rule 23(b)(2) certification, stating that "[i]n light of the Supreme Court's rejection of this approach, it is not clear to the court how, even if class-wide liability were established, a week-by-week analysis of every class member's damages could be feasibly conducted."[24]

In *Aho v. AmeriCredit Financial Services Inc.*,[25] the court rejected Rule 23(b)(2) certification where the amount of restitution would vary from class member to class member and in some cases constitute a significant sum. The court held that *Dukes* requires plaintiffs to pursue such "individualized" claims under Rule 23(b)(3).

Not all post-*Dukes* certification decisions, however, favor defendants. In *United States v. City of New York*,[26] and in apparent contravention of *Dukes*' key holdings,

the court held that injunctive-relief claims could be certified under Rule 23(b)(2) despite the plaintiffs' request for class-wide back pay and compensatory damages, that back pay could be determined using a formula approach and that the need for individual hearings did not defeat predominance or superiority under Rule 23(b)(3).

WHAT COMES NEXT?

These cases, despite the *City of New York* decision, illustrate that it generally will be more difficult for plaintiffs to obtain class certification post-*Dukes*. District courts will now be required to scrutinize closely all alleged common questions of law and fact to determine if the proposed common questions generate common answers that are apt to drive the resolution of the litigation. Variations in whether class members suffered injury will be susceptible to challenge. It will not be sufficient for plaintiffs to allege a "general policy" without proving the existence of the policy and its impact on each class member.

Courts are also more likely to hear at the class certification stage *Daubert* challenges to expert testimony. Plaintiffs will be required to actually show commonality rather than merely assert commonality via their lawyers or experts. Even where some level of commonality is shown, plaintiffs in damages cases will also need to meet Rule 23(b)(3)'s predominance and other standards. They will not be permitted to use a formulaic approach to calculating damages if that approach precludes defendants from addressing individual variations in each class member's claim.

As demonstrated in *MacGregor*, *Dukes* will benefit retailers and other businesses that delegate authority to the local level. The *Dukes* court observed that Wal-Mart's relevant employment decisions were decentralized and made in local stores. The court found this decision-making structure to be the opposite of a common practice justifying a class action. Retail and other similar companies frequently operate in this manner with respect to employment and many other decisions. These companies will be able to argue that nationwide class actions are inappropriate for businesses whose relevant decisions are made at the local level.

The court ruled unanimously that individualized claims for monetary damages cannot be certified under Rule 23(b)(2) and instead must be certified, if at all, under the more onerous requirements of Rule 23(b)(3).

In response to *Dukes*, plaintiffs' attorneys will likely modify the types of cases they bring and their characterization of the common questions asserted in those cases. In several pending cases, plaintiffs' attorneys are arguing that they need additional discovery to meet their Rule 23 burdens. They are also arguing that *Dukes* is limited to its facts and that its size renders it unlike any other class action.

Going forward, plaintiffs' attorneys may file smaller class actions focused on specific job groups and/or locations. These smaller class cases may be brought under state laws in state courts to avoid some of *Dukes*' impact. Plaintiffs may also bring more tailored challenges targeting specific aspects of employers' personnel policies (including those that require discretionary decision making and apply to a broad range of employees). Employers likely will face more multi-plaintiff cases that attempt to consolidate various individual discrimination claims, including pattern-or-practice claims. In short, plaintiffs' attorneys will test various avenues to obtain the most expansive classes possible under the new standards.

Dukes likely will lead to an increase in Equal Pay Act claims. While the standard for certification in Equal Pay Act cases is demanding, plaintiffs' counsel may view it as a favorable alternative to proceeding under Rule 23 in light of *Dukes*. Moreover, while plaintiffs' lawyers are not likely to entirely abandon subjectivity- and stereotyping-

based theories, they may pursue more class actions focused on objective personnel policies, such as employment tests. The U.S. Equal Employment Opportunity Commission has been aggressively investigating such cases for several years as part of its focus on screening procedures and claims of systemic discrimination.

Finally, calls for government action have already begun. The EEOC is reviewing the *Dukes* decision and determining whether it warrants any changes in its Title VII enforcement strategies. The agency, which is not bound by Rule 23, could respond by more aggressively filing representative actions, potentially in partnership with intervening private class counsel.

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In addition, civil rights groups have already started calling for congressional action, including a renewed push for passage of the Paycheck Fairness Act. While the current Congress is unlikely to move forward with such legislation, as occurred with the Lilly Ledbetter Fair Pay Act, future political changes to the congressional makeup could result in legislation designed to limit some of the employer-friendly aspects of *Dukes*.

The *Dukes* decision alters the class-action landscape in significant ways. It raises the bar for plaintiffs seeking class certification and, accordingly, constitutes a win for employers, who had faced the prospect of defending broad class claims attacking the individualized decision making of local managers based upon vaguely identified, allegedly discretionary policies. Plaintiffs' attorneys now face much greater obstacles when pursuing class actions and likely will be more diligent in researching and selecting cases. They will certainly test the boundaries of *Dukes*, potentially seeking narrower classes or attempting to narrowly frame *Dukes*' precedential effect.

Employers, in order to defend against these new actions and to most efficiently manage their businesses, should continue to develop employment practices and policies that reflect best practices, monitor those practices and policies to ensure compliance with EEO policies, and analyze the impact of such practices and policies for equity and consistency with diversity policies and goals.

NOTES

1 131 S. Ct. 2541 (2011).
2 *Id.* at 2551.
3 *Id.* at 2558.
4 *Id.* at 2551.
5 *Id.*
6 509 U.S. 579 (1993).
7 *Dukes*, 131 S. Ct. at 2551.
8 *Id.*
9 *Id.*
10 *Id.* at 2553.
11 *Id.*
12 *Id.* at 2555.
13 *Id.* at 2559-60.
14 151 F.3d 402 (5th Cir. 1998).
15 *Dukes*, 131 S. Ct. at 2560.
16 *Id.* at 2561.
17 *Id.*
18 Nos. 074-2050 SC, 07-4012 SC, 2011 WL 2682967 (N.D. Cal. July 8, 2011).

[19] *Id.* at *5.

[20] *Id.*

[21] Civil No. 2:10-CV-03088, 2011 WL 2981466 (D.S.C. July 22, 2011).

[22] *Id.* at *4.

[23] Civil Action No. 08-2509, 2011 WL 4018028 (E.D. Pa. Sept. 8, 2011).

[24] *Cruz*, 2011 WL 2682967, at *6.

[25] No. 10cv1373 DMS (BLM), 2011 WL 3047677(S.D. Cal. July 25, 2011).

[26] --- F.R.D. ----, No. 07-CV-2067 (NGG)(RLM), 2011 WL 2680474 (E.D.N.Y. July 8, 2011).

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