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WAL-MART v. DUKES:
CLASS ACTIONS UNDER SCRUTINY

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Wal-Mart v. Dukes: Clarification Of Rule 23 Standards

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In *Wal-Mart Stores Inc. v. Dukes et al.,*[1] the U.S. Supreme Court reversed the 6-to-5 *en banc* decision of the U.S. Court of Appeals for the 9th Circuit[2] that had affirmed an order certifying the largest employment discrimination class in history. As a result, the Supreme Court has provided clarification of Rule 23 standards that will impact the litigation of class actions nationwide.

THE SUPREME COURT'S DECISION

The Supreme Court's opinion addresses two primary questions:

- whether plaintiffs established commonality under Federal Rule of Civil Procedure 23(a)(2); and
- whether plaintiffs' claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances.

The court unanimously determined that the class certification order should not have been granted under Rule 23(b)(2). A majority opinion of 5 to 4 ruled that the plaintiffs also failed to satisfy the "common question" requirement of Rule 23(a)(2).

The dissent criticized this aspect of the majority opinion for "disqualif[ying] the class at the starting gate, holding that the plaintiffs cannot cross the 'commonality' line set by Rule 23(a)(2)," and maintained that "[a] putative class of this type may be certifiable under Rule 23(b)(3)."[3]

The Certification of the Plaintiff Class Was Inconsistent With Rule 23(a)

The opinion first addresses whether the plaintiffs adequately demonstrated a common policy of discrimination under Rule 23(a). The Supreme Court framed the issue as whether a "common contention" is "capable of class-wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke."[4] The court acknowledged that there were two ways plaintiffs' lawyers could prove such a policy:

- if employer used a "biased testing procedure"; or
- a showing of "significant proof" that an employer "operated under a general policy of discrimination."[5]

The plaintiffs' theory in *Dukes* did not rely on a biased testing procedure. Instead, the plaintiffs argued that the common "policy" at Wal-Mart consisted of two elements: an alleged common corporate culture that embodied sexual stereotypes, coupled with a policy that gave local managers unfettered discretion in making personnel decisions.

However, the Supreme Court found that a general policy of discrimination was "entirely absent," recognizing that Wal-Mart's announced policies forbade sex discrimination and imposed penalties for denials of equal opportunity.[6] *Dukes* fur-

ther recognized that the only corporate policy alleged in the case was one allowing discretion by local supervisors in pay and promotion decisions, which, in and of itself, was "a policy against having uniform employment practices."[7]

The court also criticized the opinion of the plaintiffs' expert and rejected the plaintiffs' anecdotal evidence of discrimination. The plaintiffs relied on the testimony of a sociologist, William Bielby, who conducted a "social framework analysis" of Wal-Mart's corporate culture and concluded that the discretion in personnel decisions caused the company's management personnel to be "vulnerable" to gender discrimination. However, the court determined that his testimony did "nothing" to advance the case because he could not calculate "whether 0.5 percent or 95 percent of the employment decisions ... might be determined by stereotyped thinking."[8]

The plaintiffs also relied on statistical evidence about pay and promotion disparities between men and women at the company. However, the court deemed the statistical evidence insufficient because "even if [the expert studies] are taken at face value, these studies are insufficient to establish" plaintiffs' theory of discrimination on a class-wide basis. The court noted that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[9]

Finally, the court dispatched the plaintiffs' anecdotal proof — 120 affidavits, representing only one of every 12,500 class members and relating to some 235 stores out of the 3,400 stores at issue — as insufficient to show a general policy of discrimination."[10]

Plaintiffs' Back Pay Claims Were Improperly Certified Under Rule 23(b)(2)

The Supreme Court's ruling also addressed the split in the federal circuits relative to the standard for determining whether plaintiffs can seek monetary relief in a class action certified under Rule 23(b)(2). The Supreme Court concluded that the plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2) and that claims for monetary relief may not be certified under Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."[11]

The court determined that Rule 23(b)(2) certification is unavailable when "each class member would be entitled to an individualized award of monetary damages."[12] Instead, such claims "belong in Rule 23(b)(3)."[13]

If plaintiffs turn to more-friendly state jurisdictions, there will be more attempts by employers to remove class actions to federal courts under the Class Action Fairness Act.

CLASS-ACTION LITIGATION IN THE WAKE OF THE *DUKES* RULING

The Supreme Court's decision in *Dukes* provides clarity on numerous key issues relevant to the litigation of class actions. As a result, the Supreme Court's ruling repositions the litigation playing field, and provides a road map for the prosecution and defense of class claims.

Smaller Cases Will Be Pursued In Greater Quantity

It is clear that the *Dukes* decision requires plaintiffs to establish by significant proof that an employer operated under a "general policy" of conduct applicable to the proposed class as a whole. Plaintiffs must find a common answer to the question "why was I disfavored."

In doing so, plaintiffs likely will be forced to allege narrower class definitions. Lawsuits may be confined to a particular division, category of employee, or collective bargaining

unit as appropriate depending on the scope of the practices at issue. They may also be focused on smaller and mid-sized employers to allow plaintiffs to compile more robust anecdotal evidence, which was found insufficient in *Dukes*.

Merits-Based Inquiries Will Overlap With Class-Certification Elements

In *Dukes*, the Supreme Court observed that the commonality issue overlapped with the merits issue that the employer engaged in a pattern or practice of discrimination, and said an inquiry into the merits in this respect is entirely permissible. For this reason, the court determined that its previous decision in *Eisen v. Carlisle & Jacquelin*,[14] had been "mistakenly cited to the contrary."[15]

Eisen stated that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[16] In essence, the Supreme Court has now cast aside and repudiated this reading of *Eisen*. The court's decision in *Dukes* confirms that a district court should consider and resolve any issues of fact that are necessary to determine whether one or more elements of Rule 23 are satisfied, regardless of whether those issues may overlap or be identical to one or more issues to be decided in ruling on the merits of the plaintiff's claims.

Standards for the Admission Of Expert Testimony

The Supreme Court's ruling in *Dukes* did not decide whether the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals Inc.*[17] for admission of expert testimony has the same application for testimony offered at the class-certification stage as it does

Federal Rule of Civil Procedure 23 prerequisites for certification

Rule 23(a)

- The class is so numerous that joinder of all members is impracticable.
- There are questions of law or fact common to the class.
- The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- The representative parties will fairly and adequately protect the interests of the class.

Plus at least one of these three:

Rule 23(b)

- Individual actions would risk inconsistent rulings.
- Injunctive relief is appropriate for the whole class because the opposing party has refused to act.
- Questions of law or fact common to class members predominate over questions affecting individual members.

for testimony offered at trial. However, the court all but recognized that it may be applicable.[18]

While the language on this issue can be categorized as dicta, district courts may view the *Dukes* decision as requiring a *Daubert* analysis to consider the reliability and helpfulness of expert witness opinions at the class certification phase, and the ruling is likely to strengthen the district court's gatekeeping function relative to experts. Because it is likely no longer sufficient for a plaintiff to present expert testimony and then argue that the district court may find that testimony reliable at some later point in the proceedings, plaintiffs' counsel will likely submit more robust expert evidence earlier in litigation, ensuring that the evidence is not overreaching or unreliable.

"Trial by Formula" Is Inapplicable To Certain Class Actions

The Supreme Court's opinion also rejected the plaintiffs' argument that extrapolation techniques could be used to decide class-wide issues. In accepting the plaintiffs' argument, the 9th Circuit had relied on *Hilao v. Estate of Marcos*,[19] a 2-1 panel decision that addressed the highly unusual circumstance of how to try the case of multiple Philippine nationals who alleged "torture, summary execution and 'disappearance' committed by the Philippine military and paramilitary forces under the command of Ferdinand E. Marcos during his nearly 14-year rule of the Philippines."

In *Hilao*, a small percentage of claims were randomly selected by an expert statistician and then evaluated by a special master, who made recommendations as to which of those claims were valid. Those findings were then extrapolated to the class by multiplying the percentage of valid claims by the average recommended award from the sample.

This extrapolation theory has become an innovative tool often cited by plaintiffs' lawyers to determine class-wide issues to avoid trying a number of individual cases. Given the Supreme Court rejection of the "trial by formula" theory, its use in future actions, if at all, is likely to be limited to computing damages.

Rule 23(b)(3) Certification and Hybrid Actions May Become the Focus

Dukes involved an "injunctive relief" class certified under Rule 23(b)(2), and not a "predominant common issues" class under Rule 23(b)(3), and the dissent specifically noted that certification may have been possible under Rule 23(b)(3).

Because the Supreme Court did not address either Rule 23(b)(3)'s requirement that issues common to the class predominate over issues unique to individual class members' claims, or its requirement that class treatment be superior to other methods for fairly and efficiently resolving the controversy, *Dukes* may be distinguishable in other cases relying on Rule 23(b)(3).

It may also be distinguishable from cases in which plaintiffs seek "hybrid" certification of Rule 23(b)(2) and Rule 23(b)(3) classes in a single proceeding, a theory that the 9th Circuit recognized was "worth consideration."[20]

Further, although the majority opinion was careful not to exclude all monetary claims from Rule 23(b)(2) classes, it also made it clear that they will be the exception, not the rule. As a practical matter, plaintiffs pursuing relief under Rule 23(b)(3) will limit

claims for monetary relief and characterize any such request as truly "incidental" to injunctive relief.

State Court Actions May Provide More-Liberal Class-Action Procedures

Plaintiffs may also pursue more class actions in state courts in an effort to certify class actions under more-lenient standards than those clarified by *Dukes*. For example, in California, while state courts look to Rule 23 in deciding certain issues, the law is somewhat more hospitable for plaintiffs in class actions. California courts "view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious."[21]

It is therefore unclear whether California courts will follow *Dukes* in allowing overlap of certification and merits inquiries prior to certification and, if they do, to what extent they will allow the inquiry. Limiting inquiry into issues involving both merits and certification issues could have the effect of allowing plaintiffs to certify class actions more easily. California also has a public policy that encourages the use of the class-action device.[22] Federal law carries no similar imprimatur for the class action.

If plaintiffs turn to more-friendly state jurisdictions in an effort to certify complex discrimination actions, there will be increased attempts by employers to remove class actions filed in state courts to federal courts pursuant to the Class Action Fairness Act of 2005. Removal of state law claims to federal court would force plaintiffs to litigate under Rule 23 for purposes of class certification.

The Role of Administrative Agencies May Expand

Employers can expect that the *Dukes* decision will further invigorate already motivated government agencies, such as the U.S. Equal Employment Opportunity Commission, to investigate and pursue systemic discrimination claims. One way the EEOC may bring claims on behalf of classes of employees is through a pattern or practice lawsuit under Section 707 of Title VII. However, the EEOC does not have to satisfy Rule 23 requirements in a pattern-or-practice lawsuit because it is not acting as representative of class, but rather is suing in its own name to redress a discriminatory practice.[23]

Likewise, so long as one employee has filed an administrative charge of discrimination, the EEOC may pursue relief on behalf of other similarly-situated workers.[24] Finally, Title VII grants "[t]he person or persons aggrieved" by charged discrimination an unconditional right to intervene in a suit brought by the EEOC.[25] For this reason, and in light of the *Dukes* clarification of the Rule 23 standards, it may be advantageous for private plaintiffs' counsel to co-venture with the EEOC by intervening in an EEOC pattern-or-practice lawsuit.

Broader Implications of Dukes *Beyond Title VII Claims*

In federal court, state-law-based wage-and-hour class claims are also litigated under Rule 23. Even when litigated in state court, the class-action rule applied there is often similar if not identical to Rule 23. Even in states that have a different procedure for class certification, state courts still look to federal procedural rules in applying their Rule 23 equivalent.[26]

As a result, *Dukes* is apt to have a broader application beyond Title VII claims. Indeed, the U.S. District Court for the Eastern District of Louisiana, relying on *Dukes*, recently

denied certification of an action seeking additional wages that the defendant allegedly failed to pay the plaintiffs in breach of the employment agreements that each plaintiff signed.[27]

Even in actions in which Rule 23 does not apply, *Dukes* will provide guidance to courts in deciding whether class claims should proceed. For example, a South Carolina federal judge, while recognizing that collective actions under the Fair Labor Standards Act are not subject to the same provisions as those associated under Rule 23, nonetheless considered the *Dukes* decision illuminating and helpful in determining that a company's lack of uniform practices required by supervisors made the case extremely individualized.[28]

Another federal court, in an FLSA action in Wisconsin, referred to *Dukes'* implications that a company-wide policy giving discretion to local managers or program directors is not a policy capable of evaluation on a class-wide basis.[29]

In addition, a Michigan state court, in denying certification of a toxic-tort case, reasoned that despite the fact that *Dukes* involved Rule 23, it nonetheless "has far-reaching implications for certification of class action lawsuits."[30]

NOTES

1 131 S. Ct. 2541 (2011).

2 603 F.3d 571 (9th Cir. 2010.

3 131 S. Ct. at 2556.

4 *Id*. at 2545.

5 *Id*. at 2553.

6 *Id*.

7 *Id*. at 2554.

8 *Id*. at 2553.

9 *Id*. at 2556.

10 *Id*.

11 *Id*. at 2557.

12 *Id*.

13 *Id*. at 2558.

14 417 U.S. 156, 177 (1974).

15 131 S. Ct. at 2552 n.6.

16 417 U.S. at 177.

17 509 U.S. 579 (1993).

18 131 S. Ct. at 2553-54 ("[t]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so.").

19 103 F.3d 767, 771 (9th Cir. 1996).

20 *See Dukes*, 603 F.3d 571.

21 *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000).

22 *Sav-On Drug Stores v. Superior Court*, 34 Cal. 4th 319, 339-40 (2004).

23 *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

24 *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

25 *See* 42 U.S.C. § 2000e-5(f)(1).

26 *See, e.g., Hypertouch Inc. v. Sup. Ct. (Perry Johnson Inc.)*, 128 Cal. App. 4th 1527, 1544 (2005) (in the absence of controlling state authority, California courts look for guidance to the federal rule).

[27] *Altier v. Worley Catastrophe Response LLC*, 2011 WL 3205229 (E.D. La. July 26, 2011).

[28] *MacGregor v. Farmers Insurance Exchange*, 2011 WL 2981466 (D.S.C. July 22, 2011).

[29] *Ruiz v. Serco, Inc.*, No. 3:10-cv-00394 (W.D. Wis. Aug. 5, 2011).

[30] *Henry v. Dow Chemical Co.*, No. 03-47775 (Saginaw County, Mich.).

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