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The U.S. Supreme Court's highly anticipated June 20 ruling in *Wal-Mart Stores Inc. v. Dukes* has forever changed the landscape of workplace class actions and ''makes class certification more difficult to obtain,'' say attorneys Gerald L. Maatman Jr. and Laura Maechtlen in this BNA Insight.

As a result of the ruling, plaintiffs are more likely to allege narrower class definitions, while federal judges will demand more evidence of commonality, and wade farther into the merits at the class certification stage, the authors say. The article also discuss the broader implications of *Dukes* for employers that want to avoid class action litigation, and for litigators of workplace class actions.

Wal-Mart Stores v. Dukes: U.S. Supreme Court's Clarification Of Rule 23 Standards Means a Win for Employers Facing Class Actions

By Gerald L. Maatman Jr.
and Laura Maechtlen

In its long awaited ruling in *Wal-Mart Stores Inc. v. Dukes*, No. 10-277, 2011 U.S. LEXIS 4567 (U.S. June 20, 2011), the U.S. Supreme Court reversed the 6-to-5 *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit[1] that had affirmed an order certifying the largest employment discrimination class in history. As a result, the landscape of workplace class actions will never be the same again.

The Supreme Court's opinion addresses two primary questions certified for review: (1) whether plaintiffs established commonality under Rule 23(a)(2); and (2) whether plaintiffs' claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances. The Supreme Court unanimously determined that the class certification order should not have been granted under Rule 23(b)(2). Further, a majority

[1] 603 F.3d 571 (9th Cir. 2010).

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opinion authored by Justice Scalia—and joined by Chief Justice Roberts, Kennedy, Thomas, and Alito—ruled that the plaintiffs also failed to satisfy the ''common question'' requirement of Rule 23(a)(2). Justice Ginsburg's dissent—joined by Justices Breyer, Sotomayor, and Kagan—criticizes the majority for ''disqualif[ying] the class at the starting gate, holding that the plaintiffs cannot cross the 'commonality' line set by Rule 23(a)(2).''[2] Justice Ginsburg maintains that ''[a] putative class of this type may be certifiable under Rule 23(b)(3).''[3]

These rulings are exceedingly significant to employers for their defense of complex employment discrimination litigation and structuring of human resources best practices. This article analyzes these issues.

The Supreme Court's Decision

A. Certification of Plaintiff Class Inconsistent With Rule 23(a)

The opinion first addresses whether plaintiffs adequately demonstrated a common policy of discrimination under Rule 23(a).[4] The Supreme Court opined that ''the crux of this case is commonality.''[5] Plaintiffs' theory—endorsed below by the District Court and the slim majority of the Ninth Circuit—is that the common ''policy'' consisted of two elements: an alleged common corporate culture that allegedly embodies sexual stereotypes, coupled with a policy that gave local managers unfettered discretion in making personnel decisions. The Supreme Court framed the issue as whether ''that common contention'' is ''capable of classwide 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.''[6] The Supreme Court concluded that based on the reasons for the employment decisions at issue, ''it would be impossible to say that examination of all the class members' claims for relief will produce a common answer to the critical question'' at issue in the lawsuit.[7]

Citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158 (1982), the Supreme Court acknowledged that there were two ways an employer could prove such a policy: (1) if an employer used a ''biased testing procedure''; or (2) a showing of ''significant proof that an employer operated under a general policy of discrimination.''[8] Concluding that the first factor had no application in the case at hand, it found that a general policy of discrimination ''is entirely absent here.''[9] Instead, it recognized that Wal-Mart's announced policies forbade sex discrimination and imposed penalties for denials for equal opportunity.

The Supreme Court also criticized plaintiffs' expert showing—based on the testimony of Dr. William Bielby, which the majority viewed with extreme skepticism—and concluded that the testimony demonstrated no linkage between sexual-bias stereotyping and employment decisions that adversely affected the class members. The Supreme Court opined that Dr. Bielby's testimony fell far short of ''significant proof'' that the company operated under a general policy of discrimination.[10] Notably, the Supreme Court indicated that Dr. Bielby's testimony must pass muster under the *Daubert* standard for the admission of expert testimony, but found that question unnecessary to reach.[11]

The Supreme Court reasoned that the only evidence of a corporate policy that plaintiffs showed was Wal-Mart's policy of allowing discretion by local supervisors over employment decisions, which, in and of itself, was insufficient to raise an inference of discrimination; instead, this evidence was ''just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against* having uniform employment practices.''[12]

Accordingly, the plaintiffs' presentation fell short of the requisite proof necessary for Rule 23(a)(2), because showing the invalidity of one manager's use of discretion ''will do nothing to demonstrate the invalidity of another's'' such that all class members' claims will ''depend on the answers to common questions.''[13] The Supreme Court also addressed plaintiffs' statistical proof (from Drs. Richard Drogin and Marc Bendick), concluding that ''even if [the expert studies] are taken at face value, these studies are insufficient to establish'' plaintiffs' theory of discrimination on a classwide basis noting, ''[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.''[14] The Supreme Court also dispatched plaintiffs' anecdotal proof—120 affidavits, representing about 1 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.[15]

For these reasons, the Supreme Court held that plaintiffs failed to demonstrate the existence of any common questions sufficient for class certification under Rule 23(a)(2).

B. Plaintiffs' Backpay Claims 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).[16] The Su-

[2] 2011 U.S. LEXIS 4567, at *52.
[3] *Id.* at *51.
[4] Rule 23, subdivision (a), states that a district court may certify a class if four factors are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
[5] 2011 U.S. LEXIS 4567, at *18.
[6] *Id.* at *20.
[7] *Id.* at *24.
[8] *Id.* at *25-26.
[9] *Id.* at *26.
[10] *Id.* at *28.
[11] *Id.* at *27-28.
[12] *Id.* at *29.
[13] *Id.* at *30.
[14] *Id.* at *34.
[15] *Id.* at *34-35.
[16] Rule 23, subdivision (b), requires that, in addition to Rule 23(a) factors, at least one of three conditions must be satisfied: (1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to class members predominate over questions affecting only individual members, and a class action is superior to other available

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preme Court concluded that 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.''[17] This was a question the Supreme Court previously raised but did not decide in *Ticor Tile Insurance v. Brown*, 511 U.S. 117 (1994).

The Supreme Court determined that Rule 23(b)(2) certification is unavailable when ''each class member would be entitled to an individualized award of monetary damages.''[18] Instead, such claims ''belong in Rule 23(b)(3).''[19] The practical effect of this ruling is that plaintiffs now have a much more substantial showing to make, for Rule 23(b)(3) requires plaintiffs to demonstrate predominance and superiority, and provides class members with the right to mandatory notice and the right to opt out.

Finally, the Supreme Court also rejected plaintiffs' theory—and the Ninth Circuit's conclusion below—that back pay could be determined with what it called a ''Trial by Formula.''[20] To cure Wal-Mart's concerns, plaintiffs had advanced a trial plan involving a procedure where a sample of class members would be selected, and statistical modeling could yield a result for the entire classwide recovery without further individual proceedings. The Supreme Court concluded that such a device would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), as a class cannot be certified on the premise that an employer ''will not be entitled to litigate its statutory defenses to individual claims.''[21]

Defense of Class Actions in the Wake of *Dukes*

The Supreme Court's decision in *Dukes* provides clarity for employers regarding several key issues for litigating class actions. As a result of *Dukes*, plaintiffs are more likely to allege narrower class definitions, while federal district court judges will demand more evidence of commonality and wade farther into the merits at the class certification stage. As a result, the Supreme Court's ruling rearranges the litigation playing field, and makes class certification more difficult to obtain.

A. Plaintiffs' Burden to Meet Rule 23 Prerequisites in Complex Discrimination Actions

Some commentators have described the *Dukes* decision as a ''death knell'' for employment discrimination class actions because they believe it expands Plaintiffs' burden to prove commonality.[22] However, a reasoned view of *Dukes* is that it clarifies the standards on which future class actions are to be evaluated in the federal courts, but does so in a way that will impact class actions in the employment context and beyond. For employment discrimination class actions, it is clear that the *Dukes* decision clarifies the standard of proof required for plaintiffs to assert a classwide discrimination claim. Plaintiffs must find a common answer to the question, ''Why was I disfavored.'' In turn, they must establish by significant proof that an employer operated under a general policy of discrimination. It remains to be seen whether plaintiffs' counsel will invest their time and resources in litigating such theories post-*Dukes*.

B. Merits-Based Inquiries Can Overlap With Class Certification Elements

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 stated that an inquiry into the merits in this respect is entirely permissible. For this reason, the Supreme Court determined that its previous decision in *Eisen v. Carlisle & Jacquelin*[23] has been ''mistakenly cited to the contrary.''[24] *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.''[25] In essence, the Supreme Court has now cast aside and repudiated this reading of *Eisen*. The Supreme Court's decision in *Dukes* is consistent with a developing trend in the lower federal courts,[26] as it 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.

C. Viability of 'Social Framework Analysis' Theory

The expert opinion of Dr. Bielby in *Dukes* relied on a method known as ''social framework analysis,'' which looks at distinctive features of an employer's policies and practices and evaluates them against what social science research shows to be factors that create and sustain bias. Social framework analysis has been utilized in many cases, and is a popular method for plaintiffs to try to establish a ''common'' policy or practice under Rule 23.[27] In *Dukes*, the plaintiffs' expert used this method as a basis for his opinion that managerial

methods for the fair and efficient adjudication of the controversy.

[17] 2011 U.S. LEXIS 4567, at *38.

[18] *Id.* at *39.

[19] *Id.* at *42.

[20] *Id.* at *50.

[21] *Id.*

[22] *See, e.g.*, David G. Savage, ''Supreme Court blocks huge class-action suit against Wal-Mart,'' *L.A. Times*, June 21, 2011 (citing Columbia University law professor John Coffee).

[23] 417 U.S. 156, 177 (1974).

[24] 2011 U.S. LEXIS 4567, at *22-23 n.6.

[25] 417 U.S. at 177.

[26] *Brown v. Am. Honda (In Re New Motor Vehicles Canadian Export Antitrust Litig.)*, 522 F.3d 6, 24 (1st Cir. 2008); *Miles v. Merrill Lynch & Co. (In Re Initial Pub. Offerings Securities Litigation)*, 471 F.3d 24, 33-34 (2d Cir. 2006); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 3:12 (6th ed. 2009) (''The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits have expressly adopted certification standards that require rigorous factual review and preliminary factual and legal determinations with respect to the requirements of Rule 23 even if those determinations overlap with the merits.'').

[27] *See, e.g., Velez v. Novartis Pharm Corp.*, No. 04-09194 (S.D.N.Y. Feb 25, 2010) (expert report of Deborah L. Rhode); *Equal Employment Opportunity Commission v. Bloomberg*, 2009 WL 6499190 (S.D.N.Y. Dec 9, 2009) (expert report of Eugene Borgida); *Puffer v. Allstate Ins. Co.*, 2008 WL 2782551 (N.D. Ill. Mar 5, 2008) (report of Dr. Barbara Reskin); *Butler v.*

discretion and inadequate anti-discrimination efforts contributed to disparities between men and women in compensation and career trajectories at the company. Notably, however, the Supreme Court found that Dr. Bielby's opinion failed to state with ''specificity'' how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.[28] Accordingly, because he could not answer this ''essential question,'' the Supreme Court disregarded his opinion in the case.[29]

The Supreme Court's recognition that Dr. Bielby's opinion failed to establish a general policy of discrimination establishes that plaintiffs can no longer rely solely on the social framework method to meet the requirements set forth in Rule 23. The Supreme Court did, however, recognize that subjective decision-making ''can'' support a claim that an employer operated under a general policy of discrimination, noting that ''an employer's undisciplined system of subjective decision-making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.''[30] This means that Plaintiffs must introduce evidence to demonstrate how such bias *actually* impacted the workplace, and not just that it was *vulnerable* to bias.

D. Plaintiff's Expert Presentations Cannot Be Unreliable or Overreaching

The Supreme Court's ruling did not decide whether *Daubert* has the same application for expert testimony offered at the class certification stage as it does for testimony offered at trial. While the language on this issue can be categorized as dicta, defense lawyers are sure to seize upon it to argue the point that it is appropriate for a district court to conduct a *Daubert* analysis to consider the reliability and helpfulness of expert witness opinions at the class certification phase. It is 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; conversely, this suggests that plaintiffs should be limited in their ability to submit unreliable or overreaching expert evidence at the class certification phase. The Supreme Court's analysis on this issue presents a roadblock for plaintiffs in the future. Indeed, a number of courts and commentators embraced this view pre-*Dukes*.[31] In sum, the Supreme Court's ruling is likely to strengthen the gate-keeping function relative to experts, and convince most federal district court judges that a *Daubert* analysis of expert testimony in the class certification process is necessary.

E. 'Trial by Formula' Inapplicable to Certain Class Actions

The Supreme Court's opinion also rejected plaintiffs' argument that extrapolation techniques could be used to decide classwide issues. In accepting plaintiffs' argument, the Ninth Circuit had relied upon *Hilao v. Estate of Marcos*,[32] a 2–1 panel decision, which 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.''[33] 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 classwide 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.[34]

Home Depot Inc., No. 94-4335 (N.D. Cal. Aug. 29, 2007) (report of Dr. Susan Fiske).

[28] 2011 U.S. LEXIS 4567, at *27.

[29] *Id*.

[30] *Id*. at *29-30.

[31] *See, e.g., Cooper v. Southern Co.,* 390 F.3d 746, 752-54 (11th Cir. 2004) (*Eisen* cannot be involved ''to artificially limit a trial court's examination of factors necessary to a reasoned determination of whether a Plaintiff has met her burden of establishing each of the Rule 23 criteria''). *See also* L. Elizabeth Chamblee, Between ''Merit Inquiry'' And ''Rigorous Analysis'': Using *Daubert* to Navigate The Gray Areas Of Federal Class Action Certification, 31 Fla. St. U.L. Rev. 1041, 1090 (2004). This issue continues to divide the courts, and remains a battleground for differing interpretations of Rule 23 procedure. *Compare American Honda Motor Co. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010) (district courts are allowed to ''conclusively rule on the admissibility of an expert opinion prior to class certification . . . [where] that opinion is essential to the certification decision''); *In Re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 323 (3d Cir. 2008) (expert testimony should not be ''uncritically accepted as establishing a Rule 23 requirement''); *In Re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 42 (2d Cir. 2006) (trial court must resolve factual disputes, including conflicting expert testimony, before applying the Rule 23 legal standard); *compare Blades v. Monsanto Co.*, 400 F.3d 562, 569-70 (8th Cir. 2005) (rejecting *Daubert* challenge, but carefully weighing expert opinion testimony). For this reason, *Dukes* will likely play a central role in the continued litigation of this matter.

[32] 103 F.3d 767 (9th Cir. 1996).

[33] *Id.* at 771.

[34] *See, e.g., Cimino v. Raymark Indus. Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (rejecting the plaintiffs' proposed three-step trial plan, the court notes that the *Hilao* opinion failed to address Seventh Amendment concerns, and concluded, ''we find ourselves in agreement with the thrust of the dissenting opinion there''); *Zapata v. IBP, Inc.*, 175 F.R.D. 578, 581 (D. Kan. 1997) (court declines to apply *Hilao*, noting among other matters that in that case ''the defendant had waived questions concerning the propriety of the methodology employed''); *Arch v. The American Tobacco Co*., 175 F.R.D. 469, 493-94 (E.D. Pa. 1997) (court declined to apply *Hilao*, finding that, ''[u]nlike *Hilao*, defendants in this case do not waive any challenge to the computation of damages,'' and further that its application would require the court ''to bifurcate issues in violation of the Seventh Amendment''). Numerous commentators also have criticized *Estate of Marcos* in failing to engage in the thorough analysis required by Rule 23. *See, e.g.,* Margaret G. Perl, Note, Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations, 88 Geo. L.J. 773, 782-87 (2000) (noting that *Hilao* cannot be reconciled with class certification precedent in other mass tort cases); George A., Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities From the Class Action Device*, 33 L. Legis. 181, 185-86 (2007) (criticizing *Hilao* for not engaging in rigorous analysis); *cf. Kpadeh v. Emmanuel*, 261 F.R.D. 687, 691 (S.D. Fla. 2009) (rejecting *Hilao*'s reasoning the court found that even human rights advocates

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F. Rule 23(b)(3) Certification Orders And Hybrid Actions May Be Distinguishable

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). In this respect, 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. On that basis, the *Dukes* decision may be distinguishable in other cases relying on Rule 23(b)(3). It may also be distinguishable from cases where plaintiffs seek certification of Rule 23(b)(2) and Rule 23(b)(3) classes in a single proceeding, a theory that the Ninth Circuit recognized was ''worth consideration.''[35]

G. Monetary Claims Brought Under Rule 23(b)(2) Must Truly Be 'Incidental'

Although Justice Scalia was careful not to exclude all monetary claims from Rule 23(b)(2) classes, he also made it clear that they will be the exception, not the rule. As a practical matter, requiring monetary relief claims to be litigated under Rule 23(b)(3) significantly raises the stakes for class plaintiffs and their counsel.

H. *Dukes* Has Legs Regardless Of Size of Putative Class

Opponents of the decision to certify the class in *Dukes* often presented their arguments as a function of size.[36] Wal-Mart is the largest employer in the United States and the original class was estimated to include 1.6 million women. However, following the Supreme Court's decision, employers should be mindful that class action filings focused on smaller and mid-sized employers may become the focus of the plaintiffs' bar. This is true for several reasons. First, the proof offered by plaintiffs in *Dukes* that was found insufficient was the anecdotal evidence; the Supreme Court determined that the proof failed to assist the plaintiffs in proving a ''general policy'' of discrimination because the 114 declarations submitted by plaintiffs accounted for only 1 of 12,500 class members, and related to only some of 235 out of 3,400 of Wal-Mart's stores. Second, the holding is not limited to issues of size. It clarifies the Rule 23 standards and, as long as plaintiffs meet the ''numerosity'' requirement in Rule 23(a)(1), the opinion's analysis will apply.

who applaud the result in *Hilao* concede that the court ''did not engage in [an] intellectually rigorous analysis of class certification requirements'').

[35] *See Dukes*, 603 F.3d 571.

[36] *Dukes* was not the largest class ever certified. *In Re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 111 (S.D.N.Y. 2010) (certifying class including over 10 million claimants); *Fresco v. Auto Data Direct Inc.*, No. 03-CIV-61063, 2007 WL 2330895, at *2 (S.D. Fla. 2007) (certifying class ''estimated to include more than 200 million individuals'').

Broader Implications of *Dukes*

A. Implications for Employers

Dukes also provides guidance for employers who want to avoid class action litigation.

Employers must be cognizant that, following *Dukes*, decentralizing decisionmaking remains a best practice in conjunction with robust EEO, non-discrimination, and diversity policies. However, employers must be careful in how they establish policies and procedures for discretionary decisionmaking. Decisions that rely on subjectivity should be based on corporate guidance, thereby ensuring decisions are legitimate and non-discriminatory. In addition to discretionary authority, managers charged with decisionmaking should be given guidance and training. Subjective decisions in the workplace should be linked to position and job performance, and employers should have a robust system for employees to assert complaints of any unfair conduct, including an appeals process for decisions to which an employee disagrees. Finally, employers should audit discretionary processes at multiple levels to ensure that there is no adverse impact.

In addition, *Dukes* is not limited to Title VII claims and inevitably will be cited by defendants arguing for its application in other forms of employment-related class action litigation. For example, in federal court, state law 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 like California, that have a different procedure for class certification, state courts still look to federal procedural rules in applying their Rule 23 equivalent.[37] As a result, the Supreme Court's holdings in *Dukes*—strictly applying the rule's commonality requirement, allowing consideration of the merits along with certification issues at least where there is overlap, and restricting back pay damages under Rule 23(b)(2)—will be of substantial help to employers in their defense of wage and hour claims.

B. Implications for Workplace Class Actions

As is typically the case with key pronouncements of the law by the Supreme Court, the ruling in *Dukes* is apt to be applied in many ways and in a myriad of situations.

In 2010, several large nationwide employment discrimination class actions were settled and given final approval by federal district court judges.[38] Since certification of a settlement class requires conformity to the requirements of Rule 23, the *Dukes* ruling may well impact the analysis of federal district court judges in passing upon proposed settlements of workplace class action litigation. It remains to be seen whether a more relaxed interpretation of Rule 23 is employed in a settlement context than in a contested class certification proceeding.

[37] *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).

[38] *See, e.g., Velez v. Novartis Pharmaceuticals Corp.*, 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010) (final approval given to $175 million gender discrimination pay and promotions class action).

Defense counsel are apt to use the *Dukes* ruling in other workplace litigation contexts. Given the ubiquitous nature of wage & hour litigation, defense counsel are likely to argue that the requirement of commonality under Rule 23(a)(2) and ''trial by formula'' concepts from *Dukes* are relevant to collective action certification under 29 U.S.C. § 216(b).

Finally, employers are likely mistaken if they take solace in the *Dukes* ruling as eliminating the threat of workplace class action litigation. The plaintiffs' class action bar is surely not going away without a fight, and are focused on ''re-booting'' theories and strategies to prosecute aggregate claims of employment discrimination. Plaintiffs certainly have the option of bringing multiple individual suits, multi-plaintiff suits, or smaller, more cohesive class actions focused on an employer's individual locations or regional operations.

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