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Wal-Mart Stores, Inc. v. Dukes:

The Supreme Court Reins In Expansive Class Actions

The United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[1] represents a significant milestone in class action jurisprudence, one that infuses the requirements for class certification under the Federal Rules of Civil Procedure with added strength. The Court put rigor into the "commonality" requirement of Rule 23(a), requiring the presence of at least one question that "will resolve an issue that is central to the validity of each one of the claims [in the matter] in one stroke."[2] In addition, the Court limited the types of ancillary claims that can accompany certification of a Rule 23(b)(2) injunctive class, including claims for money damages requiring individualized determinations. In short, the Court signaled its aversion to the certification of expansive class actions, and the decision should rein in class certification analysis performed under Rule 23.

Background: Plaintiffs' Claims

The named plaintiffs in *Dukes*, current or former female employees of defendant Wal-Mart Stores, Inc. ("Wal-Mart"), alleged that Wal-Mart had discriminated against them on the basis of their sex.[3] Specifically, the plaintiffs asserted that Wal-Mart violated Title VII of the Civil Rights Act of 1964[4] by denying them equal pay and management-level promotions in favor of male co-workers.[5] The named plaintiffs sought to represent a class of *all* female Wal-Mart employees, approximately 1.5 million persons over a 13-year time period.[6]

The plaintiffs' claims were not premised on any express corporate policy but on allegations that Wal-Mart's local managers exercised discretion in making hiring and pay decisions disproportionately in favor of male employees, causing an "unlawful disparate impact on female employees."[7] The plaintiffs sought injunctive and declaratory relief to prohibit Wal-Mart's allegedly discriminatory practices and also sought punitive damages and backpay for each putative class member.[8]

The Lower Court Decisions: Certification of "[O]ne of the [M]ost [E]xpansive [C]lass [A]ctions [E]ver"[9]

The Supreme Court reviewed the decisions of the United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit, each of which had approved certification of what the Supreme Court described as "one of the most expansive class actions ever."[10] The District Court certified a Rule 23(b)(2) class defined as "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."[11] In certifying the class, the District Court determined that common issues of law or fact existed such that certification was warranted based upon three sources of evidence: (1) "statistical evidence about pay promotion disparities between men and women at the company;" (2) "anecdotal reports of

discrimination from about 120 of Wal-Mart's female employees;" and (3) "the testimony of a sociologist . . . who conducted a 'social framework analysis' of Wal-Mart's 'culture' and personnel practices, and concluded that the company was 'vulnerable' to gender discrimination."[12]

On appeal, the Ninth Circuit, sitting *en banc*, affirmed the District Court's broad certification order.[13] The Ninth Circuit found that (1) a common question existed as to whether "Wal-Mart's female employees nationwide were subject to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them,"[14] (2) the plaintiffs' monetary claims for backpay were appropriate for certification under Rule 23(b)(2) because the monetary claims did not predominate over the plaintiffs' claims for injunctive and declaratory relief, and (3) the plaintiffs' claims could be tried as a class action through the use of randomly chosen "sample cases" picked from the approximately 1.5 million class members' claims.[15]

The Supreme Court Decision: Putting Rigor into Rule 23

The Supreme Court reversed the certification order approved by the District Court and Ninth Circuit. In a 5-4 split, the Court held that the class at issue failed to satisfy the commonality requirement of Rule 23(a).[16] The Court unanimously found that the plaintiffs' claims for backpay, which sought individualized monetary relief, were not certifiable under the provisions of Rule 23(b)(2).

1. The Supreme Court Clarifies the Commonality Prong of Fed. R. Civ. P. 23(a)

The "commonality" requirement, set forth in Rule 23(a)(2), requires a party seeking class certification to demonstrate that the claims at issue contain "questions of law or fact common to the class."[17] The Court acknowledged the well-established principle that a party may establish commonality by proving the existence of a single common question shared by the members of the putative class.[18] The Court, however, rejected lower courts' treatment of the requirement as imposing "minimal" burdens on a plaintiff.[19] To the contrary, the Court ruled that commonality imposes a rigorous test on a party seeking certification.

In particular, the Court held that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury,"[20] and that their claims "depend upon a common contention" "capable of classwide resolution."[21] A common issue is "capable of classwide resolution" where the determination of that issue will resolve a matter that is central to the validity of all of the putative class members' claims.[22] Moreover, a party seeking certification must provide "significant proof" that a common question exists.[23]

In the context of the Title VII discrimination claims at issue in *Dukes*, the Court held that the commonality prong of Rule 23(a) required the plaintiffs to demonstrate that Wal-Mart "operated under a general policy of discrimination."[24] The Court rejected the plaintiffs' expert, statistical, and anecdotal evidence as inadequate to meet their burden of establishing commonality.[25] The Court found that the plaintiffs' purported expert's generalized conclusions regarding Wal-Mart's "corporate culture" and its "vulnerability" to gender discrimination had no bearing on the certification analysis because the expert was unable to testify as to whether gender stereotypes actually played a role in employment decisions at Wal-Mart.[26] The Court similarly rejected the plaintiffs' reliance on statistical evidence, and anecdotes proffered by individual class members, as "insufficient to establish that [the plaintiffs'] theory can be proved on a classwide basis."[27] According to the Court, none of the evidence proffered by the plaintiffs identified, never mind proved the existence of, a "specific employment practice" that tied all of the 1.5 million putative class members' claims together such that

the determination of the lawfulness of that practice would necessarily resolve each and every class member's claim.[28]

2. Certification Under Rule 23(b)(2): Monetary Claims Are Rarely, If Ever, Welcome

Rule 23(b)(2) permits certification of a class where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[29] In *Dukes*, the plaintiffs sought certification of a Rule 23(b)(2) class, but made claims for backpay for each putative class member as well as for injunctive and declaratory relief. While the Court noted that the language of Rule 23(b)(2) could be read to prohibit class certification of any claims seeking monetary relief of whatever nature, the Court did not reach that question,[30] and recognized that lower courts have allowed claims seeking monetary relief to be certified under Rule 23(b)(2) where the monetary relief is "'incidental to [the] requested injunctive or declaratory relief.'"[31] The Court, nevertheless, did construe Rule 23(b)(2), ruling that even under the more forgiving "incidental to" analysis, the plaintiffs' backpay claims were not incidental to the injunctive relief sought by plaintiffs and were thus inappropriate for class treatment under Rule 23(b)(2).[32]

The Court found that Rule 23(b)(2) does not apply to claims for *individualized* relief.[33] This is true, the Court explained, whether such individualized relief is injunctive or monetary in nature.[34] Instead, Rule 23(b)(2) is intended to apply only to claims through which "a single injunction or declaratory judgment would provide relief to each member of the class."[35] As such, claims seeking individualized awards of monetary damages for each class member (as well as claims seeking individualized injunctive relief) are inherently unsuited for Rule 23(b)(2) certification.[36] The hallmark of a Rule 23(b)(2) class is "the notion that the conduct [at issue] is such that it can be enjoined or declared unlawful only as to all of the class members or as to none at all."[37] Where individualized relief is necessary, such claims fall outside the boundaries of Rule 23(b)(2).

In examining the structure of Rule 23(b),[38] the Court concluded that claims seeking individualized monetary relief "belong in Rule 23(b)(3)" and not in Rule 23(b)(2).[39] As the Court reasoned, "[t]he procedural protections attending the (b)(3) class – predominance, superiority, mandatory notice, and the right to opt out – are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*."[40] Indeed, the Court held that predominance and superiority are already inherent in cases suitable for Rule 23(b)(2) certification – that is, classes seeking "indivisible" injunctive relief that will benefit all class members.[41] In such classes, the Court explained that notice and opt-out rights are unnecessary to preserve the due process rights of absent Rule 23(b)(2) class members because they are either entitled to the common relief or none at all.[42] To the contrary, the procedural protections found in Rule 23(b)(3) "underscore[] the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone – a choice Rule 23(b)(2) does not ensure that they have."[43] On this basis, the Court rejected the plaintiffs' argument that certification under Rule 23(b)(2) was appropriate because the backpay claims did not "predominate" over their claims for injunctive relief.[44]

Finally, the Court held that individualized claims for monetary relief cannot be tried on a classwide basis under Rule 23(b)(2).[45] Indeed, the Court found that the protection of a *defendant's* due process rights necessarily precludes the "trial by sample set" procedure adopted by the Ninth Circuit.[46] That is so because such a trial method would have precluded Wal-Mart from presenting all of its potential defenses to each individual class member's claim to an entitlement for backpay.[47] In sum, the Court's

decision indicates that few, if any, claims for monetary relief will satisfy its interpretation of Rule 23(b)(2).

3. Potential Effect on "Disparate Impact" Theories

In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), the Court had held that challenges to the results of discretionary decision-making, similar to the *Dukes* situation, could be challenged under a disparate impact legal theory. Yet, in *Dukes*, the Court noted that *Watson* was to be applicable only "in appropriate cases" and "the recognition that this type of Title VII claim 'can' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common."[48] The Court's treatment of *Watson* certainly suggests a limitation of the types of situations in which the Court will allow disparate impact theories to proceed, including not only in Title VII actions but also in other areas where disparate impact theories have applied, such as fair lending actions.[49]

Conclusion

The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* places a check on matters seeking to certify expansive putative classes. While the full impact of the Dukes decision will only become known after application by the lower courts, the message from the Supreme Court is clear. First, the commonality requirement set forth in Rule 23(a)(2) is no mere formality and mandates the demonstration of the existence of common issues that are central to the putative class claims as well as capable of classwide resolution. Second, Rule 23(b)(2) is not a vehicle for certification of claims seeking individualized monetary relief, but rather, those types of claims must be brought, if at all, pursuant to Rule 23(b)(3). Third, a trial of a sampling of individual claims cannot vindicate a defendant's due process rights and thus cannot be employed as a means to certify an otherwise unmanageable and expansive class.

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[1] *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, --- U.S. ---, --- S. Ct. ---, 2011 WL 2437013 (U.S. June 20, 2011).

[2] *See id.* at *7.

[3] *See id.* at *4.

[4] *See* 42 U.S.C. § 2000e-1, *et seq.*

[5] *Dukes*, 2011 WL 2437013, at *4.

[6] *See id.*

[7] *Id.*

[8] *See id.*

[9] *Id.* at *3.

[10] *Id.*

[11] *Id.* at *5 (internal quotation marks omitted).

[12] *Id.* Wal-Mart unsuccessfully moved to strike much of the plaintiffs' evidence, offered its own statistical evidence to defeat commonality and the other requirements of Rule 23(a), and argued that the plaintiffs' monetary claims for backpay were inappropriate for certification under Rule 23(b)(2). *See id.*

[13] *See id.* at *6.

[14] *Id.* (internal quotation marks omitted).

[15] *See id.* The Ninth Circuit reasoned that sample cases "would allow Wal-Mart 'to present individual defenses in the randomly selected "sample cases," thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination.'" *Id.* (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 627 n.56 (9th Cir. 2010)).

[16] Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented from the majority's commonality discussion. *See id.* at *16-21 (Ginsburg, J., concurring in part and dissenting in part).

[17] Fed. R. Civ. P. 23(a)(2).

[18] *Dukes*, 2011 WL 2437013, at *11.

[19] *See*, *e.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145 (N.D. Cal. 2004) ("the necessary showing to satisfy commonality is 'minimal'" (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)); *Bryant v. Service Corp. Int'l*, No. C 08-01190 SI, 2011 WL 855815 (N.D. Cal. Mar. 9, 2011) (describing commonality requirement as "minimal"); *Padilla v. Maersk Line, Ltd.*, 271 F.R.D. 444, 448 (S.D.N.Y. 2010) (finding that plaintiff met his "minimal burden" as to commonality); *Woodward v. Andrus*, 272 F.R.D. 185, 191 (W.D. La. 2010) ("Because of th[e] minimal requirement, the threshold of commonality is not high." (internal quotation marks omitted)); *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 364 (S.D. Iowa 2008) (assuming plaintiff satisfied "the relatively minimal commonality requirement"); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 554 (N.D. Ga. 2007) (noting minimal burden to establish commonality); *Barton v. Corrections Corp. of Am.*, No. 03-CV-428-JHP-SAJ, 2005 WL 5329514, at *4 (N.D. Okla. Sept. 1, 2005) (same).

[20] *Dukes*, 2011 WL 2437013, at *7.

[21] *Id.*

[22] *See id.* The Court also describes the necessary common question as the "glue" holding the claims of each one of the putative class members together. *Id.*

[23] *See id.*

[24] *Id.*

[25] *See id.* at *8-9 (finding evidence of a general policy of discrimination "entirely absent").

[26] *See id.* at 8. The Court also indicated its skepticism of the District Court's conclusion that a court's gatekeeper role under Rule 702 of the Federal Rules of Evidence and Supreme Court precedent did not apply to expert testimony at the certification stage, stating that "[w]e doubt that is so." *Id.*

[27] *Id.* at *10.

[28] *See id.*

[29] Fed. R. Civ. P. 23(b)(2).

[30] *See Dukes*, 2011 WL 2437013, at *12 (noting that "[o]ne possible reading of [Rule 23(b)(2)] is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all").

[31] *Id.* at *15 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)).

[32] *See id.* at *12.

[33] *See id.* ("at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy [Rule 23(b)(2)]").

[34] *Id.* (Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant").

[35] *Id.*

[36] *Id.*

[37] *Id.* (internal quotation marks omitted).

[38] *See id.* at *12-13.

[39] *Id.* at *13.

[40] *Id.* (emphasis in original).

[41] *See id.* ("When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute.").

[42] *See id.* ("(b)(2) does not require that class members be given notice and optout rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause").

[43] *Id.*

[44] *Id.* at *14.

[45] *See id.* at *15 ("because the necessity of [individualized] litigation will prevent backpay from being 'incidental' to the classwide injunction, [plaintiffs'] class could not be certified even assuming, *arguendo*, that 'incidental' monetary relief can be awarded to a 23(b)(2) class").

[46] *Id.*

[47] *Id.* ("Because the Rules Enabling Act forbids interpreting Rule 23 'to abridge, enlarge or modify any substantive right,' . . . a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (quoting 28 U.S.C. § 2072(b) and citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

[48] *Id.* at *9.

[49] This topic will be explored in more depth in a forthcoming K&L Gates client alert.