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A legal update from Dechert's Labor and Employment, Antitrust/Competition, Mass Torts and Product Liability and White Collar and Securities Litigation Groups

***Wal-Mart Stores, Inc. v. Dukes*: Supreme Court Strikes Down Nationwide Sex Discrimination Class Action**

In an important decision that reinvigorates the protections of Rule 23 of the Federal Rules of Civil Procedure, the U.S. Supreme Court blocked an attempt to certify a class of approximately 1.5 million employees of Wal-Mart Stores, Inc. alleging gender discrimination. The Court's decision puts an end to what it referred to as "one of the most expansive class actions ever" and requires heightened scrutiny of class actions in all areas of the law, including mass torts and antitrust.

In a broadly written opinion, the Court firmly placed a heavy burden on litigants seeking class certification in federal court. Specifically, the Court emphasized that reviewing courts are required to undertake a "rigorous analysis" of a motion for class certification, including, when necessary, an analysis of the merits; defined the "commonality" standard of Rule 23(a)(2) as requiring proof "in fact" of issues that are applicable across the entire class; and flatly rejected attempts by class action plaintiffs to circumvent the strict requirements for a damages class under Rule 23(b)(3) by purporting to seek "injunctive" relief under Rule 23(b)(2).

Background

In 2004, plaintiffs Betty Dukes, Christine Kwapnoski and Edith Arana filed a putative class action against Wal-Mart pursuant to Title VII of the Civil Rights Act of 1964. According to the plaintiffs, Wal-Mart granted local supervisors unfettered discretion concerning pay and promotion decisions and the supervisors' decisions disproportionately favored men. The plaintiffs alleged that Wal-Mart's refusal to

control the local supervisors amounted to disparate treatment of female employees. The plaintiffs sought to certify a class of current and former female employees that spanned dozens of job classes and 3,400 stores nationwide. As the Supreme Court summarized, the plaintiffs alleged that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."

The United States District Court for the Northern District of California granted the plaintiffs' motion for class certification, relying on three types of evidence offered by the plaintiffs: statistical evidence concerning disparities in pay and promotions based on gender, anecdotal evidence of discrimination from approximately 120 female employees and the testimony of a sociologist concerning Wal-Mart's alleged culture and personnel practices. The U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, affirmed the critical aspects of the district court's holding in a divided decision. According to the Court of Appeals' majority, Rule 23(a)'s

commonality requirement was satisfied because the case involved the question of whether female employees “were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them.”

The Ninth Circuit then held that the class could be certified under Rule 23(b)(2), which permits mandatory class actions in cases in which the plaintiffs principally seek class-wide injunctive or declaratory relief. Although the plaintiffs sought awards of backpay in addition to injunctive relief, the court still concluded that Rule 23(b)(2) applied to the case because the monetary claims did not “predominate” and were not “superior in strength, influence, or authority” to the plaintiffs’ nonmonetary claims. Finally, the Court of Appeals held that the class of 1.5 million workers was manageable because the district court could calculate damages by conducting mini-trials for a random sample of claims and extrapolating those determinations to the full class.

The Supreme Court granted certiorari and reversed. The Court, in an opinion by Justice Scalia, unanimously held that the class was not appropriate for certification under Rule 23(b)(2). Justice Scalia, joined by the Chief Justice and Justices Kennedy, Thomas and Alito, also wrote for a 5-4 majority that Rule 23(a)’s commonality requirement was not met. Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, dissented from that aspect of the Court’s decision.

The Commonality Requirement for Class Certification Becomes More Demanding

Rule 23(a) sets forth the prerequisites for maintaining any federal class action. Among other requirements, a class may proceed only where “there are questions of law or fact common to the class.” In *Dukes*, a majority of the Supreme Court squarely rejected the plaintiffs’ argument that there were questions of law or fact common to the 1.5 million members of the proposed class. Specifically, the majority noted that “Rule 23 does not set forth a mere pleading standard,” but rather that a plaintiff must thus “prove that there are *in fact* . . . common questions of law or fact.” This requires a court to conduct a “rigorous analysis” that “will entail some overlap with the merits of the plaintiff’s underlying claim.” Significantly, the Court rejected outright any construction of *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974), that would prevent a court from analyzing

the merits of the claims in adjudicating class certification.

To establish commonality, the Court held that the plaintiffs must offer “significant proof” that Wal-Mart “operated under a general policy of discrimination.” The plaintiffs’ evidence concerning Wal-Mart’s policy of affording discretion to local supervisors did not satisfy this standard because their statistical and anecdotal evidence failed to establish the existence of a “specific employment practice” that “tie[d] all their 1.5 million claims together.” The Court also rejected the effort of the plaintiffs’ expert sociologist to characterize discretionary decisions by local Wal-Mart supervisors as a common policy, concluding that “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.” In so holding, the Court suggested that even at the class certification stage courts may need to subject proffered expert testimony to scrutiny under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In her dissent, Justice Ginsburg took issue with the Court’s reasoning, contending that the majority’s analysis “blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3) [which requires that common questions “predominate” over individual ones and that a class action is a “superior” mode of adjudication].” The dissent also accused the majority of ignoring the principle that whether an employer has impermissibly delegated discretion can be a common question because “[a] system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes.”

Rule 23(b)(2) Does Not Permit a Class with Members Requesting Individual Relief

Despite their differences with respect to commonality, the Court was unanimous in holding that the lower court had improperly certified the plaintiff class under Rule 23(b)(2) and that reversal was therefore warranted.

Rule 23(b)(2) does not permit certification of a class in which individualized claims for relief are asserted. As the Court simply stated:

Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

In reaching this conclusion, the Court rejected the Ninth Circuit's holding that Rule 23(b)(2) can apply where monetary relief is only a "nonpredominant" component of the relief sought. Where individualized monetary relief is sought, the Court held, Rule 23(b)(3), with its requirement that class adjudication be superior to individual actions and its procedural protections of notice and the right of class members to opt-out, is the only proper mechanism. Requiring a proposed class to meet the requirements of Rule 23(b)(3), the Court ruled, also allows courts to consider a defendant's interest in a fair process. Turning to the facts in *Dukes*, the Court specifically noted that Wal-Mart "is entitled to individualized determination of each employee's eligibility for backpay" and the lower courts' "Trial by Formula" concept, which the Court termed a "novel project," does not adequately protect this right.

***Dukes* Strengthens Defendants' Hands in Class Actions**

The Court's decision in *Dukes* will help employers to defend against future employment class actions and should benefit defendants outside the employment context as well. The Court's decision will make it harder for employees to claim, absent some centralized policy subject to challenge, that their discrimination claims involve common issues of law or fact. The Court's rejection of the plaintiffs' claim based on Wal-Mart's alleged "delegation of discretion" is likely to make it substantially more difficult for employees to rely on employers' appropriate and necessary grants of discretion to supervisors to establish a "pattern or practice" of discrimination.

In addition, several aspects of the *Dukes* decision are likely to have a significant effect on class actions generally, including those involving mass torts and

antitrust issues. First, the majority's emphasis on the "rigorous" showing required to establish the existence of commonality under Rule 23(a) in all purported class actions should compel lower courts to examine more closely the proof offered by plaintiffs in support of their motions for class certification and to reject classes that might have been certified prior to the Court's decision. The Court's decision ratifies the approach taken by a number of lower courts which have emphasized that: (1) courts may not relax the requirements of Rule 23(a) where the claims, on their face, would require individualized adjudications before each class member may obtain relief; (2) class certification decisions may require an examination of the merits of the claim, thus ending the debate on that issue occasioned by language in *Eisen*; and (3) expert testimony offered in support of class certification may be subject to the strictures of *Daubert*.

Second, the Court's unanimous ruling with respect to the scope of Rule 23(b)(2) should block plaintiffs from attempting to circumvent Rule 23(b)(3)'s obligation to establish that the class action mechanism is a superior method of adjudication in cases involving claims for money damages. Going forward, courts will likely be watchful for plaintiffs trying to pass off a Rule 23(b)(3) class as a 23(b)(2) class just because there is a request for injunctive relief and will reject such attempts and place the proper burden on plaintiffs.

Finally, language in both the majority and minority opinions will bolster the utility of *Dukes* not only in cases brought under Rule 23(b)(2), but also in cases under sections (b)(1) and (b)(3). Indeed, the Court expressly stated that its analysis of the limits of Rule 23b(2) applies with equal force to putative classes brought under Rule 23(b)(1), which applies where use of individual actions "would create a risk of: (A) inconsistent or varying adjudications ... that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members." Furthermore, although the *Dukes* plaintiffs elected not to proceed pursuant to Rule 23(b)(3), the Court's mandate of a "rigorous analysis" of class allegations, including review of the merits, will apply with equal vigor to such cases. Indeed, the dissent's position that the Court's analysis of "commonality" was in essence a statement of the law surrounding the "predominance" requirement of section (b)(3) will aid in application of *Dukes* to such classes.

Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment, www.dechert.com/antitrust, [www.dechert.com/product liability](http://www.dechert.com/product_liability) and [www.dechert.com/white collar](http://www.dechert.com/white_collar).

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