The Legal Intelligencer

Doubling Down on *Dukes*: Expanding Upon 'Rigorous' Review

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Two terms ago, in *Wal-Mart Stores v. Dukes*, a 5-4 majority of the U.S. Supreme Court emphasized that class actions should be the "exception," not the rule, in federal litigation. In *Dukes*, the court held that a class of 1.5 million current and former employees of Wal-Mart failed to satisfy the "commonality" requirement of Federal Rule of Civil Procedure 23, and, therefore, could not bring a class action asserting their employment discrimination claims under Title VII. Central to the court's holding was its conclusion that the putative plaintiffs failed to provide "convincing proof" at the certification stage of a company-wide policy of discrimination to tie their claims together.

Dukes sent a strong signal that district courts should conduct a "rigorous" review of whether each Rule 23 requirement is satisfied "in fact." The question remained, however, just how "rigorous" or deep "in fact" should district courts go? This term, the court will attempt to provide more guidance on that score in two cases focused on lower courts' class-based damage determinations.

When Does Certification "Overlap" with Merits?

The first case concerns whether rebuttable presumptions of damages may be rebutted prior to class certification or only at trial. In *Amgen v. Connecticut Retirement Plans and Trust Funds*, the plaintiffs sought class certification of a securities fraud action brought under Securities and Exchange Commission Rule 10b-5, alleging that the defendant, a biotechnology company, inflated the price of its stock by failing to disclose safety information about two of its products. The U.S. Court of Appeals for the Ninth Circuit held that the plaintiff was entitled to class certification, in large part, because the proposed class's reliance on the defendant's alleged misrepresentations was common to the class under the "fraud-on-the-market presumption." Although ultimately rebuttable at trial, the Ninth Circuit held that the complaint's reliance on the presumption was sufficient to support class certification.

As explained by the Ninth Circuit, the "fraud-on-the-market presumption" rests on two underlying assumptions: (1) "The price of a stock traded in an efficient market fully reflects all publicly available information about the company and its business"; and (2) in deciding to purchase stock, investors rely upon the stock price as a reflection of the stock's value, "and, by extension, each piece of publicly available

information" that the stock price reflects. The Ninth Circuit concluded that, to invoke this presumption at the class certification stage, plaintiffs simply had to prove that "the securities market was efficient," and the defendant's "alleged misstatements were public." Because these two elements were uncontested, the Ninth Circuit held that plaintiffs adequately alleged a class-wide theory of reliance.

In adopting this standard, the Ninth Circuit rejected the view of some other circuits, which requires plaintiffs to prove "materiality" at the class certification stage. The *Amgen* court rejected this approach, concluding that the "materiality" of the defendant's alleged misrepresentations is a "merits issue" that did not address the central question at the class certification stage: whether a class action will generate "common answers" that will promote efficient class-wide resolution of plaintiffs' claims.

The Supreme Court will examine in November whether materiality must be proven (or just alleged) prior to class certification. Although *Amgen* is a securities-fraud case, it will have broader implications for whether "merits issues" can be considered prior to class certification. In the course of its review, the court will surely consider the impact of class certification on settlement. In previous decisions, the court has openly acknowledged that certification exponentially increases a defendant's potential damages and thereby exerts powerful leverage to abandon even meritorious defenses. If so, leaving issues such as materiality for another day is not in the interests of justice. Considering the tone of *Dukes* and the practical impact of certification, the court seems likely in *Amgen* to require lower courts to conduct a more aggressive analysis of merits issues that "overlap" with the certification decision.

?Does Daubert Apply?

The court will explore the same themes in a case originating in our backyard. In *Comcast v. Behrend*, a class of cable customers alleged that Comcast engaged in a scheme designed to concentrate its cable distribution operations in the Philadelphia area and eliminate competition. After a four-day certification hearing, the district court certified the class, but only as to one of plaintiffs' four theories of class-wide "antitrust impact." The district court concluded that the class had met its burden to demonstrate that this remaining theory was "capable of proof at trial through evidence that is common to the class." In reaching this conclusion, the court relied upon the proposed damage-calculation model by the plaintiffs' expert.

On appeal to the Third Circuit, Comcast argued that the expert's damage model was insufficient to support certification because it did not isolate the damages that extended from the one theory of "antitrust impact" that was approved by the court. The Third Circuit rejected this argument, holding that plaintiffs must simply "assure" the court "that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." The Third Circuit was satisfied that the plaintiffs' expert's model met this burden, but noted that "we have not reached the stage of determination on the merits whether the [expert's] methodology is a just and reasonable inference or speculative."

Comcast relies on *Dukes* in urging the Supreme Court to authorize the application of *Daubert* and Federal Rule of Evidence 702 to class-certification determinations. In deciding this issue, the court will likely again be influenced by the power of class certification to compel settlement. Should an unreliable expert report drive a massive class settlement or give rise to a lengthy and expensive discovery period? That seems contrary to the interests of justice and the search for truth. And, if *Dukes* is any indication, the answer in *Behrend* will be no.

A More "Rigorous" Review?

The Supreme Court's decisions in *Amgen* and *Behrend* will reverberate beyond class-based damage determinations. Both cases raise important questions about the lower courts' gatekeeping role at the class certification stage and provide the court a platform to expand upon the "rigorous" review prescribed in *Dukes*. Indeed, *Daubert*'s application at the certification stage would alone be signific
the role of the district court, it would present an additional hurdle for class plaintiffs, p
cases, and increase the risks and costs associated with obtaining certification. Follow
Behrend, district courts will likely need to conduct a deeper Rule 23 inquiry into "over

and the reliability of expert evidence under *Daubert* and Federal Rule of Evidence 702. •

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