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PAGE 15: SHERIFF'S SALE

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COMMERCIAL LITIGATION

In Wake of Wal-Mart Case, Class Actions Still Alive and Well

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Special to the Legal

In *Wal-Mart Stores Inc. v. Dukes*, the U.S. Supreme Court reversed a grant of class certification. The case involved allegations of discrimination against women, and the Supreme Court said that the case involved too many individual claims, circumstances and factual analyses to be litigated on a classwide basis.

In the hours and days following the *Dukes* decision, the media and blogosphere were filled with startling pronouncements about what the court had done. Courts now had "more leeway to refuse to certify class actions." The law now "demanded a higher level of commonality [among class members' claims] than previously would have been required." Corporations were now assured that "the bigger and more powerful they are, the less likely their employees will be able to join together to secure their rights." One commentator even wondered "whether the Supreme Court has now decided that some corporations are too big to be held accountable."

Really?

The truth is that very little changed as a result of *Dukes*. Although the decision is a blow to those who hoped that *Dukes* would blaze a wider trail, it is hardly the class action death knell some perceive it to be.

The critical issue in *Dukes* was whether there were questions of law and fact common to the class. This "commonality" requirement is one of the four mandatory prerequisites to any class action under Federal Rule of Civil Procedure 23(a). (The others are numerosity of class members, typicality of the representative parties' claims or defenses, and adequacy of the named plaintiffs and their counsel to represent the class.) In a 5-4 decision, the court held that the named plaintiffs did not present legal or factual issues common to the approximately 1.5 million members of the putative class.

Although some would label the outcome the work of a result-oriented Supreme Court, the real culprit, from the plaintiffs' perspective, was something much less sinister: a bad fact pattern. Wal-Mart's pay and promotion decisions are decentralized. They are generally made at the local store manager level. Managers are given broad discretion to set wages for store employees and identify candidates for management training. Although there are some objective factors governing admission to the management training program, Wal-Mart has no testing procedure, policy or other corporate evaluation method that was alleged to have been discriminatory. Instead, the plaintiffs argued that the "corporate culture" resulted in favoritism toward men, notwithstanding a written company policy forbidding gender discrimination.

The majority's opinion, written by Justice Antonin Scalia, noted that Wal-Mart's policy of vesting its local store managers with discretion "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action." Although the majority acknowledged that giving such discretion to lower-level supervisors can, in some cases, give rise to a discrimination claim under a "disparate impact" theory, it concluded that the plaintiffs had failed to identify "a common mode of exercising discretion." Absent that, Scalia wrote, "it is quite unbelievable that all managers would exercise their discretion in a common way" in a company as large and widespread as Wal-Mart.

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Does this holding mean, as some have suggested, that Wal-Mart is "too big" to be a class action defendant? That corporations need only become larger, and give "discretion" to their individual managers, to be immune from class action litigation?

Of course not. First, *Dukes* probably has little, if any, impact outside the employment discrimination context. Other traditional areas of class action litigation, such as antitrust and securities cases, will be little affected, if at all, by *Dukes*. Pricing and disclosure of financial information remain, for most purposes, centralized corporate decisions. Employment, because of the necessarily individual nature of the decisions involved, is uniquely suited to the localized decision-making that thwarted the plaintiffs' commonality argument in *Dukes*. Nothing in *Dukes* protects Wal-Mart from class actions alleging, say, a price-fixing conspiracy or a false financial disclosure.

Second, *Dukes* does not prohibit even an employment discrimination class action against Wal-Mart. The court held only that a class consisting of all female employees nationwide, given Wal-Mart's localized decision-making, is too broad. The proposed class of 1.5 million failed because, understandably, the plaintiffs could not specify common facts, other than employment by Wal-Mart, that could be said to affect pay and promotion decisions nationwide. The court's decision does not preclude one or more smaller classes, such as a class of female employees at stores governed by a common regional office. Indeed, lawyers for the plaintiffs are now taking precisely this approach, having amended the original lawsuit to limit the proposed class to workers in California and promising "an armada of cases" against Wal-Mart by regions or states (one has already been filed in Texas).

Third, the notion that *Dukes* might tempt businesses to delegate more of their decisions to lower levels solely to minimize class action liability seems far-fetched. *Dukes* does not instruct that corporations can insulate themselves through nominal delegation that has no real impact on how decisions are actually made. Corporations that are prepared to decentralize power in this manner surely will have business reasons for doing so that are unrelated to class action liability.

Will *Dukes* have a significant impact on lower courts' application of the commonality requirement? The early returns suggest not. A search of cases in the four months following the court's opinion revealed nine cases in which lower courts rejected defendants' efforts to invoke *Dukes*, in each instance distinguishing *Dukes* as inapplicable where an act, practice, or policy of the defendant is common to the entire class.

It is important to read the *Dukes* holding in the context of Rule 23 in its entirety. In addition to the four mandatory prerequisites to certification prescribed by Rule 23(a), a plaintiff seeking class certification must also satisfy one of three alternative criteria set forth in Rule 23(b): (i) that the prosecution of separate actions by the individual class members would risk adjudications that would establish incompatible standards of conduct for the defendant or would substantially impede the interests of unnamed plaintiffs (Rule 23(b)(1)); (ii) that the defendant has acted on grounds applicable to the class, so that classwide injunctive or declaratory relief is appropriate (Rule 23(b)(2)); or (iii) that the common factual or legal questions "predominate" over individual questions, and that a class action is therefore the superior method of resolving the controversy (Rule 23(b)(3)).

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In Justice Ruth Bader Ginsburg's concurring/dissenting opinion in *Dukes* (joined by three other justices), the primary criticism was that the majority effectively conflated the Rule 23(a) commonality requirement with the more rigorous Rule 23(b)(3) "predominance" analysis. In other words, according to Ginsburg, instead of simply asking the Rule 23(a) question of whether there were factual or legal questions common to the class, the majority was really making a Rule 23(b)(3) inquiry of whether those common legal or factual questions predominated over individual questions. Because "predominance" is not a mandatory prerequisite, but merely a choice on a menu of three Rule 23(b) conditions that may be satisfied, imposing a predominance requirement at the threshold Rule 23(a) stage would have been premature and improper.

Even if Ginsburg were correct, however, the practical effect on class certification is unlikely to be significant. The overwhelming majority of class certification motions invoke predominance under Rule 23(b)(3) as the basis for Rule 23(b) certification. We have seen relatively few certification motions that rely on the risk of inconsistent or prejudicial individual adjudications under Rule 23(b)(1). Class actions that seek only injunctive or declaratory relief, as required for Rule 23(b)(2) certification, are even more rare. This is not surprising, given that the primary benefit of the class action is the ability to aggregate numerous small damage claims without having to mobilize a commensurate number of plaintiffs. And the one point on which all nine justices agreed in *Dukes* was that a claim for individualized monetary damages — even one that is considered ancillary to, or that does not "predominate" over, a claim for injunctive for declaratory relief — cannot be certified under Rule 23(b)(2).

Thus, even if the majority did "raise the bar" for satisfying the commonality requirement of Rule 23(a), the higher bar is one that most class action plaintiffs already must satisfy to comply with Rule 23(b). The remainder — the cases in which certification is sought under Rule 23(b)(1) or (2) — seem particularly unlikely to have any similarity to the *Dukes* fact pattern. For example, in cases like *Dukes*, where the only common issue alleged is a "corporate culture" that infects discretionary decision-making, it is hard to envision that separate lawsuits would create incompatible standards of conduct for the defendant; and in the absence of specific, traceable, common conduct, injunctive or declaratory relief will be hard to fashion. Thus, cases with fact patterns similar to *Dukes* will usually be Rule 23(b)(3) cases, in which case the "heightened" commonality inquiry that doomed the plaintiffs in *Dukes* will be made in any event.

But *Dukes* raises one question to a higher level: Should Rule 23's commonality requirements be relaxed to further classwide dispute resolution? Whether Rule 23's concept of commonality should be expanded to encompass a common "corporate culture," absent any allegation tracing the class' harm to any specific policy, practice or individual, is a legitimate and open policy question. Given the sprawling nature of the *Dukes* class, however, the court's decision would have dramatically altered Rule 23 only if it upheld, rather than reversed, class certification.

Ironically, although *Dukes* has received the bulk of the attention, it was not the most significant class action decision of the court's term. Two months prior to Dukes, the Supreme Court upheld the use of class arbitration waivers — arbitration clauses that specifically prohibit classwide arbitration — in consumer contracts. Given the pervasiveness of arbitration clauses in such contracts, which permit the corporation to avoid litigation altogether, the court's decision in *AT&T Mobility v. Concepcion* and the increase in class arbitration waivers that can be expected to ensue pose a far greater threat than *Dukes* to the ability to obtain relief through the class mechanism.

A Supreme Court opinion is a momentous addition to any area of law, and *Dukes* is now the nation's seminal case addressing Rule 23(a)'s commonality requirement. But claims that *Dukes* has somehow transformed class action law are, in our view, greatly exaggerated. •