CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
August 2010 (1)

Dukes v Wal-Mart Stores: En Banc Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Splits in Approving Largest Class Action Ever Certified

Donald M. Falk, Archis A. Parasharami, & Marcia E. Goodman

Mayer Brown LLP

www.competitionpolicyinternational.com

Dukes v Wal-Mart Stores: En Banc Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Splits in Approving Largest Class Action Ever Certified

Donald M. Falk, Archis A. Parasharami, & Marcia E. Goodman[1]

I. INTRODUCTION

The U.S. Court of Appeals for the Ninth Circuit has issued a significant decision affirming the certification of the largest class action since the adoption of Federal Rule of Civil Procedure 23. In *Dukes v. Wal-Mart Stores, Inc.*,[2] a divided *en banc* court ruled, 6 to 5, that the district court did not abuse its discretion in certifying a class of as many as 1.5 million female employees who worked in Wal-Mart's 3,400 stores at any time after December 1998 for gender discrimination claims based on pay. The effect of the Ninth Circuit's decision will reach far beyond the employment context and is likely to ease the path to certify class actions under antitrust and California unfair competition theories as well.

The Ninth Circuit's decision creates or deepens conflicts with other circuits on at least three key class certification issues:

1. Whether the district court must resolve *Daubert* objections to the admissibility of experts used in support of class certification before ruling on the class certification motion;
2. Whether the use of "sample cases" is consistent with the defendant's right to present affirmative defenses against each class member's claims at trial; and
3. Under what circumstances claims for injunctive relief predominate over claims for monetary relief so as to permit class certification under Rule 23(b)(2), which excuses plaintiffs from satisfying the "predominance" and "superiority" requirements imposed by Rule 23(b)(3) on class actions for damages.

Dukes is likely to affect certification of antitrust class actions (and thus, the incentives to settle cases of questionable merit). As one court has put it, because of the enormous stakes involved in class actions, the "basic truth about class action litigation" is that "the fight over class certification is often the whole ball game."[3] Because *Dukes* lowers the bar to class certification in the Ninth Circuit, businesses that may be targeted by antitrust class actions should be prepared to face more litigation there, and should be sure to preserve important issues for potential Supreme Court review.

[1] The authors are partners in the Palo Alto, Washington D.C., and Chicago offices, respectively, at Mayer Brown LLP. The authors would also like to give credit to Kevin Ranlett and Daniel Jones, associates at Mayer Brown LLP, who contributed substantially to the article.

[2] 603 F.3d 571 (9th Cir. 2010).

[3] Hartford Acc. & Indem. Co. v. Beaver, 466 F.3d 1289, 1294 (11th Cir. 2006).

II. BACKGROUND

In 2001, six plaintiffs brought a class action in a California federal district court alleging that Wal-Mart, the world's largest private employer, had engaged in company-wide gender discrimination in violation of Title VII of the 1964 Civil Rights Act. The plaintiffs asserted that women employed in Wal-Mart stores around the country received less pay and fewer promotions than men in comparable positions. The plaintiffs sought injunctive and declaratory relief, back pay, and punitive damages on behalf of a proposed nationwide class.

The district court certified a class that encompassed the claims of up to 1.5 million female employees seeking injunctive and declaratory relief and back pay, and certified a separate class of the same employees seeking punitive damages. The district court declined to certify the claims of employees seeking back pay for allegedly unlawfully withheld promotions. Wal-Mart appealed the certification of both classes under Rule 23(f). After a panel of the Ninth Circuit affirmed, the Ninth Circuit granted *en banc* review.

III. ANALYSIS

The *en banc* Ninth Circuit affirmed the certification of the claims for injunctive and declaratory relief and back pay, and remanded the punitive-damages class for the district court to determine whether it may be certified under Rule 23(b)(2) or (b)(3). The Ninth Circuit also remanded the claims of former Wal-Mart employees so that the district court can determine whether to certify additional classes or subclasses under Rule 23(b)(3). In addition, the Ninth Circuit affirmed the district court's refusal to certify claims for back pay related to allegedly withheld promotions. In the course of reaching these holdings, the court created or deepened a number of circuit splits.

A. Daubert Objections to Expert Testimony at the Class Certification Stage

The Ninth Circuit created a circuit split in ruling that the district court had not abused its discretion in refusing to test the reliability of the methodology of an expert testifying in support of class certification. The plaintiffs had relied on a sociologist who concluded that Wal-Mart's many store managers and other decision makers are vulnerable to gender stereotyping. The expert testimony was significant to upholding the class certification decision. Wal-Mart moved to strike the report under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[4] but the district court declined to hold a *Daubert* hearing and ultimately relied on the expert's testimony in finding the existence of common questions. The Ninth Circuit affirmed in part because it was "not convinced" that "*Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial."[5] In the Ninth Circuit's view, it was sufficient to permit the defendant the opportunity for a *Daubert* review at the merits stage, at which time the expert report might be stricken.

The Seventh Circuit recently reached the opposite conclusion in *American Honda Motor Co. v. Allen*,[6] holding that district courts must fully adjudicate *Daubert* challenges to class certification experts *before* analyzing class certification itself. The plaintiffs in *American Honda* relied on an expert report to demonstrate the existence of common issues regarding an alleged design defect in certain Honda motorcycles. In response, Honda moved to strike the expert report as

[4] 509 U.S. 579 (1993).
[5] *Dukes*, 603 F.3d at 602 n.22.
[6] 600 F.3d 813 (7th Cir. 2010).

unreliable under *Daubert*. The district court acknowledged reservations about the expert's report, but nonetheless certified the putative class and denied the motion to strike without prejudice to its being renewed before trial. The Seventh Circuit vacated and remanded, holding that the district court was required to address Honda's motion to strike. Under the Seventh Circuit's decision, class action plaintiffs may not escape challenges to the experts they use at the class certification stage by arguing that evidentiary objections should be deferred until the motions *in limine* before trial.

The conflict between the Seventh and Ninth Circuits on whether *Daubert* challenges must be resolved before analyzing class certification is of immense importance to antitrust defendants. Almost all antitrust class actions involve conflicting expert testimony on class certification issues such as ability to provide common proof of liability and injury.[7] Because of the enormous pressure on defendants to settle once a court certifies a class, the Ninth Circuit's approach makes it less likely that courts will entertain *Daubert* challenges to class certification experts.

B. Due Process and Manageability Concerns

The Ninth Circuit also affirmed the district court's ruling that the enormous class was nonetheless manageable for trial, and that certification did not violate Wal-Mart's statutory and due process right to defend against each individual claim of discrimination. The Ninth Circuit first held that Title VII plaintiffs need only prove a pattern and practice of discriminatory conduct on a group-wide basis in order to qualify for prospective relief. The court then held that Wal-Mart's right to present individual defenses would be protected by having the district court randomly select and try a small number of "sample cases," and then discount the award distributed to the class by the percentage of meritless cases in the sample. The Ninth Circuit acknowledged that this approach would result in a windfall to some class members, but concluded that an employer that has been proven to have discriminated against a group must bear that risk.

In endorsing minitrials of "sample" cases in order to derive a formula for calculating back pay on a class-wide basis, the Ninth Circuit created a circuit split with the Fifth Circuit, which rejected that approach in *Cimino v Raymark Indus. Inc*.[8] In a vigorous dissent, Judge Ikuta argued that the court's sampling approach, or any other formula-based approach to administering back pay, is inapplicable under Title VII because of the defendant's "statutory right to raise individual defenses in response to the request for back pay."[9] An individual class member's right to due process may also be violated by sampling, as class members with meritorious claims would receive less relief than to which they are entitled. Moreover, because it is unclear how this sampling approach would work in practice, other due process or manageability issues will likely emerge. Putative antitrust classes may raise similar concerns, particularly as to the existence of antitrust injury and the nature and extent of any damages, especially in cases in which the amount by which a price may exceed competitive levels may vary.

C. Standard for Certifying Claims for Both Monetary and Injunctive Relief Under Rule 23(b)(2)

To be certified, a class must meet all the requirements of Rule 23(a) and one of Rules 23(b)(1), (b)(2) or (b)(3). The district court had certified the class in this case under Rule 23(b)(2),

[7] *See*, *e.g.*, In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 322-24 (3d Cir. 2008).
[8] 151 F.3d 297, 319 (5th Cir. 1998); *see also Dukes*, 603 F.3d at 649 n.27 (Ikuta, J., dissenting) (noting split).
[9] 603 F.3d at 650 n.28.

which allows certification when "final injunctive relief or declaratory relief is appropriate respecting the class as a whole." Class actions in which plaintiffs' claims for monetary relief "predominate" over their claims for injunctive and declaratory relief, however, are not permissible under Rule 23(b)(2). They instead must be certified, if at all, under Rule 23(b)(3), which requires the plaintiff to establish that common issues predominate over individual ones and that a class action would be superior to other means for resolving the dispute.

In *Dukes*, the Ninth Circuit announced a new standard for determining when monetary relief predominates over injunctive relief such that the class may be certified under the more lenient Rule 23(b)(2) standard: "a class must seek only monetary damages that are not 'superior [in] strength, influence, or authority' to injunctive and declaratory relief."[10] The court directed consideration of four factors:

1. "[W]hether the monetary relief sought determines the key procedures that will be used;"
2. "[W]hether it introduces new and significant legal and factual issues;"
3. "[W]hether it requires individualized hearings; and"
4. "[W]hether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns."[11]

The Ninth Circuit concluded that claims for back pay under the circumstances of the case did not predominate over the requests for injunctive and declaratory relief, and then remanded for the district court to apply the four-factor test and any other factors deemed appropriate to the Rule 23(b)(2) analysis for claims for punitive damages. The court stated that notice and an opportunity for Plaintiffs to opt-out of the punitive damages claims alleviated some of the due process and manageability concerns but did not relieve the district court of its obligation to determine whether each of the requirements for class certification under either Rule 23(b)(2) or (b)(3) is met.[12]

The Ninth Circuit's new standard creates a three-way circuit split. The Fifth Circuit (joined by the Sixth, Seventh, and Eleventh Circuits) holds that monetary relief predominates "unless it is incidental to requested injunctive or declaratory relief."[13] By contrast, the Second Circuit determines whether monetary relief predominates by examining the plaintiffs' subjective intent in bringing the lawsuit.[14] Moreover, the Ninth Circuit's approach appears to permit separate certification under Rule 23(b)(2) of the more injunctive aspects of a claim (here, the request for an injunction and back pay) even if additional and purely pecuniary aspects of the same claim (here, the potential for billions in punitive damages) might tip the balance against the predominance of injunctive relief.

Antitrust class action plaintiffs who challenge conduct that is continuing or likely to recur may try to shoehorn their complaints into the *Dukes* template by contending that injunctive relief predominates notwithstanding their damages claims, perhaps advancing a public-interest

[10] *Id.* at 616.

[11] *Id.* at 617.

[12] *Id.* at 621.

[13] Allison v. Citgo Petroleum Group, 151 F.3d 402, 415 (5th Cir. 1998); *see also* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 646-51 (6th Cir. 2006); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Lemon v. Int'l Union of Operating Eng'rs Local No. 139, 216 F.3d 577, 580-81 (7th Cir. 2000).

[14] Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).

rationale directed at the "strength, influence, or authority" of an injunction requiring or prohibiting specific business conduct. It is not clear whether the *Dukes* analysis of Rule 23(b)(2) would encompass cases in which the monetary relief consisted of damages rather than a traditionally equitable remedy like back pay. Antitrust defendants in the Ninth Circuit should be wary, however, of claims under California's Unfair Competition Law (Business & Professions Code § 17200), which are commonly added on to antitrust complaints in both state and federal courts in California (and sometimes elsewhere).[15] That state law has been construed to prohibit "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[16] The monetary relief available under Section 17200 consists only of restitution, which like back pay is a classic equitable remedy.[17] And plaintiffs increasingly seek nationwide application of Section 17200 in their actions, particularly against California-based defendants.[18]

IV. NEXT STEPS

The Ninth Circuit's decision certifies a class of historic size, with potential damages in the billions of dollars, and creates or deepens at least three circuit splits on important issues related to class certification. Wal-Mart has indicated in press statements that it is considering its options, including seeking U.S. Supreme Court review.[19]

In the meantime, however, businesses that are forced to defend against class-action litigation within the Ninth Circuit should expect to face repeated citations to *Dukes*. In response, a number of steps should be considered. First, defendants should preserve the argument that *Dukes* is wrongly decided to allow for potential Supreme Court review in their own cases—or to take advantage of any developments should *certiorari* be granted in *Dukes* or another case raising similar issues. Second, although the *Dukes* court held that a full *Daubert* hearing is not required to resolve challenges to class certification experts, a district court retains discretion to conduct one. Accordingly, defendants should consider aggressively challenging the qualifications, methodology, and conclusions of plaintiffs' experts and requesting that district courts hold hearings when appropriate. Third, companies that seek to demonstrate that the presence of individualized issues precludes class certification should submit as much evidence of individual differences as possible—including, for example, declarations from members of the potential class—to show that a determination of liability on the basis of common proof would be impossible. Defendants should resist any effort to use add-on claims under Section 17200 to contend that certification under Rule 23(b)(2) is appropriate, including through arguments that the provision does not apply to the claims of most class members. Finally, businesses should focus

[15] *See, e.g.*, E. & J. Gallo Winery v. Encana Corp., 503 F.3d 1027 (9th Cir. 2007); In re Wholesale Electricity Anti-Trust Cases I and II, 147 Cal. App. 4th 1293 (2007); In re Terazosin Hydrochloride Antitrust Litig., 2001 WL 34050426 (S.D. Fla. Oct. 25, 2001).

[16] Cel-Tech Comm'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999).

[17] *See* Cal. Bus. & Prof. Code § 17203.

[18] *See, e.g.*, Parkinson v. Hyundai Motor America, 258 F.R.D. 580, 598 (C.D. Cal. 2008); In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1027 (N.D. Cal. 2007).

[19] *See* Jeff Gearhart, Executive Vice President and General Counsel, Wal-Mart, 9th Circuit Reverses Key Aspects of Lower Court's Ruling in Dukes Case (Apr. 26, 2010), http://walmartstores.com/pressroom/news/9804.aspx. Wal-Mart has also obtained an extension to file its petition for a writ of certiorari to August 25, 2010. *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10a19.htm.

on the manageability and due process issues, laying out in as much detail as possible the incorrect results that can emerge from a sampling approach to liability and damages.