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I. INTRODUCTION

Last year we reported on the *en banc* Ninth Circuit's pathbreakingly broad decision affirming the certification of a class of 1.5 million plaintiffs in a lawsuit alleging that Wal-Mart had discriminated against its female employees at all levels.[2] At that time, we noted that the court of appeals had lowered the bar to class certification in several important respects, creating or deepening at least three conflicts among the circuits that might draw the attention of the Supreme Court.

The effects of the Ninth Circuit's decision were short-lived; the Supreme Court granted certiorari and reversed in *Wal-Mart Stores, Inc. v. Dukes*.[3] The Court unanimously concluded that the Ninth Circuit had gone too far in approving certification under Federal Rule of Civil Procedure 23(b)(2). Rejecting the Ninth Circuit's use of that Rule as a less-demanding basis to certify a 1.5-million-member class of individuals seeking individual monetary awards, the Court restored Rule 23(b)(2) to its traditional limits as a means for permitting a class to seek a common injunction or declaration.

In addition, the Court (over dissent) provided its first comprehensive and coherent definition of what it means for a question to be "common" under Rule 23(a)(2). That holding will influence the analysis of damages classes that can be certified only by satisfying Rule 23(b)(3) with proof that common questions predominate over individual ones. Only questions that are "common" under Rule 23(a)(2) count in the predominance analysis under Rule 23(b)(3).

Both aspects of the Supreme Court's decision in *Dukes* are likely to affect certification of antitrust class actions (and, thus, the incentives for defendants to settle cases of questionable merit). The Court's Rule 23(b)(2) holding removes a potential avenue to certify classes for both injunctive and pecuniary relief based on a single-factor analysis that addresses only the allegedly

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[2] Donald M. Falk, Archis A. Parasharami, & Marcia E. Goodman, *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*, 8(1) CPI ANTITRUST CHRON. (August 2010), reporting on *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), rev'd, 131 S. Ct. 2541 (2011).

[3] 131 S. Ct. 2541 (2011).

unlawful practice rather than its differing (and sometimes absent) effects on each individual class member.

More significant may be the Court's clarification that commonality under Rule 23(a)(2) does not encompass every abstract theory or general factual similarity, but involves important issues that can be resolved for all class members in a single stroke. The Court's skeptical reaction to the *Dukes* plaintiffs' use of expert testimony to avoid individualized issues also may have particular significance in antitrust class certification proceedings. While the Ninth Circuit's superseded decision had provided unusually broad support to plaintiffs seeking class certification, the Supreme Court's decision sets relatively clear limits on aspects of class certification that had become indistinct and thus improperly permissive.

II. BACKGROUND

A class can be certified in federal court only if it meets the requirements of Rule 23. The proponent of certification first must demonstrate that the putative class meets all four criteria listed in Rule 23(a), including the requirement in Rule 23(a)(2) that "there are questions of law or fact common to the class." The proponent then must show that the class satisfies one of the three subsections of Rule 23(b).

Most classes are certified under Rule 23(b)(3), which permits certification when "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would provide the "superior" method for "fairly and efficiently adjudicating the controversy." Although they sought billions of dollars in back pay, the *Dukes* plaintiffs relied on Rule 23(b)(2), which applies when "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."

Dukes began with a 2001 complaint 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 female employees in Wal-Mart stores around the country received lower pay and fewer promotions than male employees in comparable positions. The plaintiffs sought injunctive and declaratory relief, back pay, and punitive damages on behalf of a proposed nationwide class. The plaintiffs' theory was that Wal-Mart's employment policies afforded too much discretion to local managers. That discretion, plaintiffs said, permitted the exercise of excessive subjectivity by the managers, systematically resulting in unlawful discrimination against Wal-Mart's female employees.

As pertinent here, the district court relied on Rule 23(b)(2) to certify a class of 1.5 million employees to seek backpay as well as injunctive and declaratory relief. The Ninth Circuit accepted Wal-Mart's interlocutory appeal under Rule 23(f), but affirmed the grant of class certification, first in a panel decision and then *en banc*. The Supreme Court granted certiorari and reversed. The Court unanimously concluded that the a class could not be certified under Rule 23(b)(2) to seek backpay, which is substantial and individually varying monetary relief. By a 5-4 vote, the Court also held that no class could be certified at all because the only "common" issue—Wal-Mart's allegedly discriminatory policy of permitting subjective factors to influence employment decisions—was not genuinely common under Rule 23(a)(2).

III. ANALYSIS

A. A Definition—With Teeth—of a "Common Issue" for Class Certification

As a practical matter, the most significant holding in *Dukes* is likely to be its articulation of the commonality requirement under Rule 23(a)(2). Although *Dukes* also involved some issues specific to classes certified under Rule 23(b)(2) and to the employment discrimination context, the Court explained that "[t]he crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'"[4] In deciding what may qualify as "questions of law or fact common to the class," the *Dukes* Court defined the issues that may weigh on the common side of the balance in a predominance inquiry under Rule 23(b)(3).

The Court in *Dukes* defined a "common issue" under Rule 23(a)(2) as a "common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[5] That is, the issue must give "cause to believe that all [the class members'] claims can productively be litigated at once." The Court specifically rejected the sufficiency of common-sounding but ultimately abstract issues that can be raised by "[a]ny competently crafted class complaint."[6] Rather, the Court concluded, "[w]hat matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[7]

The Court in *Dukes* also confirmed that compliance with the strictures of Rule 23 is a matter of proof, not a matter of pleading or presumption: "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[8] The Court also noted that such a "rigorous analysis" of plaintiffs' claim for class certification will necessarily entail "some overlap with the merits of the plaintiff's underlying claim." Many courts, by contrast, had declined to resolve questions about the legal elements of the putative class claims, even when the answer would determine whether a question was genuinely and fairly susceptible to common proof.

The Court held that the plaintiffs failed to identify a specific employment practice that "tie[d] all their 1.5 million claims together."[9] The plaintiffs' theory—which depended on individual, allegedly biased exercises by thousands of managers of subjective decision-making authority—did not provide any "glue holding the alleged *reasons* for" the millions of employment "decisions together."[10] Thus, the Court held, "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question."

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[4] 131 S. Ct. at 2550-51 (quoting Fed. R. Civ. P. 23(a)(2)).

[5] *Id.* at 2551.

[6] *Id.* (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–132 (2009)).

[7] *Id.* (quoting Nagareda, *supra*, at 132) (emphasis in original).

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

[9] *Id.* at 2555-2556.

[10] *Id.* at 2552.

B. Rule 23(b)(2) Is Not A Back Door To Certify Individualized Damages Claims

The Court also disapproved the use of Rule 23(b)(2)—the provision for classes seeking injunctive relief—as a shortcut to certify classes seeking huge monetary awards as well. The Court rejected the Ninth Circuit's flexible inquiry into whether the request for injunctive relief predominated in importance over the monetary claims, explaining, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."[11] The Court noted that it did not need to decide whether Rule 23(b)(2) "does not authorize the class certification of monetary claims at all," or whether, instead, a class could be certified under that subsection so long as the pecuniary relief was only "incidental" to an injunction, in the sense that a monetary award flowed directly from the injunction itself and required no further individualized proceedings.[12]

Either way, the Court held, Rule 23(b)(2) did not encompass the class approved by the Ninth Circuit in *Dukes*, because claims for "*individualized* relief (like the backpay at issue here) do not satisfy" that Rule.[13] Just as 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," it could not authorize certification of a class seeking backpay that would have to be determined individually and separately ordered as to each plaintiff.[14]

C. No "Trial by Formula"

In unanimously rejecting the Ninth Circuit's application of Rule 23(b)(2), the Court gave substantial weight to the defendant's right to individualized determinations and to "raise any individual affirmative defenses it may have," as well as overall manageability concerns.[15] The Court rejected the Ninth Circuit's endorsement of "Trial by Formula," in which mini-trials of "a sample set of the class members" could provide data from which a "percentage of claims determined to be valid could be derived." That percentage, the lower courts had proposed, then would be multiplied by an "average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings," producing a lump-sum result irrespective of the circumstances of individual plaintiffs (such as whether they had been subjected to adverse employment decisions at all), much less the merits of their legal claims or Wal-Mart's affirmative defenses.

The Supreme Court disapproved of this "novel project" because the Rules Enabling Act prohibits the use of class procedures under Rule 23 to "abridge, enlarge, or modify any substantive right."[16] Thus, the Court held, "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."

D. Expert Testimony at the Class Certification Stage

Plaintiffs seeking to certify large, disparate classes often present expert testimony designed to show that issues are, in fact, common to the class and can be resolved on a class-wide basis. The Court did not decide whether, as to expert testimony on class certification, the district court

[11] *Id.* at 2557..
[12] *See id*. at 2557, 2560 (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).
[13] *Id*. at 2557 (emphasis in original).
[14] *Id.* (emphasis in original).
[15] *Id.* at 2561.
[16] *Id.* (quoting 28 U.S.C. § 2072(b).

had to exercise its gatekeeping powers under Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[17] The Court left little doubt about the answer, however: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification state of class-action proceedings. … *We doubt that is so*."[18] And the Supreme Court closely scrutinized the reliability of plaintiffs' expert testimony supporting class certification as if *Daubert* did apply.

For example, the Court rejected the conclusion of an expert sociologist who conducted a "social framework analysis" of Wal-Mart's corporate culture to conclude that Wal-Mart was vulnerable to gender discrimination. The Court honed in on the expert's concession "that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotypical thinking."[19] Because the expert could not answer that basic question, his testimony failed to tie the supposed common defect in Wal-Mart's decision-making to the allegedly discriminatory result. Thus, the Court determined, "we can safely disregard what he has to say."[20] That amounts to a conclusion that the expert testimony was inadmissible—precisely what *Daubert* is intended to test.

The Court's rigorous analysis of the expert testimony accords with the Third Circuit's *Hydrogen Peroxide* decision and others that require district courts to rigorously scrutinize expert testimony and resolve any disputes between the experts that bear on the requirements of Rule 23.[21]

IV. IMPLICATIONS FOR ANTITRUST CASES

Antitrust class actions are likely to continue to play a prominent role in the development of Rule 23 jurisprudence—including the practical implications of *Dukes*.

First, at the margin, the commonality standard enunciated in *Dukes* will reduce the likelihood of class certification in antitrust cases while increasing the likelihood that currently certified classes will be decertified. Although most antitrust cases will have *one* genuinely common issue unless the proposed class is overbroad, the balance between common and individualized issues may change dramatically in some cases, now that only issues meeting the *Dukes* test—resolution at once for the entire class—can count towards predominance under Rule 23(b)(3).

Second, the distinct commonality test underscores the importance for a defendant to identify any individualized issues, including affirmative defenses—and to make clear why class certification would impair or eliminate its right to present individualized defenses. A respect for due process seems to underlie much of the Court's analysis and criticism of the procedural innovations approved by the lower courts.

Third, although the Court did not require a full *Daubert* hearing to resolve challenges to class certification experts, a district court retains discretion to conduct one and the Court strongly indicated that this approach is preferable, if not required. Almost all antitrust class actions involve conflicting expert testimony on class certification issues such as ability to provide common proof of liability and injury.[22] The Court's language in *Dukes* makes it likely that more

[17] 509 U.S. 579 (1993).
[18] *Dukes*, 131 S.Ct. at 2253-2254 (emphasis added).
[19] *Id.* at 2553 (quoting district court).
[20] *Id.* at 2554.
[21] *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322-24 (3d Cir. 2008).
[22] *See,. e.g.*, *id.*

courts will entertain *Daubert* challenges to class certification experts (as anecdotally appears to be the case). Moreover, the Court's searching analysis of the expert testimony presented in *Dukes* makes clear that a district court cannot end its analysis whenever the plaintiffs submit expert testimony to support class certification. Rather, before certifying a class, the court must determine which side had the better evidence.

Fourth, Rule 23(b)(2) will remain of secondary significance in antitrust cases. Few antitrust class-action plaintiffs are likely to fit into whatever limited exception for incidental pecuniary relief may exist. For example, while price-fixing plaintiffs might argue that a consistent overcharge applied to each unit sold so that any damages award was "incidental," a defendant could respond that (as with the backpay in *Dukes*) significant individual proof would be required in order to determine each plaintiff's eligibility for (and the amount of) any refund—and the higher premium on accuracy because the award would be trebled. Moreover, price-fixing class actions (indeed, antitrust class actions generally) infrequently address continuing behavior, making an injunction quite possibly inappropriate as a matter of law (if not duplicative of an injunction entered on behalf of law enforcement authorities). In any event, antitrust class actions will provide complex and challenging settings for the further evolution of the principles set forth in *Dukes*.