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CLIENT ALERT

Supreme Court Changes The Class Action Landscape In *Dukes v. Wal-Mart*

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A second reading of the Supreme Court's decision in *Wal-Mart Stores v. Dukes* confirms much of last week's media hype. The decision is a true game-changer as to what it will now take to certify a complex class action, and not just in Title VII cases. The initial headlines rightly focused on the big news of the Court's unanimous holding that the sort of allegations made against Wal-Mart in *Dukes* cannot be certified under Rule 23(b)(2). Requiring such cases to meet the more difficult requirements of Rule 23(b)(3) – particularly the predominance and superiority standards – will have profound implications.

A closer look at the decision also leaves one impressed with Justice Scalia's treatment of the Court's historical approach to Title VII class certification questions in both disparate treatment and disparate impact cases. The early prediction here is that Justice Scalia's recapitulation of the Title VII precedent will be a frequently cited primer on the first principles governing many issues presented by complex Title VII litigation. The majority opinion's treatment of some of the early Title VII cases, including *Griggs v. Duke Power* and *Franks v. Bowman Transportation* are (at least to employers) a much-welcomed "back to basics" tutorial on the historical understanding of the kinds of cases appropriate for class action treatment. In this respect, the Court's opinion injects a much-needed dose of reality into this corner of the law.

But what may be the most significant feature of *Dukes* is the Court's unanimous rejection of what Justice Scalia called Trial by Formula. The Court put the serious kibosh on that approach, tartly concluding that "[w]e disapprove that novel project." Of almost equal importance is the majority's decision to give the bum's rush to the "social framework" testimony offered by one of the plaintiffs' experts. The majority opinion likewise contains significant language helpful to employers trying to convince courts to reject overly-simplistic statistical presentations made by plaintiffs' experts. And the Court's discussion of *Teamsters*, as well as its invocation of the Due Process Clause, provides employers with powerful new arguments to defeat certification in many large class action cases.

On reflection, Justice Ginsburg's dissent seems particularly unpersuasive. Her point that subconscious bias on the part of individual decision-makers may affect particular decisions on pay or promotions (or any other employment decision, for that matter) hardly seems to warrant certification of a class of the size at issue in *Dukes*. After all, it's hard to imagine a more individualized inquiry less suitable for class treatment than to probe the subconscious of a significant number of male decision-makers. The dissent's argument that the majority improperly imported the Rule 23(b)(3) questions of predominance and superiority into what Justice Ginsburg viewed as the separate and threshold question of whether a class action complaint meets the "commonality" requirement of Rule 23(a) is not likely to have much long-term currency, at least in cases that have not yet been certified. It is clear that a plaintiff has to satisfy **both** the elements of Rule 23(a) and meet the standards of one of the subsections of Rule 23(b) in order to be certified. As a practical matter, it often will be irrelevant whether one gets to the issues teed up by the majority through Rule 23(a) "commonality" analysis, or through a rigorous application of the "superiority" and "predominance" requirements of Rule 23(b)(3). In the end, the majority opinion is going to make it a lot more difficult for plaintiffs to certify large amorphous class actions.

Dukes guarantees that class certification battles in Title VII litigation will be fought across a broader front. To mention just a few of the implications of the Court's decision:

- Merits arguments are now a explicitly endorsed part of the strategy to defeat class certification;
- The defense lawyer toolbox should continue to include *Daubert* challenges to 'junk science' and other dubious types of expert testimony;
- Class action pleadings will be properly subjected to closer scrutiny, as the lower courts apply *Twombly* and *Iqbal* to class actions;
- Defense-side lawyers will have to think creatively about the (not always obvious) consequences of litigating Title VII class actions within the confines of Rule 23(b)(3) now that 23(b)(2) analysis is likely past history; and
- Plaintiffs should be put to the (very stern) test of demonstrating that large class actions involving these kinds of allegations can actually be tried in a manner that satisfies the employer's Due Process rights.

Further discussion of these (and other) points will be provided in subsequent client alerts. Some of these issues will be discussed in detail in our upcoming webinar on the implications of the Court's decision.

Dukes will surely resonate beyond Title VII. The decision provides enormous support to employers seeking to avoid final certification of many types of wage-hour collective actions brought under the Fair Labor Standards Act. And the Court's opinion, when read together with the Court's decision earlier this month in *Amara v. CIGNA*, should make it more difficult for plaintiffs to get class action treatment in a variety of cases brought under The Employee Retirement Income Security Act (ERISA). In these and other kinds of complex employment law litigation, employers will develop more sophisticated strategies for addressing the key questions involved in litigating Rule 23(b)(3) class actions, including notice and opt-out issues, that are familiar in other types of commercial litigation.

Although the *Dukes* decision is a significant win for responsible employers, it's premature to pop champagne corks in celebration of the permanent demise of the use of the class action device to extort huge settlements from employers. One should never under-estimate the undying creativity and tenacity of plaintiffs' lawyers focused on what is euphemistically called the "entrepreneurial" class action. Companies that wish to avoid the problems faced by Wal-Mart must continue to do the careful work necessary to develop sophisticated defenses (including statistical analyses) to the kinds of claims made in blunderbuss class action complaints like *Dukes*. This should include careful consideration of the merits of conducting privileged statistical analyses in advance of litigation. A safe prediction is that defense-side employment lawyers will have ample opportunity to address the multitude of issues and challenges presented by *Dukes*.

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