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Expert Analysis

Dukes Represents a Triumph of the Defense View of Class Certification

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For many years, factions of the courts have waged a philosophical battle over the certification of wage-and-hour claims as class actions. While different courts cited the same precedents and invoked the same basic principles, the standards remained vague as to the showing necessary to justify certification. Furthermore, the law grants lower courts broad discretion in deciding whether individual issues predominate, usually the primary dispute in class certification. This deference to lower courts has resulted in courts reaching contrary conclusions, even when faced with virtually identical facts.

The Supreme Court's recent decision in *Wal-Mart Stores Inc. v. Dukes et al.*[1] provides needed clarity that should result in both increased consistency in lower court rulings and a reduction of wage-and-hour lawsuits in which certification is granted.

The philosophical controversy over wage-and-hour class actions involves competing policy arguments that pit principles of employee protection against principles of due process.

On the one hand, plaintiffs and courts favoring "employee rights" note that wage-and-hour laws were designed to protect employees. They also note that individual employees often lack a great incentive to sue individually. These courts reason that, while statistical sampling could be used to demonstrate that an employer violated the wage-and-hour laws at a certain rate, individualized inquiries are required to identify exactly *which employees* experienced harm. Better that the employer pay some money to all the employees in a class rather than the employer's "wrong" go unremedied.

Since certification typically triggers a settlement where all employees in the class receive some money, the idea was that "rough justice" was served by certifying classes in cases in which the plaintiff shows the employer is violating the wage-and-hour laws on a widespread basis and formulates some method to quantify the overall damages, even if there is no ready way to sort the employees who suffered harm from those who did not.

Courts that subscribe to this philosophy generally justify certification by pointing to some issue common to the proposed class to satisfy the "commonality" requirement, regardless of how superficial. Then, these courts cite precedent about the public policy in favor of enforcing the wage-and-hour laws and invoke the notion that statistics and other procedural tools often manage individual issues that emerge.

This approach always leaves the door open to eventual decertification if the case truly became unmanageable, but does so knowing that certified cases usually settle long before trial. In virtually any fact pattern in which the plaintiff made a showing of class-wide violations (for example, a few declarations from individual class members or time records showing some percentage of missing meal periods), class certification could be justified by citing existing precedent at a highly general level. Moreover, these rulings are subject to reversal only if the defendant demonstrates an abuse of discretion.

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The contrary "due process" view of certification is that class actions are a tool to streamline litigation, but not one that can dispense with a defendant's right to raise individual defenses to individual plaintiffs. Where it cannot be ascertained which employees were injured without resorting to individualized determinations, class certification is inappropriate. Proponents of this view could point to the fact that the wage-and-hour laws already were designed with employee-rights protections, including the right of the prevailing plaintiff to recover attorney fees, the existence of penalties to enhance the value of the case, and strong anti-retaliation provisions to protect the complaining employee.

When an employer has truly misclassified a large swath of its employees, plaintiffs' lawyers have incentives to bring repeated individual cases, and the employer must pay attorney fees in each case it loses. At some point of repeatedly losing, the employer would be incentivized to agree to a class-wide settlement, but such a process would fully respect the employer's due process rights.

Under this analysis, wage-and-hour class actions generally should be limited to cases in which there is either a facially unlawful policy (such as no reimbursement of a reimbursable expense) or an unlawful practice that was readily evidenced by analysis of payroll records (such as not including bonuses in the regular rate).

If, however, the defendant can identify bona fide individual issues that cause liability to vary on an individualized basis and require resolution of credibility disputes, class certification is inappropriate even though denying certification under this standard likely will lead to fewer individual wage-and-hour violations being redressed.

Although *Dukes* is not a wage-and-hour case, it raises the same philosophical dispute outlined above. *Dukes*' discussions of commonality and the use of statistical and anecdotal evidence unquestionably shares the same underlying premises as the "due process" view of certification.

First, *Dukes* set forth a new interpretation of the "commonality" requirement for a class action that is tethered to the concept that class actions exist only as a tool to aggregate similar claims that are subject to common resolution. No longer is it proper simply to identify some common issue that exists in a case without showing the significance of the common issue to the larger case. Instead, the common issue must now be one for which "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."[2]

When the dispute is whether a certain bonus is discretionary or nondiscretionary such that overtime must be paid on the bonus, the resolution of that issue will likely decide liability "in one stroke." By contrast, knowing whether a particular job duty is exempt or non-exempt will not resolve liability in a misclassification case if there is variation in how much time individual managers devote to exempt and non-exempt duties.

Similarly, if there is wide variation in whether certain employees worked off the clock, that will require an individualized analysis inconsistent with the required "commonality." In those cases, even if there are some common questions, there will not be any common *answer* to them that meets *Dukes*' "resolution in one stroke" standard.

Second, *Dukes* appears to reject the notion that determining the totality of damages is sufficient "rough justice" to justify certification even when individual liability determinations are not possible. In *Dukes*, the plaintiffs proposed to extrapolate class-wide damages by taking a sample of individuals, determining the percentage of the sample that suffered discrimination and the liability owed to that subgroup, and extrapolating that result to the larger class. If 5 percent of the class was owed $100,000, then the broader class must be owed $2 million.

Notably, the Supreme Court rejected this "trial by formula" not because the statistics were imprecise, but because the entire exercise violated the employer's constitutional due process right not to have to pay damages to employees whose rights it never violated. As the court put it:

> Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.[3]

This reasoning seems to preclude using statistics to determine class-wide damages when the result is to sweep into the class a significant number of individuals to whom the defendant is not liable. For example, if 80 percent of a class was misclassified as exempt, but an individualized analysis is required to determine which 20 percent were truly exempt, the employer would have the right to a trial on each person's claim so it could be determined who was properly classified and who was not. To take a sample and hold the employer responsible for 80 percent of the damages if a jury found that 80 percent of the sample was misclassified is just a variation on the trial by formula that the Supreme Court deemed unconstitutional.

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Dukes is less than five months old, but it has already been cited more than 100 times in subsequent decisions. In just the months of July and August 2011, multiple lower courts interpreted *Dukes* as an insurmountable impediment to class certification based on the reasons set forth above.

For example, in *MacGregor v. Farmers Insurance Exchange*,[4] the U.S. District Court for the District of South Carolina refused to grant even conditional certification to off-the-clock claims under the Fair Labor Standards Act where the company policies prohibited off-the-clock work but the plaintiffs argued that various practices resulted in employees working off the clock. Because different class members were supervised by different supervisors, the court held that certification would be improper because "a suit would [not] involve anything other than inquiries into independent supervisor decisions regarding each individual [employee's] requested, approved, and refused hours."[5]

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A similar result occurred in *Ruiz v. Serco Inc.*,[6] in which the U.S. District Court for the Western District of Wisconsin declined to grant conditional certification under the FLSA to a proposed class of individuals holding the same job title as plaintiff who allegedly were commonly misclassified as exempt. Citing *Dukes*' discussion of commonality, the District Court explained that there was a lack of evidence that everyone with the same title performed the job in the same manner. When the evidence showed variation in the mix of job duties, there was not a common answer to liability as required to establish *Dukes* commonality.[7]

By contrast, class certification was granted in *Nobles v. State Farm Mutual Automobile Insurance Co.*,[8] in which the class challenged a policy that it alleged was unlawful on its face. The certified class consisted of some 600 non-exempt employees who all used a common timekeeping system that plaintiffs alleged calculated time in a manner that violated the wage-and-hour laws. The parties contested merely whether the system was lawful or unlawful on its face. Because the case involved trying the lawfulness of a common policy, the court held that the case did not "give rise to the concerns expressed by the Supreme Court in *Dukes*."[9]

If these cases are emblematic of how class certification will be decided in the wake of *Dukes*, we can expect there to be far fewer cases certified, although class certification will still remain a viable option for certain types of wage-and-hour cases that do not trample on defendants' due process rights.

NOTES

1. 131 S. Ct. 2541 (2011).
2. 131 S. Ct. at 2551.
3. *Id.* at 2561.
4. 2011 WL 2981466 (D.S.C. July 22, 2011).
5. *Id.* at *4.
6. No. 3:10-cv-00394 (W.D. Wis. Aug. 5, 2011).
7. *Id.*, slip op. at 14.
8. 2011 WL 3794032 (W.D. Mo. Aug. 25, 2011).
9. *Id.* at *5.

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