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Fair Lending Class Actions Following Wal-Mart v. Dukes

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Nearly six months ago, in *Wal-Mart v. Dukes*, the U.S. Supreme Court vacated certification of a class of roughly 1.5 million current and former female employees of Wal-Mart who alleged gender discrimination in violation of Title VII.[1] While doing so, the Court clarified the "commonality" requirement of Federal Rule of Civil Procedure 23(a)(2), holding that lower courts should only certify classes when plaintiffs produce "significant proof" that the putative class members have suffered a common injury from a common source. The Court also held that the plaintiffs could not seek individualized monetary relief under Rule 23(b)(2).

The impact of the *Dukes* decision has already been broadly felt. In particular, the decision has acutely affected fair lending class actions in which plaintiffs allege claims under the Equal Credit Opportunity Act (ECOA)[2] and the Fair Housing Act (FHA)[3]—statutes that courts have interpreted by reference to Title VII case law.[4] This article examines the *Dukes* decision itself, discusses how several lower courts have recently applied the *Dukes* decision in fair lending class actions, and explores the degree to which *Dukes* has undercut the viability of fair lending class claims, especially claims based on disparate impact theory.[5]

Meeting the Requirements for Class Certification Under Rule 23

Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure define whether it is proper to aggregate individual claims into one action. If a class action is not first "certified" under Rule 23, it cannot proceed to trial in federal court.

Under Rule 23, a putative class must meet the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation. Among Rule 23(a)'s prerequisites to class certification, Rule 23(a)(2)'s requirement that the named plaintiffs share an "injury" in common with the class such that resolving their claims will resolve all class claims simultaneously is one of the most important.

Assuming a class can meet Rule 23(a)'s prerequisites, it must also satisfy one or more of three requirements in Rule 23(b). An action may qualify under Rule 23(b)(1) if individual adjudication of the controversy would prejudice either the party opposing the class or the members themselves. Alternatively, Rule 23(b)(2) applies to actions where "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."[6] Finally, an action may qualify under Rule 23(b)(3), which requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[7] If none of the alternative grounds of Rule 23(b) apply, the court must deny certification.

Background on the Dukes Decision

Ten years ago, certain current and former female Wal-Mart employees filed a putative class action lawsuit against the company in the U.S. District Court for the Northern District of California. The plaintiffs alleged that Wal-Mart, by virtue of the

discretion it vested in local managers, discriminated against them on the basis of their sex by denying them equal pay and promotions in violation of Title VII of the Civil Rights Act of 1964.[8] The plaintiffs sought declaratory and injunctive relief, punitive damages, and back-pay.[9] Subsequently, the plaintiffs moved to certify a class of similarly situated current and former female employees of Wal-Mart.[10] The district court granted their certification motion.[11] Wal-Mart appealed the district court's certification order, which the U.S. Court of Appeals for the Ninth Circuit, in a divided *en banc* decision, substantially affirmed.[12]

In December 2010, the Supreme Court granted Wal-Mart's petition for *certiorari* on the question of "[w]hether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) which, by its terms, is limited to injunctive or corresponding declaratory relief, and if so, under what circumstances."[13] The Court also directed the parties to brief and argue the question "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[14] As to the first question, the Court, in a 5-4 opinion, held that the plaintiffs failed to satisfy Rule 23(a)'s commonality requirement. As to the second question, the Court held unanimously that the plaintiffs' back-pay claims were improperly certified under Rule 23(b)(2).[15]

Requirement of "Significant Proof" of Commonality Under Rule 23(a)

After finding the plaintiffs had not established that Wal-Mart had a company policy of discrimination as to pay and promotion, the Court held that they had not satisfied Rule 23(a)(2)'s commonality requirement. The Court stated that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, 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 *why was I disfavored*."[16]

The Court also reinforced that "Rule 23 does not set forth a mere pleading standard."[17] It emphasized that, in light of the fact that "[a]ny competently crafted class complaint literally raises common 'questions,'" plaintiffs must demonstrate "significant proof" of commonality.[18] To meet the commonality standard, plaintiffs must show that prospective class members have suffered a common injury from a common source. Lower courts must then conduct a "rigorous analysis" to determine if such proof is adequate.[19] The Court stated unequivocally that it "cannot be helped" that class certification decisions will often "entail some overlap with the merits of plaintiff's underlying claim."[20]

The Court then concluded that the *Dukes* plaintiffs failed to show the requisite "significant proof" of commonality. The Court first rejected plaintiffs' assertion that the company "operated under a general policy of discrimination."[21] To the contrary, the Court noted that the practice of allowing local supervisors to make employment decisions was itself "a policy *against* having uniform employment practices."[22] Moreover, the Court found that Wal-Mart's policy of allowing supervisors to exercise discretion over pay and promotion matters was a "presumptively reasonable way of doing business" and raised "no inference of discriminatory conduct."[23]

Significantly, the Court also rejected plaintiffs' attempt to show disparate impact through statistical analysis and anecdotal evidence. The Court first expressed "doubt" that the lower courts were correct in not subjecting the plaintiffs' expert testimony to a *Daubert* analysis. Next, the Court rejected expert testimony on Wal-Mart's "corporate culture" being vulnerable to gender-bias as "worlds away" from "significant proof" that the company operated a policy of discrimination.[24] Likewise, the Court rejected plaintiffs' expert statistical evidence alleging disparities among pay and promotions between male and female Wal-Mart employees, noting "almost all of [the managers] will claim to have been applying some sex-neutral, performance-based criteria–whose nature and effects will differ from store to store."[25] Finally, the Court rejected plaintiffs' submission of 120 affidavits from putative class members describing their experiences of discrimination, noting the sample was too small for a putative class of approximately 1.5 million.[26]

Individualized Claims for Monetary Relief Must Meet Higher Test

The Court also unanimously held that the *Dukes* plaintiffs could not seek individualized monetary relief when requesting class certification under Rule 23(b)(2).[27] Specifically, the Court rejected plaintiffs' use of Rule 23(b)(2) to seek back-pay along with declaratory and injunctive relief, thereby overruling the lower courts.[28] The Court reasoned that any request for monetary relief under Rule 23(b)(2), including the back-pay plaintiffs' sought, can only survive if the monetary relief is "indivisible" in light of the equitable relief sought. Otherwise, plaintiffs must seek class-wide monetary damages pursuant to Rule 23(b)(3)'s requirements.

Impact of Dukes on Fair Lending Class Actions

Although it has only been a few months since the Court issued its *Dukes* decision, several lower courts have relied on the Court's commonality rationale to decide class certification motions in fair lending cases involving claims under ECOA and FHA. The decisions generally favor defendants.

For example, in *In re Wells Fargo Residential Mortgage Lending Discrimination Litigation*,[29] the U.S. District Court for the Northern District of California relied almost entirely on *Dukes* to deny the plaintiffs' petition for class certification. Plaintiffs alleged that the bank discriminated against them by "giving them mortgage loans with less favorable conditions than were given to similarly situated non-minority borrowers."[30] Similar to *Dukes*, plaintiffs in the *Wells Fargo* matter alleged that the bank's policy of giving its loan officers and mortgage lenders discretion in setting points, fees, and interest rates disparately impacted a putative class comprised of all of Wells Fargo's African American and Hispanic borrowers since 2001.[31]

In denying class certification for the *Wells Fargo* plaintiffs, the district court first rejected the statistical analysis of plaintiffs' expert.[32] As in *Dukes*, the expert opined that a regression analysis showed that the bank's discretionary lending policies had a disparate impact on the putative class. The district court, however, noted that "evidence that a 'policy of discretion' produces a disparity is insufficient, by itself, to establish commonality for purposes of Rule 23(a)." [33] More specifically, the district court found that, although the bank's officers could exercise discretion in making loans, the plaintiffs' claim lacked any evidence showing a "common mode of exercising [such] discretion."[34]

In *In re Countrywide Financial Mortgage Lending Practices Litigation*,[35] the U.S. District Court for the Western District of Kentucky used similar reasoning to deny class certification to plaintiff borrowers. In the *Countrywide* matter, plaintiffs alleged that between 2005 and 2007 Countrywide discriminated against minority borrowers by charging them higher interest rates and other costs on mortgage loans than similarly situated non-minority borrowers.[36] Relying on a disparate impact theory of liability, plaintiffs argued that Countrywide's "race-neutral policy of allowing its loan officers and third-party mortgage brokers to exercise circumscribed discretion" to adjust rates and fees produced a disparate impact on minority borrowers.[37] The plaintiffs' expert asserted–despite controlling for certain risk-based factors–that the data from nearly three million loans showed that minorities paid more for loans in terms of basis points than non-minority borrowers with similar risk-characteristics.[38]

The *Countrywide* court held plaintiffs' statistical evidence did not satisfy Rule 23(a)'s commonality requirement.[39] Specifically, the district court found that "the average differences between groups may well be within the range expected from the exercise of non-discriminatory discretion among thousands of loan officers and brokers working from hundreds of separate offices."[40] The district court also found that the analysis did not show the "common mode" of exercising discretion needed to satisfy Rule 23(a) post-*Dukes*.[41] Emphasizing this point, the court concluded that "the idea that thousands of loan officers in hundreds of separate locations around the country would exercise their discretion in a similar discriminatory fashion as to each purported class member defies belief."[42]

Even in putative class cases in which plaintiffs have pointed to a "company policy" to support their class certification theory, courts have still required proof that the alleged policy was applied to all class members. Illustrating this point is the recent ruling by the U.S. District Court for the Southern District of California in another case against Countrywide, *In re Countrywide Financial Corporation Mortgage Marketing and Sales Practices Litigation*.[43] In this case, plaintiffs sought class certification for RICO and state law fraud claims by asserting that the defendants followed a uniform sales pitch and policy to offer high-cost loans to borrowers.[44] Applying *Dukes*, the district court rejected class certification and held that the limited elements of commonality only applied to a portion of the putative class population.[45] Specifically, the district court found that the plaintiffs' claims were not "susceptible to class-wide resolution based on common evidence."[46] Instead, it noted that the "dissimilarities in the proposed class" would "'impede the generation of common answers apt to drive the resolution of the litigation.'"[47]

Given the cases described above, there is little question the Court's stricter commonality standard has been a positive development for defendants. But, for defendants interested in settling class actions, the *Dukes* decision could complicate such efforts. For example, in *Rodriguez v. National City Bank*, the U.S. District Court for the Eastern District of Pennsylvania rejected a proposed class settlement.[48] The *Rodriguez* plaintiffs alleged that the bank's pricing policy, which granted individual loan officers discretion, had a disparate impact on minority home loan applicants.[49] The district court held that the putative class did not meet Rule 23(a)'s commonality requirement. In particular, it noted that many loan officers exercised discretion differently, and thus, plaintiffs could not rely solely on their conduct to establish commonality.[50] The court further found that plaintiffs' regression analysis was insufficient to support their disparate impact claim, noting that the analysis could not eliminate the possible "non-credit related reasoning that individual loan officers contemplated . . . not based on race."[51] Regardless of whether the *Rodriguez* plaintiffs reformulate their class claims to comply with Rule 23 or whether the practical effect of the court's rejection of the settlement will be a complete victory for the lender, the *Rodriguez* decision spotlights how the *Dukes* commonality rubric could yield greater scrutiny of class settlements.

Apart from a stricter Rule 23(a) standard, settlements could also be impinged by the Court's limitations on plaintiffs' ability to bootstrap monetary claims into class actions that predominately seek injunctive relief under Rule 23(b)(2). As a corollary to the limits the Court has imposed on plaintiffs, defendants will also be limited in their ability to use 23(b)(2) to structure nationwide class settlements as a means to avoid the complications of opt-out classes under Rule 23(b)(3).[52]

Which Class Actions Are Being Certified Post-Dukes?

Although *Dukes* will reduce the number of consumer finance class actions that are certified, several post-*Dukes* cases demonstrate that some putative classes will continue to be certified–particularly those where the alleged harm arises from a common policy or practice. For example, in *Bouaphakeo v. Tyson*,[53] the plaintiffs filed a class action claiming that the defendant violated the law by not paying employees for certain activities. Because plaintiffs challenged a standard company-wide policy of not paying employees, which was applied uniformly, the U.S. District Court for the Northern District of Iowa distinguished *Dukes* and held that the class action could proceed.[54]

Similarly, in *Schramm v. J.P. Morgan Chase Bank, N.A.*,[55] the U.S. District Court for the Central District of California certified plaintiffs' class seeking restitution and injunctive relief for alleged violations of California's unfair competition statute. Plaintiffs alleged that defendants' disclosure forms and mortgage notes misrepresented the rates of interest that they would be charged.

They sought certification of a putative class of nearly 28,000 borrowers, each of whom obtained an adjustable rate mortgage from defendants in California.[56] The district court found plaintiffs' class claim met Rule 23's commonality requirement because "the inquiry at trial will be whether or not the representations made by Defendants were likely to deceive a reasonable borrower."[57] Citing *Dukes*, the district court concluded that the answer to this question could be resolved class-wide "in one stroke."[58]

Aho v. AmeriCredit Financial Services is another example of a decision in which a federal court granted a class certification motion post-*Dukes*.[59] In *Aho*, the plaintiff entered into a retail installment sales contract for the purchase of a truck, but subsequently defaulted on his payments. The plaintiff alleged on behalf of himself and a class that the defendant's notice of intent to repossess and sell the truck did not contain all of the conditions required to reinstate his mortgage, in violation of California's Fair Debt Collection Practices Act and Unfair Competition Law.[60] After analyzing the plaintiff's injury under *Dukes*, the U.S. District Court for the Southern District of California certified the proposed class. Specifically, the district court found that the class mechanism was an appropriate vehicle because (i) the defendant used only one form to provide notice, (ii) the same California law applied to all claims, and (iii) all class members would be affected by a resolution in the same way.[61]

As the above cases show, although the *Dukes* standard presents a high bar to class certification, that bar can be cleared. After *Dukes*, plaintiffs alleging that a common policy or practice had a disparate impact on a protected class are more likely to meet Rule 23(a)'s requirements than plaintiffs alleging merely a common policy of discretion. Nonetheless, even if there is a company policy and limited discretion–as in the *Countrywide Financial Corporation* matter–class certification is not guaranteed absent a showing that the policy truly affects every member of the entire class in the same manner.

Conclusion

The *Dukes* decision already has led to a reduction in the number of classes being certified. In fair lending cases, lower courts have applied *Dukes* to close the class action door on plaintiffs who try to establish commonality only through regression analyses that isolate disparities between protected and non-protected classes. In addition, because the *Dukes* decision has clarified that a defendant's mere exercise of discretion, far from being a red flag, is in fact a "presumptively reasonable way of doing business," plaintiffs seeking to meet Rule 23(a)'s commonality requirement must show that there was a common mode in which the defendant exercised that discretion.

However, *Dukes* does not herald the death of the class action. Plaintiffs will simply reformulate their strategies. Some will focus on presenting theories that link a disparate impact to a common policy or practice, rather than to a policy of discretion. Others will seek to certify smaller classes in federal court or will seek to certify classes in state courts that are not bound by Rule 23.[62] Alternatively, we *may* see a rise in so-called "mass-action" litigation, where plaintiffs' counsel attempts to bring a large number of individual cases to avoid the strictures of a class action. In short, the *Dukes* decision will continue to make it harder for plaintiffs to certify broad, nationwide classes, but it will not eliminate the significant threat class action suits pose to lenders and other financial services companies–whose practices remain under intense regulatory, enforcement, and media scrutiny.

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[1] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[2] 15 U.S.C. §§ 1691-1691f.

[3] 42 U.S.C. §§ 3601-3619.

[4] *See, e.g.*, *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 903 (8th Cir. 2005) (applying Title VII disparate impact analysis to FHA claim); *Mercado-Garcia v. Ponce Fed. Bank, F.S.B.*, 779 F. Supp. 620, 628 (D.P.R. 1991), *aff'd*, 979 F.2d 890 (1st Cir. 1992) ("Courts which have interpreted ECOA have used the same analytical framework as that used in actions pursuant to Title VII…."). Recently, however, the Supreme Court granted a petition for a writ of certiorari to answer the question of whether disparate impact claims are indeed cognizable under the FHA. *Gallagher v. Magner*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 2011 BL 285895 (U.S. Nov. 7, 2011)(No. 10-1032).

[5] Under the disparate impact theory, courts generally have permitted plaintiffs to allege discrimination against private defendants under ECOA and FHA by showing evidence that a lender's facially neutral policies and practices had the *effect* of harming a protected class.

[6] Fed. R. Civ. P. 23(b)(2).

[7] Fed. R. Civ. P. 23(b)(3).

[8] *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004).

[9] *Id.*

[10] *Id.* at 141-42.

[11] *Id.* at 143.

[12] *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010).

[13] Brief of Petitioner-Appellant at i, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[14] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010).

[15] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[16] *Id.* at 2552.

[17] *Id.* at 2551.

[18] *Id.* (internal citations and quotations omitted).

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2553.

[22] *Id.* at 2554.

[23] *Id.* (internal quotation marks omitted) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988)).

[24] *Id.*

[25] *Id.* at 2555.

[26] *Id.* at 2555-56.

[27] *Id.* at 2557-58.

[28] *Id.* at 2558-59.

[29] *In re Wells Fargo Residential Mortg. Lending Discrimination Litig.*, No. 08–md–01930 (N.D. Cal. Sep. 6, 2011).

[30] *Id.* at 2 (internal quotations omitted).

[31] *Id.* at 3.

[32] *Id.* at 5.

[33] *Id.* (quoting *Dukes*, 131 S. Ct. at 2556).

[34] *Id.* at 5-6 (internal quotations omitted).

[35] *In re Countrywide Fin. Mortg. Lending Practices Litig.*, No. 08-md-01974 (W.D. Ky. Oct. 13, 2011) (order denying class certification).

[36] *Id.* at 1-2.

[37] *Id.* at 2.

[38] *Id.* at 3-4.

[39] *Id.* at 8.

[40] *Id.* at 7.

[41] *Id.*

[42] *Id.*

[43] *In re Countrywide Finan. Corp. Mortg. Mktg. and Sales Practices Litig.*, No. 08-md-01988 (S.D. Cal. Oct. 11, 2011) (Docket No. 458) (order denying class certification).

[44] *Id.* at 5-7.

[45] *Id.* at 10-11.

[46] *Id.* at 10.

[47] *Id.* (quoting *Dukes*, 131 S. Ct. at 2551).

[48] *Rodriguez v. Nat'l City Bank*, No. 08-cv-02059, 2011 BL 248000, at *2 (E.D. Pa. Sep. 8, 2011).

[49] *Id.* at *12.

[50] *Id.* at *16.

[51] *Id.* at *17.

[52] It is worth noting that *Dukes* left a critical question unresolved: whether claims for any monetary relief under Rule 23(b)(2) violate the due process clause. Although the Court did not reach this issue, it stated in dicta that a "serious possibility" exists that recovering monetary damages under 23(b)(2) could violate due process because this fails to give defendants the chance to defend against each individual's claims. This statement will likely invite defendants to raise this argument in federal courts and state courts, where the Federal Rules of Civil Procedure do not apply.

[53] *Bouaphakeo v. Tyson Foods, Inc.*, No. 07-cv-04009, 2011 BL 219782, at *2 (N.D. Iowa Aug. 25, 2011).

[54] *Id.* at *5-6.

[55] *Schramm v. J.P. Morgan Chase Bank, N.A.*, No. 09-cv-09442, 2011 BL 289781 (C.D. Cal Oct. 19, 2011).

[56] *Id.* at *2. The court explained that the original proposed class would decrease following its ruling that some borrowers' claims were barred by the statute of limitations. *Id.*

[57] *Id.* at *6.

[58] *Id.* The court also found that plaintiffs' restitution claim met the other requirements of Rule 23. In addition, plaintiffs sought class certification for a "rescission based on fraud or mistake" claim. The court, however, refused to certify a class for this claim; it concluded that plaintiffs failed to meet Rule 23(b)(3)'s requirement that common questions of law or fact predominate over individual questions. *Id.* at *14.

[59] *Aho v. AmeriCredit Fin. Serv., Inc.*, No. 10-cv-01373, (S.D. Cal. Nov. 8, 2011) (Docket No. 98 at *1).

[60] *Id.* at *2.

[61] *Id.* at *12. The district court also bifurcated the proposed class for purposes of determining damages. Specifically, it found that plaintiffs could pursue a limited class under Rule 23(b)(2) that did not include statutory damages or restitution. *Id.* at *13. The district court also certified under Rule 23(b)(3) a subclass "of all those who made a payment toward a deficiency" which entitled them to restitution. *Id.* at *20.

[62] Indeed, one recent state Supreme Court post-*Dukes* has distinguished the application of its rules of civil procedure from the federal rules; thus, inviting plaintiffs into its forum. *See* Jackson v. Unocal Corp., No. 09SC668, 2011 BL 290712, at *18-19 (Col. Oct. 31, 2011) (explaining that "[a] trial court must conduct a rigorous analysis of the evidence to its satisfaction that each [Colorado Rules of Civil Procedure] 23 requirement is established" and acknowledging that this discretion-based burden of proof diverges from a federal court trend of applying a "preponderance of the evidence" standard to class certification questions) (emphasis added). By contrast, other state courts with rules of procedure patterned after the federal rules have largely adhered to the commonality standard set out in *Dukes*. *See, e.g.*, *Tire Kingdom, Inc. v. Dishkin*, No. 3DO8-2088, 2011 BL 177415, at *18 (Fla. Dist. Ct. App. July 6, 2011).