Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

10 Years Of Dukes: A Resounding Class Certification Legacy

By **Theodore Boutrous and Theane Evangelis** (June 25, 2021, 1:42 PM EDT)

In Wal-Mart Stores v. Dukes, the U.S. Supreme Court in 2011 decertified a nationwide class of female Walmart workers who alleged pay and promotion bias under Title VII. In this Expert Analysis series, the attorneys who represented each side before the justices discuss how the landmark decision has shaped the class action landscape over the last 10 years.

Ten years ago this month, on June 20, 2011, the U.S. Supreme Court issued its seminal decision in Wal-Mart Stores Inc. v. Dukes.[1] Looking back, Dukes was — and remains — a landmark in the class action world.

Theodore Boutrous

The decision elaborated on first principles animating Rule 23 of the Federal Rules of Civil Procedure and recognized important new guardrails for class certification that have helped protect the rights of all those involved while ensuring that class actions are fairer and used for the right reasons, under the right circumstances.

The plaintiffs' case in Dukes was an example of a class that threatened to violate the due process rights of absent class members and the defendant. The record-setting nationwide 1.5 million-member certified class was larger than the entirety of the U.S. armed forces. And, according to the Supreme Court's ruling, the women in the class from around the country had very little in common other than the fact that they worked at Walmart.

Theane Evangelis

But based on the testimony of a sociologist and aggregated statistics, the plaintiffs postulated that Walmart's discretionary pay and promotion decisions were vulnerable to gender bias and claimed that that was enough to satisfy Rule 23(a)'s commonality requirement. And even though they sought back pay and punitive damages, they invoked Rule 23(b)(2), which applies to injunctive and declaratory relief claims, arguing that their monetary relief claims were "incidental" to their request for an injunction.

The Supreme Court rejected these arguments.

First, in the 5-4 portion of the majority opinion authored by Justice Antonin Scalia, the court reversed on the basis that the plaintiffs had failed to demonstrate commonality. The takeaways from Dukes are well known and often repeated.

"Rule 23 does not set forth a mere pleading standard," according to the opinion. Rather, a "party seeking class certification must affirmatively demonstrate his compliance with" Rule 23 and class certification "is proper only if the trial court is satisfied, after a 'rigorous analysis,' that the prerequisites of Rule 23(a) have been satisfied."[2]

Likewise, a "class representative must be part of the class and possess the same interest and suffer the same injury as the class members."[3]

Perhaps most importantly, the Supreme Court explained that a common question of law or fact under Rule 23(a)(2) "must be of such a nature that it is capable of classwide resolution," meaning it will resolve a central issue to "one of the claims in one stroke," even if there is "some overlap with the merits."[4]

Applying those standards, the court rejected the notion that Rule 23(a)'s commonality requirement was a low bar. It rebuked the plaintiffs' sociology expert, explaining that it could disregard what he said because his testimony was "worlds away from significant proof" of gender bias and "did nothing to advance [the plaintiffs'] case."[5]

Moreover, the court declared:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-mart's "policy" of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business.[6]

And, while the plaintiffs conceivably could have shown commonality if they had been able to demonstrate that Walmart "operated under a general policy of discrimination," the court found that "entirely absent."

The opinion continued: "Walmart's announced policy forbids sex discrimination and ... the company imposes penalties for denials of equal employment opportunity."[7]

Justice Ruth Bader Ginsburg dissented from only this portion of the opinion based on her belief that the majority focused too much "on what distinguishes individual class members, rather than on what unites them," like "discretion over pay and promotions."[8]

Second, the court unanimously and emphatically rejected class certification under Rule 23(b)(2), which governs injunctive and declaratory relief claims. The court held "the monetary relief [was] not incidental to the injunctive or declaratory relief." Rather, such claims are more properly evaluated under Rule 23(b)(3), which governs claims for monetary relief.[9]

The court stated that "individualized monetary claims belong in Rule 23(b)(3)," emphasizing that the "procedural protections attending the (b)(3) class — predominance, superiority, mandatory notice and the right to opt out — are missing from (b)(2)."[10]

The court reasoned that, because a Rule 23(b)(2) class is mandatory, the class was made up of all women who were current employees of Walmart or had worked for Walmart in the past without any notice or opportunity to opt out of the class and pursue their individual claims on their own if they wanted to do so.[11]

This jeopardized the due process rights of millions of women and prevented "individualized determinations of each employee's eligibility for backpay," which the plaintiffs sought to remedy through a "trial by formula."[12]

The court referred to this as a "novel project" and said it was improper because "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right'" and therefore the class, which necessarily would have prevented Walmart from "litigat[ing] its statutory defenses to individual claims," could not be certified.[13]

Dukes dramatically altered the landscape of class action litigation and changed the judicial mindset for determining whether a class is the appropriate vehicle for adjudicating disputes.

The Supreme Court's decision has been cited in federal cases 6,404 times, including in the June 21 decision from the Supreme Court in Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System, where it reiterated that "a court has an obligation before certifying a class to determine that Rule 23 is satisfied, even when that requires inquiry into the merits."[14]

Rule 23 is now properly recognized as imposing important evidentiary requirements, not just pleading standards, plus rigorous procedural mandates, and that has gone a long way toward protecting due process.

While it had been over a decade since the Supreme Court's last major class action decisions — Amchem Products Inc. v. Windsor[15] in 1997 and Ortiz v. Fibreboard Corp.[16] in 1999 — Dukes touched off and reverberates through a series of important Supreme Court decisions further elaborating on the rigorous standards governing class certification.

In 2013, the Supreme Court built on Dukes in Comcast Corp. v. Behrend, reversing class certification because questions of individual damage calculations would "inevitably overwhelm questions common to the class" and the lower courts ignored challenges to the plaintiffs' damages model simply because they overlapped with the "merits of the claim."[17]

In doing so, the court reiterated what it said in Dukes: that Rule 23(b)(3)'s predominance criteria is an "adventuresome innovation" reserved for cases "in which class-action treatment is not as clearly called for."[18]

That same year, in American Express Co. v. Italian Colors Restaurant, the Supreme Court cautioned that Rule 23 "imposes stringent requirements for certification that in practice exclude most claims."[19]

Also in 2013, in Standard Fire Insurance Co. v. Knowles, the Supreme Court held that a plaintiff who files a proposed class action "cannot legally bind members of the proposed class before the class is certified."[20]

And in Tyson Foods Inc. v. Bouaphakeo, the Supreme Court in 2016 reaffirmed Dukes' admonition against trial by formula, limiting the use of representative sampling "to establish classwide liability" only where it also could be used to prove an individual's claim and depending on "the purpose for which the sample is being introduced and on the underlying cause of action."[21]

The federal courts of appeals have followed suit. In 2019, the U.S. Court of Appeals for the D.C. Circuit in

In re: Rail Freight Fuel Surcharge Antitrust Litigation concluded that a damages model that showed variable damages for a subset of the class did not satisfy Rule 23(b)(3)'s predominance requirement because there was "no common proof of those essential elements of liability" for that subset.[22]

The same year, the U.S. Court of Appeals for the Eleventh Circuit in Cordoba v. DirecTV LLC vacated the certification of a class where it found a large portion of it did not have standing, and individualized questions about which members had standing "may predominate over common issues susceptible to class-wide proof."[23]

Last year, the U.S. Court of Appeals for the Ninth Circuit in Bahamas Surgery Center LLC v. Kimberly-Clark Corp. ordered decertification of a fraudulent-concealment class because "individual issues predominated ... with regard to the materiality of the purported omissions."[24] Also in 2020, the Ninth Circuit in Mays v. Wal-Mart Stores Inc. likewise concluded that certification was improper where the plaintiff presented "bare assertions of numerosity without any clear factual ground."[25]

Dukes also has had an impact on class actions in state courts. For example, in 2014 in Duran v. U.S. Bank National Association, the California Supreme Court affirmed the denial of class certification on the ground that certification would have abridged the defendant's right to "litigate its statutory defenses to individual claims."[26]

And because of Dukes and its progeny, plaintiffs must now affirmatively demonstrate compliance with Rule 23 to obtain class certification rather than accepting a named plaintiff's say-so or a smattering of general allegations. In other words, plaintiffs must prove their case that class treatment is justified and will be fair; courts cannot simply take their word for it.

This has forced plaintiffs to think twice before trying to certify overbroad classes based on flimsy (or no) evidence. And it has required courts to scrutinize the evidence relating to Rule 23's requirements before acquiescing to the plaintiffs' request for class certification.

Dukes also put an end to the use of no-notice class actions that threatened the due process rights of both absent class members and defendants. The Supreme Court, in rejecting the Rule 23(b)(2) certification of back pay claims and trial by formula, admonished the plaintiffs for attempting to certify a class that would "nullify" the important protections for absent class members and prohibit a defendant from litigating its defenses to individual claims.

Post-Dukes, named plaintiffs cannot force absent class members into a class without notice or the right to decide their own fate, and they cannot use the class device to strip away a defendant's right to defend itself as it would in an ordinary individual lawsuit asserting the same claims.

Finally, Dukes demonstrated the crucial need for clear rules when the rights of absent persons are at stake. As Justice Ginsburg put it in Taylor v. Sturgell in 2008, to protect those rights we need "crisp rules with sharp corners" — not "a round-about doctrine of opaque standards."[27] Dukes provided just that — crisp rules with sharp corners that clarified the rules of the road for class actions.

Dukes was a watershed decision that paved the way for ensuring that class actions are fairer and reserved for the right cases and not viewed simply as an expedient way to dispose of the claims of many individuals all at the same time because of some asserted policy benefits or broad remedial purposes. Post-Dukes, where there is no "glue," there is no class.[28]

Of course, there is still work to be done to ensure that class actions remain faithful to the Supreme Court's teachings in Dukes. Vestiges of the pre-Dukes world still remain in certain areas.

For example, in the antitrust context, plaintiffs are still too often able to get a class certified based on the mere speculation of an expert.[29]

Another persistent problem is the improper certification of class actions where many, if not most, of the absent class members have suffered no injury at all, raising Article III standing problems and predominance issues that some courts have been willing to overlook or paper over as "damages issues" that do not defeat class treatment.[30]

However, the Ninth Circuit's decision this year in Olean Wholesale Grocery Cooperative Inc. v. Bumble Bee Foods LLC,[31] which cited Dukes, may signal that this trend is coming to an end. And on Friday in TransUnion LLC v. Ramirez, the Supreme Court held:

> Every class member must have Article III standing in order to recover individual damages. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[32]

Ten years ago, many predicted that Dukes would be a game changer. They were right.

While there is still room for further improvement of the class action process, Dukes has fulfilled its promise, to the benefit of the parties, absent class members and the civil justice system as a whole.

Theodore J. Boutrous Jr. and Theane Evangelis are partners at Gibson Dunn & Crutcher LLP.

Andrew Kasabian, an associate at the firm, contributed to this article.

Disclosure: The authors represented Walmart before the Supreme Court in Wal-Mart v. Dukes.

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[2] Id. at 350–51

[3] Id. at 348–49.

[4] Id. at 350–51.

[5] Id. at 354–55.

[6] Id. at 355.

[7] Id. at 353.

[8] Id. at 377 (Ginsburg, J., dissenting).

[9] Id. at 360 (maj. opn.).

[10] Id. at 362.

[11] Id. at 361–62.

[12] Id. at 366.

[13] Id. at 367. On remand, District Judge Charles Breyer denied certification of an even narrower class because the plaintiffs had still not proven commonality. Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115, 1127–28 (N.D. Cal. 2013). The district court reasoned that plaintiffs' "numbers are not much stronger than they were when the failed to carry the day at the Supreme Court," their "anecdotes by class members d[id] not help their case much," and they did not identify any specific practice that the Supreme Court had not already rejected. Id. at 1121, 1124, 1127. In short, "[p]laintiffs' proposed class suffer[ed] from the same problems identified by the Supreme Court, but on a somewhat smaller scale." Id. at 1127.

[14] Goldman Sachs Grp., Inc. v. Ark. Teacher Retirement Sys., --- S. Ct. ----, 2021 WL 2519035, at *5 (2021) (first citing Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2013), and then Dukes, 564 U.S. at 351 & n.6).

[15] Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

[16] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

[17] 569 U.S. 27, 34 (2013).

[18] Id.

[19] 570 U.S. 228, 234 (2013).

[20] 568 U.S. 588, 593 (2013).

[21] 577 U.S. 442, 459–60 (2016).

[22] 934 F.3d 619, 624 (D.C. Cir. 2019). As the D.C. Circuit said: "No damages model, no predominance, no class certification." Id. at 626.

[23] 942 F.3d 1259, 1275–76 (11th Cir. 2019).

[24] 820 F. App'x 563, 566 (9th Cir. 2020).

[25] 804 F. App'x 641, 642 (9th Cir. 2020).

[26] 59 Cal. 4th 1, 35 (2014) (first citing Behrend, 569 U.S. at 35, and then Dukes, 564 U.S. at 351 & n.6).

[27] 553 U.S. 880, 901 (2008) (quoting Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 881 (6th Cir. 1997)).

[28] Dukes, 564 U.S. at 352 ("Here respondents wish to sue about literally millions of employment decisions at once. Without 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.").

[29] In re Cathode Ray Tube (CRT) Antitrust Litigation, 2013 WL 5391159, at *5 (N.D. Cal. Sept. 24, 2013) (granting certification based on expert report because the standard for proving antitrust injury and damages has not "changed drastically under Dukes, Comcast, or Amgen").

[30] E.g., Ramirez v. TransUnion LLC, 951 F.3d 1008, 1023 (9th Cir. 2020) ("[O]nly the representative plaintiff need allege standing at the . . . class certification stage[].").

[31] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774 (9th Cir. 2021).

[32] TransUnion LLC v. Ramirez, 2021 WL 2599472, --- S. Ct. ----, at *10 (2021) (quoting Tyson Foods, 577 U.S. at 466 (Roberts, C.J., concurring)). In sum, "[n]o concrete harm, no standing." Id. at *15.