



Wal-Mart Stores, Inc. v. Dukes: One Year Later

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Dukes Overview

- Filed on behalf of approximately 1.5 million current and former employees
- Alleged gender discrimination in violation of Title VII
- Prospective class sought an injunction, declaratory relief, and backpay

Rule 23 Requirements at Issue in *Dukes*

- Rule 23(a)(2) requires “questions of law or fact common to the class”
- Rule 23(b)(2) applies when “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”

Potential Impact of *Dukes*

- Commonality
- Rigorous Analysis
- *Daubert*
- 23(b)(2) Limited to Injunctive and Declaratory Relief
- Individualized Money Damages
- Trial by Formula and Rules Enabling Act
- Cohesiveness Requirement in Rule 23(b)(2)
- Issue Certification Under Rule 23(c)(4)

Commonality

- Reciting common questions is not sufficient
- There must be “significant proof” that commonality is met under 23(a)(2)
- A single common question is sufficient but the question must “generate common answers apt to drive the resolution of the litigation”
- The answer to common question must resolve an issue that is central to the validity of each claim
- Dissent stated commonality is no longer “easily satisfied”
- Legislation to undo *Dukes* has been introduced

Has Commonality Changed?

- Broad interpretation of *Dukes* holding:
 - *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).
 - *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 2011 WL 5553829 (W.D. La. 2011).
 - *Burton v. District of Columbia*, 277 F.R.D. 224 (D.D.C. 2011).
- Narrow interpretation of *Dukes* holding:
 - *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012).
 - *Ross v. RBS Citizens*, 667 F.3d 900 (7th Cir. 2012).
- Commonality holding will have a limited impact on Rule 23(b)(3) classes

Rigorous Analysis Required

- Resolved conflict between *Eisen* and *Falcon*
- Court held that a “rigorous analysis” is required in which a court must consider the merits to the extent necessary to make determinations on whether the requirements of Rule 23 are met
- Most federal circuits had already adopted this approach

How Rigorous Analysis Applies?

- Reversible error if not applied:
 - *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).
- Applies outside of employment discrimination context:
 - *Kottaras v. Whole Foods Mkt., Inc.*, 2012 WL 259862 (D.D.C. 2012).
- “Significant proof” may not be required outside of employment discrimination context:
 - *D.G. v. Yarbrough*, 278 F.R.D. 635 (N.D. Ok. 2011).
- Does not bar initial requests for discovery:
 - *Artis v. Deere & Co.*, 276 F.R.D. 348 (N.D. Cal. 2011).
- Precludes bifurcated discovery:
 - *In re Cmty. Bank of N. Virginia*, 2011 WL 4382942 (W.D. Pa. 2011).

Daubert

- Split at the circuit level about whether *Daubert* applies at the certification stage
- *Dukes* court stated, “[t]he District Court concluded that *Daubert* did not apply to expert testimony at the certification stage . . . [w]e doubt that is so”

Does *Daubert* Apply?

- The Eighth and Third Circuits do not require a full *Daubert* analysis:
 - *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011).
 - *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011).
- The Seventh Circuit requires a full *Daubert* analysis:
 - *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012).
- Unclear standard in Ninth Circuit:
 - *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).
 - *But see Bruce v. Harley-Davidson Motor Co., Inc.*, 2012 WL 769604 (C.D. Cal. 2012).

23(b)(2) Limited to Injunctive and Declaratory Relief

- *Dukes* held that 23(b)(2) applies only to “injunctive and declaratory” relief, not to “equitable” relief
- Court held that equitable remedy of backpay did not meet 23(b)(2) requirements

What Qualifies as Injunctive or Declaratory Relief?

- Possible that medical monitoring class cannot be certified under 23(b)(2):
 - *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011).
- Medical monitoring class may be certified under 23(b)(2):
 - *Donovan v. Philip Morris USA Inc.*, 2012 WL 957633 (D. Mass. 2012).

No “Individualized” Money Damages

- Court held that claims for “individualized relief” cannot be certified under 23(b)(2)
- Court stated that it is “clear that individualized monetary claims belong in Rule 23(b)(3)”
- Court left open question of whether claims for monetary relief are ever permissible under 23(b)(2)

Are Monetary Claims Ever Permissible Under 23(b)(2)?

- Statutory damages and claims for restitution not permissible:
 - *Aho v. AmeriCredit Fin. Serv., Inc.*, 277 F.R.D. 609 (S.D. Cal. 2011).
- Punitive damages might be permissible:
 - *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).

No “Trial by Formula”

- The Ninth Circuit had previously allowed the use of extrapolation to resolve individual issues in class actions
- Court rejected the “trial by formula” approach based on the Rules Enabling Act
- Court held that individualized hearings are necessary to determine the scope of individual relief and resolve individual affirmative defenses

Can “Trial by Formula” Ever Be Used?

- Formula impermissible:
 - *Cruz v. Dollar Tree Stores, Inc.*, 2011 WL 2682967 (N.D. Cal. 2011).
 - *Stone v. Advance Am.*, 278 F.R.D. 562 (S.D. Cal. 2011).
- Formula permissible:
 - *Easterling v. Conn. Dep’t of Corr.*, 278 F.R.D. 41 (D. Conn. 2011).
 - *Troy v. Kehe Food Distrib., Inc.*, 276 F.R.D. 642 (W.D. Wash. 2011).

Cohesiveness Requirement?

- There is a split in the circuits on whether there is a cohesiveness requirement—First and Ninth Circuits have not approved cohesiveness requirement
- Court stated, “[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them”
- Some courts interpret this as approving the cohesiveness requirement:
 - *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011).
 - *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012).

Issue Certification

- 23(c)(4) states that, “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues”
- There is a split in the circuits on 23(c)(4)
- *Dukes* did not address issue certification
- In *Dukes* and prior Rule 23 cases, the Supreme Court has focused on Rule 23’s structure, text, and the Rules Advisory Committee’s comments
- All of these favor a narrow interpretation of Rule 23(c)(4)



That's all, folks.