

## Does 'Wal-Mart' doom expansive reading of rule authorizing class actions for 'particular issues'?

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Much ink has been spilled analyzing *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and its implications for class action jurisprudence. One point so far overlooked by commentators, however, is *Dukes*' signal as to how the U.S. Supreme Court would likely address the controversial Rule 23(c)(4) issue certification, which has divided the courts of appeal. Rule 23(c)(4) authorizes a class action "with respect to particular issues." This somewhat enigmatic language and its placement within subdivision (c) has led to a circuit court split as to whether (c)(4) is merely a benign housekeeping tool or an underutilized and potentially heroic player on the stage of class action jurisprudence.

This article will first focus on the text, structure and framers' intentions as to Rule 23(c)(4) to determine what insights may be gleaned from the provision itself. Then it will briefly describe the current circuit split over the proper interpretation of the rule. The teachings of the Supreme Court on the proper interpretation of Rule 23 will then be analyzed, before concluding that *Dukes*, the latest in a trilogy of Supreme Court decisions interpreting Rule 23, suggests that the Supreme Court would likely narrowly interpret Rule 23(c)(4).

*Dukes* has raised the class certification bar. Accordingly, innovative class counsel have begun to request that district courts make an end-run around the Rule 23(a)(2) commonality and (b)(3) predominance requirements by ignoring them and certifying a class pursuant to subdivision (c)(4) on issues such as "liability." Does subsection (c)(4) trump the (a)(2) and (b)(3) requirements?

### TEXT AND STRUCTURE OF THE RULE

The text of Rule 23 appears to require courts to analyze predominance, superiority and manageability for the case taken as a whole. Issues identified as common cannot be analyzed "separately," but rather must be balanced against and compared to individualized issues. This common-sense requirement is evident from the text and structure of the rule. The text of Rule 23(b)(3) demands consideration of the entire case. Subdivision (b)(3) of the rule asks not whether common issues exist, but whether they "predominate over any questions affecting only individual members." The same subdivision further requires that the class action be the superior device "for the fair and efficient adjudication of the controversy," not just the best way to adjudicate a specific common issue.

Rule 23's structure confirms this textual analysis. The critical requirements for a class action are set forth in subsections (a) and (b). Subsection 23(c)(4), by contrast, has a more modest function; it contains judicial housekeeping rules that allow the rest of the rule to function properly. Provisions in subsection 23(c) provide details as to the timing of certification orders and the content of notices, and they explain the proper forms for judgments in class actions. Rule 23(c)(4) only confirms what is implicit in (b)(3)'s predominance requirement—that certification may be feasible even if every issue is not common through, for instance, the courts' ability to subclass, Rule 23(c)(5). Nothing in Rule 23(c)(4) licenses a court to ignore the vital prerequisites for a 23(b)(3) class action—predominance, superiority and manageability. Rule 23(c)(4) enables a court to certify particular issues; it does not sanction courts to analyze purportedly common issues in isolation. Whether or

not the court employs Rule 23(c)(4), the controversy as a whole must satisfy the express mandates of Rule 23(b)(3).

The transcript of the Advisory Committee proceedings confirms Rule 23(c)(4)'s modest role. Professor Ben Kaplan characterized the provision that was to become 23(c)(4) as "a sort of detail." Transcript of Civil Rules Committee Meeting, Oct. 31-Nov. 2, 1966, at 3. In later correspondence, Professor Charles Alan Wright referred to the same provision as a "picky detail, which does not require statement in the rule." Letter from Charles A. Wright to Benjamin Kaplan dated March 30, 1967. It is clear that the framers did not intend to hide an elephant in the (c)(4) mouse hole. Cf. *Whitman v. Am. Trucking Ass'ns Inc.*, 531 U.S. 457, 468 (2002) ("Congress...does not, one say, hide elephants in mouse holes.") (Scalia, J.).

The U.S. Court of Appeals for the Fifth Circuit has held that a "district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). The court concluded that the "proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Id.* The Fifth Circuit was motivated by a concern that "allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3)" and would lead to "automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.*

Although other circuits disagree (see, e.g., *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (quoting

Valentino v. Carter-Wallace Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)), Dukes and recent Supreme Court decisions reflect that the Supreme Court believes that the proper approach is to follow the structural and textual interpretation of the rule—the approach utilized by the Fifth Circuit in Castano.

### THREE KEY HIGH COURT PRECEDENTS

The decisions in Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997), Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), and Dukes reflect a Supreme Court insistent on interpreting Rule 23 with careful fidelity to its current structure, text and its framers' intentions, and not as a malleable tool to be "rewritten" by an adventurous judiciary. The Court in all three decisions grounded its approach to its Rule 23 analysis on the interpretive limitations imposed by the Rules Enabling Act, which sets forth the process by which federal rules are enacted. 28 U.S.C. 2071-2077 (2011).

The Court in Amchem explained that the Rules Enabling Act mandates an "extensive deliberative process involving many reviewers: the Rules Advisory Committee, public commentators, the Judicial Conference, this Court, [and] the Congress." 521 U.S. at 620. In light of this, Justice Ruth Bader Ginsburg, writing for the majority, reasoned that the Court could not approve the proposed new breed of Rule 23 class action, the "settlement only" class action. Id. at 620. After analyzing both the text of Rule 23 and its framers' intentions, Ginsburg rejected the argument that "settlement classes" did not need to satisfy Rule 23(a) or (b)(3) requirements. Id. at 618-20. See generally Laura J. Hines, "Challenging the Issue Class Action End-Run," 52 Emory L.J. 709, 749-51 (2003).

Rule 23(e), the provision allegedly authorizing such a bypass, "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." Id. at 621. Ginsburg concluded that the district court's class certification could not be upheld, "for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." Id. at 625. Ginsburg emphasized that (b)(3)'s predominance requirement functions to prohibit cases involving significant disparities among class members in order "to assure the class cohesion that legitimizes representative action in the first place." Id. at 623-24. If Rule 23(e) could be interpreted as authorizing class actions based merely on the commonality

of class members' interest in the proposed settlement, the "vital prescription [of predominance] would be stripped of any meaning." Id. at 623.

The Court in Ortiz also rejected an adventurous interpretation of subdivisions (b) (1)(B) and (e) that would have permitted a bypass of the safeguarding functions served by subdivisions (a) and (b): "A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3)." 527 U.S. at 858-59. The Court viewed the Rules Enabling Act as the analytical starting point: "The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." Id. at 861. The Court conceded that Rule 23(b)(1)(B)'s text could be interpreted expansively to apply to the "limited fund" of tort claims for damages at issue, but concluded that the more "prudent course" would be to adhere to a construction of the rule consistent with the "historical limited fund model" contemplated by its framers. Id. at 842.

Justice David Souter, writing for the majority, doubted whether the "Advisory Committee would have intended liberality in allowing such a circumscribed tradition to be transmogrified by operation of Rule 23(b)(1) (B) into a mechanism for resolving the claims of individuals not only against the fund, but also against an individual tortfeasor." Id. at 844, n.21. Similarly, the absence of any Advisory Committee debate on the application of (b) (1)(B) to mass tort claims rendered "simply implausible [the argument] that the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3)...would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B). We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims. But we do recognize that the Committee would have thought such an application surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements." Id. at 844.

### THE ANALYSIS IN 'DUKES'

In Dukes, the Court again focused on the structure of Rule 23 and found that "permitting the combination of individualized and classwide relief in a (b)(2) class is...inconsistent with the structure of Rule 23(b)." 131 S. Ct. at 2558. The majority opinion, authored by

Justice Antonin Scalia, noted that Rule 23(b) (3) "is an adventuresome innovation" with "greater procedural protections [than (b)(2)]" and that its prerequisites are 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. Id. "Given that structure," the court found it clear that individualized monetary claims belong in Rule 23(b)(3). Id. Scalia also cautioned against novel approaches, given that the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right." Id. at 2561.

Dukes, Ortiz and Amchem signal that the Supreme Court would look with disfavor upon an expansive interpretation of Rule 23(c) (4). Based on the Supreme Court's reading of the limitations imposed against "judicial inventiveness" by the Rules Enabling Act, the starting point of any Rule 23 interpretation must be "the Rule as now composed." Amchem, 521 U.S. at 620. The text, structure, and framers' intentions of Rule 23(c)(4) strongly suggest that it no more empowers courts to circumvent subdivision (a) or (b) requirements than the proposed subdivision (e) end-runs resoundingly rejected by the Court in Ortiz and Amchem. As demonstrated by the Supreme Court's analyses in Dukes, Ortiz and Amchem, Rule 23's intended meaning is best ascertained by faithful adherence to its text, structure, and its framers' intentions.

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