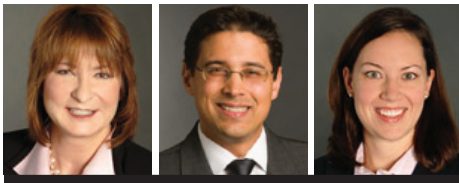


THE RECORDER

IN PRACTICE

A year post-'Dukes'

The Supreme Court answered some questions, but created more, now being addressed in the lower courts



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Litigation

One year ago, the Supreme Court in *Wal-Mart v. Dukes* rejected an expansive, nationwide Title VII class action filed on behalf of 1.5 million current and former female Wal-Mart employees. The court held 5-4 that the plaintiff employees had failed to prove the common companywide pattern or practice of discrimination necessary to maintain their claims as a class. Upon remand from the Supreme Court, the *Dukes* plaintiffs have continued to press new variations of their claims in their quest for class treatment. Plaintiffs have divided

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their claims into multiple regionally-based class actions, including one currently pending in the Northern District of California. Wal-Mart's motion to dismiss these class claims was heard last month and is currently under submission.

Not surprisingly, *Dukes* has since reverberated in class action proceedings across the country. In the three months following the 2011 decision, more than 90 district courts and a handful of circuit court decisions cited the case, often decertifying previously certified classes in an array of areas, including product liability, environmental and mass tort cases. *Dukes* appears

to have also had a measurable impact on the filing of class certification motions. A LexisNexis search of motions for class certification reveals that in the year prior to *Dukes*, 520 motions for class certification were filed, with 245 classes certified; in the year following *Dukes*, 449 motions for class certification were filed, 234 of which re-

sulted in certification. Thus, the filing of class certification motions declined 13 percent. *Dukes* may have impacted plaintiffs' decisions to seek class certification this past year as much for the questions it left open as for the ones it answered. In particular, *Dukes* left open two important questions: the scope and propriety of *Daubert* challenges to expert testimony supporting class certification, and the existence of corresponding due process limitations on state court class actions. The U.S. Supreme Court and the California Supreme Court are poised to answer both of these questions within the next year.

In the year following *Dukes*, many federal courts around the country have applied some level of a *Daubert* inquiry at the certification stage. They differ, however, in the scope and depth of that inquiry.

Some, like the U.S. Courts of Appeal for the Seventh, Ninth and Eleventh circuits, have engaged in full *Daubert* inquiries at the class certification stage. In *Messner v. Northshore University HealthSystem*, for example, the Seventh Circuit applied a full *Daubert* analysis of expert testimony crit-

'DAUBERT' ANALYSIS AT THE CERTIFICATION STAGE

The *Dukes* decision did not explicitly hold that *Daubert's* reliability and admissibility test applies to expert opinions supporting class certification, but it strongly suggested this may be the case. Taking a cue from this observation, in the year following *Dukes*, many federal courts around the country have applied some level of a *Daubert* inquiry at the certification stage. They differ, however, in the scope and depth of that inquiry.

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ical to the certification decision. Testimony is “critical,” the court determined, when it is essential to an issue that is determinative of certification. This increased scrutiny, however, comes at a cost. It front loads the discovery burden for plaintiffs and defendants alike. And it has the potential to blur certification and merits discovery, potentially leading to less bifurcation of the two stages of discovery.

The Eighth and Third circuits, on the other hand, engage in a limited *Daubert* inquiry at the class certification stage. They require a district court to preliminarily evaluate the reliability and admissibility of expert testimony to determine whether expert evidence is sufficient to support class certification. These courts reason that, since full discovery has not been had at the certification stage, and the question of certification and the ultimate viability of the claims can be revisited later, the court need not decide conclusively what evidence will ultimately be admissible at trial at the certification stage. But this reasoning seems contrary to Rule 23(C)(1)(A)’s mandate that class certification be determined “[a]t an early practicable time,” not left for trial.

A more searching *Daubert* analysis does not necessarily doom a class, however. In *Keegan v. American Honda*, for example, the Central District of California employed a full *Daubert* analysis of the parties’ proffered experts for two classes of Honda Civic owners and lessees who alleged that the automaker violated warranties and consumer protection laws by knowingly selling Civics that contained a major tire defect. The court excluded expert testimony that fell short of the *Daubert* requirements, including the majority of a plaintiffs’ expert report. Nonetheless, the district judge certified the two classes because that part of the expert testimony that did meet *Daubert* supported commonality under *Dukes* in that the vehicles carried the same alleged unreasonable risk of safety prob-

lems, even though plaintiffs had not established that each individual vehicle experienced identical problems.

The Supreme Court will soon resolve this circuit split emerging as a result of its dicta in *Dukes*. The court granted review of *Comcast v. Behrend* on June 25, agreeing to decide: “Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a classwide basis.” Another petition for *certiorari* currently pending before the court in *Zurn Pex v. Cox* asks the court to resolve a related question: whether district courts may rely on expert testimony in support of class certification “without conducting a full and conclusive examination of its admissibility” under Fed. R. Evid. 702 and *Daubert*. District courts have already taken notice of the *Comcast* grant: the Northern District of California court, in the follow-on *Wal-Mart* case, for example, ordered supplemental briefing to address the impact of the Supreme Court’s grant of *certiorari* in *Comcast* on the pending motion to dismiss.

DUE PROCESS LIMITATIONS ON STATE COURT CLASS ACTIONS

Another unanswered question after *Dukes* is: What are the corresponding due process limitations on state court class actions? The U.S. Supreme Court has declined to address the issue thus far, despite several opportunities to do so. It declined petitions for *certiorari* in several cases presenting the issue, including *Farmers Ins. of Oregon v. Strawn*, *Philip Morris USA v. Jackson*, and most recently, *Louisiana Citizens Property Insurance v. Oubre*. Because the court declined review in these cases, the contours of state class actions are being worked out state by state.

For example, a recent California court of appeal decision, *Duran v. United States*

Bank National Association, applied *Dukes*’ reasoning to a wage-and-hour state class action, and determined that due process prevented the use of representative sampling “to prevent employers from asserting individualized affirmative defenses in cases where they are entitled to do so.” Citing *Dukes*, the court of appeal held that the trial court’s refusal to allow the defendant to introduce evidence challenging the individual claims of more than 90 percent of the class violated the defendant’s due process rights. The California Supreme Court has agreed to hear the case, and is expected to address: (1) whether a defendant has a due process right to obtain an individual determination of an exemption defense for every class member; and (2) whether classwide liability may be imposed based on statistical sampling or other forms of representative evidence.

CONCLUSION

Dukes may have answered some questions, but it presented at least two more. With a new case pending in the U.S. Supreme Court on the scope and applicability of a *Daubert* challenge at the certification stage, and the California Supreme Court agreeing to consider a due process challenge in the state class action context, the next chapters in class certification law will soon be written.

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