Class Certification Strategies: *Dukes* in the Rear View Mirror

1. **The Supreme Court's 2012-13 Docket**. The spirit of *Wal-Mart Stores, Inc. v. Dukes* – requiring more and more merits earlier in class litigation – is at issue in two important cases currently pending before the Supreme Court.

   Comcast v. Behrend: 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 class-wide basis.

   Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds: (1) Whether, in a misrepresentation case under Securities and Exchange Commission Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory; and (2) whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.

2. **Commonality v. Predominance**. Justice Ginsburg's dissent in Dukes criticized the majority for effectively merging 23(a)(2)'s commonality requirement with the 23(b)(3) predominance requirement. Lower courts are struggling with how to apply the commonality standard suggested in *Dukes*. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), the 7th Circuit found that so long as plaintiffs could point to some common policy applied by an employer, the existence of discretionary elements would not be sufficient to defeat commonality. Other courts have agreed with the *McReynolds* approach. *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 877 F.Supp.2d 113, 118 (S.D.N.Y. 2012); *Calibuso v. Bank of America Corp.*, -- F.Supp.2d --, 2012 WL 4458404, at *15 (September 27, 2012). *But see Bolden v. Walsh Construction Co.*, 688 F.3d 893 (7th Cir. 2012) (employment policy at issue gave managers discretion and therefore couldn't meet commonality standard).

   Outside of the employment context, courts have taken different approaches to *Dukes*' commonality standard. In *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012), the district court certified a class based on allegations of a department-wide stop and frisk policy of the New York Police Department. The court observed that (b)(2) suits for injunctive relief remain appropriate "where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member." *Id.* at 173. *See also Stinson v. City of New York*, 282 F.R.D. 360, 370

(S.D.N.Y. 2012) (certifying class action based on allegations that police officers were issuing summonses without probable cause to meet department-wide quota policy). However, in *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), a case challenging the long-term foster care system in Texas, the Fifth Circuit reversed the district court's certification of a class. The circuit court concluded that *Dukes* had established a new, heightened standard of commonality, focusing on the language from that case that the common question must "*resolve* an issue that *is central to the validity* of each one of the [class member's] claims in one stroke." *Id.* at 840 (quoting *Dukes*, 131 S.Ct. at 2551 (emphasis added)). The Fifth Circuit concluded that the district court had been insufficiently rigorous in its evaluation of the commonality question. *See also In re Live Concert Antitrust Litigation*, 863 F.Supp.2d 966, 2012 WL 1021081 (C.D. Cal. Mar. 23, 2012) (reviewing class certification under new, more rigorous standard after *Dukes*); John C. Coffee, Jr. and Alexandra D. Lahav, *The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics*, 13-19, available at http://ssrn/com/abstract=2182035.

While courts continue to struggle with the relationship between commonality and predominance, there have also been interesting recent decisions exploring the meaning of "predominance." As Judge Posner said in *Butler v. Sears, Roebuck & Co.*, 2012 U.S. App. LEXIS 23284, at *4 (November 13, 2012), "[p]redominance is a question of efficiency." In *Butler*, the court approved certification of a class of owners of Sears Kenmore washing machines. The class sought damages for defects in the product that caused mold to grown in the machines. Sears raised a range of ways in which the class members were differently situation, but the court concluded that the predominant question – did a product defect cause mold growth in these machines – could be efficiently answered as to all class members. Given that class actions that might have been certified as (b)(2) classes before *Dukes* are now being put forward under (b)(3), the question of how to evaluate predominance will gain importance.

3. **Money Damages in 23(b)(2) Classes.** In *Dukes*, the Court concluded that courts cannot certify (b)(2) classes where the plaintiffs seek "monetary relief [which] is not incidental to the injunctive or declaratory relief." While the Court made it clear that back pay in employment class actions was not incidental because of the need for individualized assessment, it left open the possibility that some types of monetary relief – anything that is "incidental" to an injunction – could be part of a (b)(2) class. In *Johnson v. Meriter Health Services Employee Retirement Plan*, 702 F.3d 364 (7th Cir. 2012), the court confronted claims from 4000 plan participants who sought reformation of their retirement plan. The plan reformation would result in payment of additional monetary benefits to each class member, but the court concluded that these monetary awards would be incidental because they would flow automatically from reformation of the plan and could

be easily calculated based on a determination of what had been paid and what was owed to each plan participant. Other courts have similarly permitted certification under (b)(2) where a claim for a declaration ordering restitution or recoupment of fees paid where the "restitution [] would flow directly from such declaration." *Rivera v. Lebanon School Dist.*, 2012 WL 2504926, at *4 (M.D. Pa. June 28, 2012). *See also Ruppert v. Alliant Energy Cash Balance Pension Plan*, 2012 WL 2930205, at *6 (W.D. Wis. July 2, 2012).

4. **Class Certification Orders and Definition of the Class**. Federal Rule of Civil Procedure 23(c)(1)(B) provides that "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)." Some defendants are trying to use Rule 23(c)(1)(B) to ratchet up what is required in a certification order by essentially saying a certification order must be detailed trial plan. In the 7th Circuit's decision in *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), the court held that "the appropriate substantive inquiry for Rule 23(c)(1)(B) is 'whether the precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis are readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion.'" *Id.* at 905 (*quoting Wachtel ex. Rel. Jesse v. Guardian Life Ins. Co. of America*, 453 F.3d 179, 185 (3rd Cir. 2006)). Defense counsel increasingly have sought to defeat certification by arguing that the class definition is insufficient to render the order "readily discernible." *See, e.g., Marcus v. BMW of North America, Inc.*, 687 F.3d 583, 592 (3rd Cir. 2012). This strategy is another iteration of the general trend exemplified by *Dukes* of requiring more and more earlier in the case.

5. **Conflation of FLSA and Rule 23 Requirements.** Earlier this month, in *Espenscheid v. DirectSat USA, LLC*, Judge Posner asserted that, "[D]espite the difference between a collective action and a class action and the absence from the collective-action section of the Fair Labor Standards Act of the kind of detailed procedural provisions found in Rule 23, there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences." Slip Op. at 2 (citation omitted). The case turned on questions of commonality, which the Seventh Circuit concluded the plaintiffs had failed to demonstrate. As Posner notes in his opinion, s. 216(b) of the FLSA does not include the same procedural requirements as Rule 23. The commonality standard articulated in *Dukes* should not apply to assessing whether plaintiffs are "similarly situated" for FLSA collective action purposes. The more courts conflate Rule 23 and FLSA standards, the more *Dukes* will influence outcomes in wage and hour cases. Several post-Dukes cases have rejected defendants' efforts to invoke Dukes. *See, e.g., Essame v. SSC Laurel Operating Co.*, 847 F. Supp. 2d 821, 828 (D. Md. 2012) (conditionally certifying FLSA

collective action; noting "Rule 23 standards are generally inapplicable to FLSA collective actions"); *Winfield v. Citibank*, 843 F. Supp. 2d 397, 409 (S.D.N.Y. 2012) (conditionally certifying collective action, observing that "numerous courts . . . have refused to apply *Dukes* on motions for conditional certification under the FLSA, concluding that the Rule 23 analysis had no place at this stage of the litigation."). Other courts, however, have found Dukes "illuminating" in the context of FLSA collective actions. *MacGregor v. Farmers Ins. Exch.*, 2011 WL 2981466, at *4 (D.S.C. July 22, 2011). *See also Blaney v. Charlotte-Mecklenburg Hosp. Auth.*, 2011 WL 4351631, at *8–10 (W.D.N.C. Sept. 16, 2011). For discussion of this and many other important trends in class action litigation, see generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. ___ (2013), available at http://ssrn.com/abstract=2038985.

6. **Issue classes.** Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." What that provision means has been a subject of considerable dispute among the circuits. Some courts have concluded that (c)(4) is a "housekeeping" rule that cannot be viewed as an alternative to or an alteration of the basic requirements of 23(b), and in particularly the requirement of predominance under (b)(3). *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). By contrast, in *McReynolds*, 672 F.3d at 492, the court held that the district court had erred in refusing to certify an issues class where the issue – whether the defendant had engaged in employment practices that had a disparate impact on the class members – could be efficiently resolved for the class as a whole. *See also In re Motor Fuel Temperature Sales Practices Litigation*, 279 F.R.D. 598, 608-611 (D. Kan. 2012) (certifying liability and injunctive relief as issue classes under (c)(4)).

7. **Consumer Class Actions**. Trends in consumer class actions have developed somewhat independent of the fallout from *Dukes*. In some respects this is because *Dukes* was dwarfed by *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), in the consumer context. Some of the big issues to watch for: choice of law (the extent to which the applicable law needs to be identified in the complaint and the status of state-law grouping in recent years, *see, e.g., Yarger v. ING Bank*, C.A. No. 11-154-LPS (D. Del. Aug. 31, 2012) (grouping state laws where the UDAP/consumer protection statutes did not have a reliance requirement)), and preemption (which, following the passage of the Dodd-Frank law in 2010 has relaxed somewhat in certain areas such as Home Owners Loan Act and National Bank Act preemption).

8. **State Law Developments**. Class actions are under attack on legislative front at the state level, with state legislators seeking to incorporate not only the most extreme readings of *Dukes*, but also other hostile provisions in to the law. Be aware of what is happening in

your state. In Arizona, for example, a bill has been proposed that would amend the state's class action laws significantly. Among other things, the new law would add a requirement that a class could only be certified if "the class is defined so as to permit the identification of class members before any merits adjudications occur." The proposed law also specifies that an injunctive class can only be certified if the party seeking to represent the "does not seek any monetary relief." And the law establishes a standard of "clear and convincing evidence" for facts relevant to certification, with a stated presumption against certification. *See* Appendix A.

9. **Settlement**. Courts reviewing class certification for settlement purposes develop in some respects a distinct body of class action law. While it is well-settled that Rule 23's requirements generally apply to settlement classes, *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997), there is room for flexibility particularly in the Supreme Court's statement that concerns of manageability don't have to deter certification of a settlement class. *Id.* Thus, for example, the Second Circuit recently observed that "with a settlement class, the manageability concerns posed by numerous individual questions of reliance disappear." *In re. American International Group Securities Litigation*, 689 F.3d 229, 241 (2d Cir. 2012). Accordingly, while acknowledging that the plaintiffs might have had to prove individual reliance had this securities case gone to litigation, the fact that the class was settling reframed the issue. *But see Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012) (concluding that "reliance" is a predominance question, not a manageability question, and must therefore be treated the same way in settlement as it would in litigation).

APPENDIX A

2013 Arizona Legislature

AN ACT
CREATING TITLE 12, CHAPTER 10, ARTICLE 4, SECTION 12-1881, ARIZONA REVISED STATUTES, RELATING TO CLASS ACTIONS

Be it enacted by the Legislature of the State of Arizona:

Section 1. Arizona Revised Statutes, Title 12, is amended by adopting Chapter 10, Article 4, Section 12-1881 to read:

(a) Prerequisites to a class action

One or more members of a class of Arizona residents may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class as to which the court or jury could reasonably reach conclusions or findings applicable to all class members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class, (5) the class is defined so as to permit the identification of class members before any merits adjudications occur, and (6) non-residents may join in the class if the claim or claims of the class arise from a sudden accident or natural event culminating in an accident that results in death or injury incurred at a specific location.

(b) Class actions maintainable

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party seeking to maintain the class action does not seek any monetary relief and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class as to which the court or jury could reasonably reach conclusions or findings applicable to all class members predominate over any questions affecting only individual members, that the

evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought and of the defenses thereto is substantially the same as to all class members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent, nature, and maturity of any litigation concerning the controversy already commenced by or against members of the class; (C) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify maintaining the case as a class action; (D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (E) the difficulties likely to be encountered in the management of a class action; and (F) the extent to which the allegations at issue are subject to the jurisdiction of federal or state regulatory agencies.

(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered, amended, or withdrawn at any time before the decision on the merits.

(2) If the court finds that an action should be maintained as a class action, it shall certify the action the accordingly on the basis of a written decision setting forth all reasons why the action may be so maintained and describing all evidence in support of the determination.

(3) A court shall not certify that an action may be maintained as a class action unless, on the basis of a full record on the relevant issues, the proponents proffer clear and convincing evidence that the action complies with all requirements for such certification. Any doubt as to whether this burden has been met shall be resolved in favor of denying class certification. The court shall decertify a class action upon any showing that an action has ceased to satisfy the applicable prerequisites for maintaining the case as a class action.

(4) There shall be a rebuttable presumption against the maintenance of a class action as to claims for which class members would have to prove knowledge, reliance, or causation on an individual basis.

(5) The determination that an action may be maintained as a class action shall not relieve any member of the class from the burden of proving all elements of the member’s cause of action, including individual injury and the amount of damages.

(6) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall provide each member with a general description of the action, including the relief sought, the possible financial consequences for the class, the names of the representative parties, and the name and address of counsel to whom members of the proposed class may direct inquiries, and shall advise

each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(7) The plaintiff shall bear the expense of the notification required by the foregoing subsection. The court may require other parties to the litigation to cooperate in securing the names and addresses of the persons within the class for the purpose of providing individual notice, but any costs incurred by the party in providing such cooperation shall be paid initially by the party claiming the class action. Upon termination of the action, the court may allow as taxable costs all or part of the expenses incurred by the prevailing party.

(8) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(9) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in conduct of actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise

(1) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(2) Before approving the dismissal or a compromise of an action that the court has determined may be maintained as a class action, the court shall hold a hearing to determine whether the terms of the proposed dismissal or compromise are fair, reasonable and adequate for

the class. At such hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard as the court may direct.

(f) Discovery

Representative parties and intervenors are subject to discovery in the same manner as parties in other civil actions. Other class members are subject to discovery in the same manner as persons who are not parties, but may be required by the court to submit to discovery procedures applicable to the representative parties and intervenors.

(g) Appeals

A court's order certifying or refusing to certify a class action is appealable in the same manner as a final order or judgment. While an appeal under this subdivision is pending, all discovery and other proceedings shall be stayed.

Section 2. Effective date. This Act shall take effect upon becoming law.