LIVING IN A POST-*DUKES* WORLD:

WHAT IS THE MEANING OF "TRIAL BY FORMULA"?

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Impact Fund

I. INTRODUCTION

Class action defense counsel are trying to assign a meaning to the "Trial by Formula" phrase from *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that is not supported by the case. The expression is not, by its terms and read in context, a sweeping condemnation of the use of aggregate proof. Nor does the *Dukes* case assume, let alone enshrine, a constitutional due process right to litigate each class member's claim individually.

Instead, the phrase "Trial by Formula" refers to just one highly idiosyncratic model of class proof that the Ninth Circuit described as a possible means of calculating damages in its en banc opinion in *Dukes*, a model which the Supreme Court repudiated. That form of proof, used in the Ferdinand Marcos class action, *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), and in no case since, relied on a set of sample trials to extrapolate compensatory damages for victims of torture, "disappearance," or summary execution. *Id.* at 786. In *Dukes*, the Supreme Court merely observed that, since Title VII's unique statutory scheme mandates individual remedies hearings for backpay claims, the Ninth Circuit's proposal to substitute the *Hilao* methodology for those statutory hearings was unacceptable. 131 S. Ct. at 2550, 2561; *see al*so 42 U.S.C. § 2000e *et seq.*

The *Dukes* Court's reference to "Trial by Formula" should not apply to evidence based on the defendant's own business records, proper scientific methods, admissions by its corporate executives, and representative testimony demonstrating corporate practices, when offered to show class-wide liability or damages. Courts should not accept a defendant's claim that the "Trial by Formula" language extends beyond the very limited purpose these words served in the *Dukes* opinion. Moreover, *Dukes* does not recognize a constitutional due process right to litigate each class member's claim individually. The *Dukes* Court expressly tied its criticism of "Trial by Formula" to the statutory defenses available under Title VII, not to due process. The concept of a due process right to individual proof in other contexts is at odds with historical and modern precedent and incompatible with important substantive rights that depend on aggregate proof. Courts routinely allow parties to rely on aggregate proof in many contexts without offending due process.

II. THE "TRIAL BY FORMULA" LANGUAGE FROM *DUKES* DID NOT CREATE A DUE PROCESS RIGHT TO LITIGATE CLASS CLAIMS INDIVIDUALLY

A. "Trial by Formula" Refers Only to Hilao's Unusual Trial Plan and Was Rejected in *Dukes* Because Title VII Requires the Opportunity to Present Individual Defenses

In *Dukes*, the Supreme Court's reference to "Trial by Formula" appears at the tail end of its extended discussion of whether the claims for backpay in that case could properly be certified under Federal Rule of Civil Procedure 23(b)(2). Read in context, the limited import of the "Trial by Formula" shorthand is plain: it refers only to one trial plan adopted in an unusual case that the Court found incompatible with Title VII's statutory scheme.

The "Trial by Formula" phrase appears after the *Dukes* Court concluded that claims for backpay under Title VII could not be certified under Rule 23(b)(2). The Court reasoned that backpay was an "individualized monetary claim" and that, given the history and structure of Rule 23, such claims belonged under Rule 23(b)(3), where additional protections, like notice and the right to opt out, are mandatory. 131 S. Ct. at 2558.

The Court expressly did not reach the question of whether any forms of monetary relief might be certifiable under Rule 23(b)(2). It discussed, but did not adopt, the Fifth Circuit's formulation for what types of monetary relief could be certified under Rules 23(b)(2)—those "incidental to requested injunctive or declaratory relief." 131 S. Ct. at 2560 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). It said that even if that formulation were correct, the backpay claims in *Dukes* could not satisfy that test, since the Fifth Circuit defined "incidental" monetary relief, in part, as not requiring "additional hearings to resolve the disparate merits of each individual's case." *Id.* (quoting *Allison*, 151 F.3d at 415) (emphasis added). Since Title VII's "detailed remedial scheme" required additional proceedings (known as *Teamsters* hearings[1]) to permit the employer to present individual statutory defenses specific to Title VII, the backpay remedy sought in *Dukes* could not be considered "incidental monetary relief." *Id.*

In one final paragraph following this "even if" discussion, the *Dukes* Court refers to "Trial by Formula." Having concluded that Title VII's statutory scheme requires additional individual proceedings before backpay can be awarded, the Court held that such proceedings could not be replaced with a "Trial by Formula." *Id.* at 2561.

[1] The Court held that the two-stage trial model first articulated in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), "gives effect" to Title VII's statutory requirements. 131 S. Ct. at 2561.

There is no need to speculate what the Supreme Court meant by "Trial by Formula" as it specifically described the objectionable model:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

131 S. Ct. at 2561. The Court then cited to the portion of the Ninth Circuit's *Dukes* ruling that contains a lengthy exegesis of the *Hilao* method of proof and how it might provide a viable approach to evaluate the backpay claims before it, one possible alternative to the district court's tentative trial plan. *Id*.; *see also supra* Part I.B.[2] In other words, the Court's rejection of "Trial by Formula" refers only to the Ninth Circuit's proposal to apply the *Hilao* method of proof to the claims in *Dukes*. The Court "disapprove[d] that novel project,"—because it would not allow Wal-Mart to present statutory defenses to individual Title VII backpay claims and therefore abridged a statutory right in violation of the Rules Enabling Act (***not*** due process).[3] 131 S. Ct. at 2561.

From this very narrow point concerning the possible frontiers of Rule 23(b)(2) as applied to Title VII backpay claims, class action defendants have sought to conjure a constitutional right to raise individualized defenses to any claim in a class action, whether statutory or common law. But nowhere does the *Dukes* opinion refer to a ***due process*** right to present individualized defenses. The Court's analysis is tied entirely to Rule 23, the Title VII statutory scheme, and the remedial scheme set forth in *Teamsters*.[4]

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[2] The district court's tentative trial plan was "based, in large part, on how other courts have handled similarly large and complex class action suits." 603 F.3d at 571, 624 (9th Cir. 2011). Following the *Teamsters* bifurcated trial model for Title VII class actions, plaintiffs would in Stage I "attempt to prove that Wal-Mart engaged in a pattern or practice of discrimination against the class via its company-wide employment policies." *Id*. at n.49. In Stage II, the court would "fashion class-wide injunctive relief" and "calculate and distribute the back pay award." Using employer business records, lump sums would be calculated for promotion and equal pay claims, with a separate procedure for distributing those sums to class members entitled to share. *Id*.

[3] The *Dukes* Court's did refer to Due Process in connection with the rights of class members to notice under Rule 23(b)(3) in suits primarily for money damages. 131 S. Ct. at 2559 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

[4] The Court explained that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b); a class cannot be

Similarly, the *Dukes* opinion nowhere equates "Trial by Formula" with the use of statistical or aggregate proof in class actions or litigation generally. Indeed, the opinion strongly endorses the use of statistical evidence to demonstrate "significant proof" of a general policy of discrimination sufficient to satisfy Rule 23(a)(2) commonality. 131 S. Ct. at 2554-55. The Court held only that the specific statistical analyses offered by the *Dukes* plaintiffs were insufficient to meet the legal standard. *Id*.

Properly understood, the Supreme Court's rejection of "Trial by Formula" means no more than that the *Hilao* method of proof cannot be substituted for individual *Teamsters* remedial hearings to determine backpay under Title VII. It has no relevance where the operative statute affords no specific right to individualized proof. *See Ross v. RBS Citizens*, N.A., 667 F.3d 900, 909 n.7 (7th Cir. 2011) (holding that the presence of individual affirmative defenses in wage and hour action did not prevent 23(b)(3) certification; *Dukes* prohibited only backpay under Rule 23(b)(2) because of affirmative statutory defense under Title VII); *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 WL 689169, at *3 (N.D. Ill. Mar. 2, 2012) (holding that *Dukes*' "Trial by Formula" language did not prevent assessment of damages in wage and hour class action with class-wide proof). *See also* Kimberly Kralowec, *Dukes and Common Proof in California Class Actions*, 21J. Antitrust & Unfair Comp. Sec. State Bar of Cal. No. 2 (Summer 2012).

B. How to Distinguish the "Trial by Formula" Criticized in *Dukes*

As explained above, the target of the Supreme Court's criticism in *Dukes* was the very specific and unusual trial model used in *Hilao*, "a 10,000+ plaintiff class action filed by Philippine nationals and their descendants who were alleged victims of torture, summary execution, and 'disappearance' at the hands of Ferdinand E. Marcos, the Philippines' former president." *Dukes v. Wal-Mart Stores, Inc*., 603 F.3d 571, 625 n.54 (9th Cir. 2010) (en banc). That trial model, adopted to address an extraordinary set of facts and circumstances, has nothing to do with the kinds of evidence ordinarily used in class actions, where plaintiffs are routinely allowed to extrapolate from existing records to reconstruct missing records, use statistical modeling of various sorts, and bolster such evidence with other business records, corporate admissions, and worker testimony.

In *Dukes*, the Ninth Circuit declined to rule on the specifics of the district court's proposed trial plan, concluding that Rule 23 manageability had been met. "At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself) . . . ." *Dukes*, 603 F.3d at 625. The Ninth Circuit then observed that there

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certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." 131 U.S. at 2561 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

were "a range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process . . . ." *Id*.

One possible approach, according to the en banc majority, would be to utilize the method used to determine compensatory damages in *Hilao*. *Id*. at 625. The components of that methodology were:

Claim Forms – Class members filed written claims. The district court determined that over 500 were facially invalid, leaving over 9500 claims. *Id*.

Sample of Claims – A computer randomly selected 137 claims, based upon a statistician's testimony about the probability that the percentage of valid claims among that sample could be generalized to all claims. *Id*. at 625-26.

Special Master – A special master supervised the depositions of the sample claimants, reviewed the claims, determined which claims were valid, and recommended an amount of damages to be awarded as to those claims. The special master recommended a total compensatory damage award based upon the percentage of valid claims, multiplied by the average recommended award. *Id*.

Jury Trial – The district court then held a jury trial on compensatory damages. The jury heard the testimony of the sample of claimants, the statistical expert, and the Special Master concerning his recommendations. It accepted some of the Special Master's recommendations and rejected others. *Id*.

Pro Rata Distribution of Compensatory Award – The district court entered judgment for the sample claimants, based on the jury's findings, and divided the compensatory damage award among the remaining claimants pro rata. *Id*.

The Ninth Circuit did not explain how specifically the *Hilao* methodology might be used, other than suggesting that Wal-Mart could litigate its individual defenses in the randomly selected "sample cases." *Id.* at 628 n.56. The "Trial by Formula" used in *Hilao* and criticized in *Dukes* bears no similarity to the process used in most cases to establish class-wide liability and/or damages.

Here are some ways in which the *Hilao* methodology was unique. First, most class cases involve one trial of all claims before one jury based on substantial evidence from which reasonable and defensible estimates are made as to the extent of the class-wide harm. *Hilao* was a trifurcated proceeding with the disputed methodology applied to only one phase: class compensatory damages, which were estimated based on evidence as to only 1.5% of all claims submitted by class members.

Second, *Hilao* involved the use of a special master, who reviewed claims, supervised the taking of deposition testimony in the Philippines, and presented recommendations to the jury.

Third, the evidence in *Hilao* consisted of anecdotal testimony regarding a wide range of events, physical injuries, and subjective emotional distress.

Fourth, the illegal conduct in *Hilao* occurred in a wide array of circumstances, resulting in vastly different types of injuries.

The properly-conducted proceedings in the typical class action bear no resemblance to the "Trial by Formula" rejected by the Supreme Court in *Dukes*.

II. THERE IS NO DUE PROCESS RULE THAT CURBS THE USE OF AGGREGATE PROOF

Class defendants have sought to expand the "Trial by Formula" dictum into a broad limitation on aggregate proof, claiming a due process right to assert "every available defense" and to contest each class member's claim individually. There is no such right.[5]

As one scholar recently explained in a comprehensive historical study of this due process claim, the faulty argument derives from cases beginning with *Lochner v. New York*, 198 U.S. 45 (1905), whose theory of due process has long been discredited:

> In effect, modern procedural due process cases and the nineteenth century tradition converge on essentials: Neither construes due process as a fixed limit on the type or quantity of evidence presented in ordinary civil proceedings. Then and now, due process leaves a great deal of room for courts to regulate parties' opportunities to present relevant evidence in civil proceedings in the service of equity and convenience. Class action defendants' arguments are rooted in a brief, and brief-lived, deviation from this tradition—the *Lochner* era. If history provides the "baseline" against which constructions of due process should be tested, class action defendants' claims are losers.

Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 324 & n.30 (2012) (discussing convincing historical evidence "that defendants' due process argument is without merit").[6]

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[5] *See*, Alexandra D. Lahav, *The Case for 'Trial by Formula'*, 90 Tex. L. Rev. 571 (2012); Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 Loy. U. Chi. L.J. 545 (2012).

[6] In this 2012 article, the author repudiates his own earlier contrary view. *See* 2012 Utah L. Rev. at 324 n.30 (repudiating argument that class-specific evidentiary shortcuts are inconsistent with due process, developed in Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 857 (2005)).

Due process requires the balancing of three separate interests: vindicating a plaintiff's interest in obtaining a remedy, avoiding an erroneous deprivation of a defendant's property, and "any ancillary interest the [Court] may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). The Supreme Court has never recognized a constitutional right to particular forms or methods of proof. Such case management decisions lie within the discretion of the trial courts, subject to appropriate review. *See*, *e.g.*, Pa. R. Evid. 102 (stating that rules "shall be construed to secure fairness in administration" and "elimination of unjustifiable expense and delay"); Pa. R. Evid. 403 (stating that relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

Due process does not limit courts from exercising their discretion to regulate the quantum, method, or order of proof when doing so is necessary to facilitate class proceedings.