Wal-Mart v. Dukes: Class Actions and Legal Strategy

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> Cutty: The game done changed. . .
> Slim: Game's the same, just got more fierce.[1]

I. The Role of Legal Strategy

Despite the dire warnings of its staunchest advocates and the occasional frustrated wishes of its critics, the class action has proved extremely hard to kill.[2] Notwithstanding the Private Securities Litigation Reform Act, which curbed some of the worst abuses by plaintiffs' lawyers in securities cases, securities class actions are still thriving. Similarly, the Class Action Fairness Act, which ensured that plaintiffs had to bring nationwide class actions in federal court rather than more sympathetic state courts, has simply created a booming business in federal class actions.

The truth is, class actions are big business for lawyers on both sides. Plaintiffs' lawyers can win multi-million dollar paydays from settling just a single case. Elite defense firms can earn millions more slowly by defending a steady stream of class actions against their clients. And that makes class-action practice the subject of a game of legal strategy all its own.

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[1] The Wire, episode 3.4, ''Hamsterdam,'' written by George Pelecanos, directed by Ernest Dickerson (HBO 2004).

[2] See, e.g., Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373 (2005); Benjamin Sachs-Michaels, The Demise of Class Actions Will Not Be Televised, 12 Cardozo J. Conflict Resol. 665 (2011).

What do I mean by legal strategy? Strategy is

> (1) a plan for action toward a goal;
> (2) that comprises a series of actions over time; and
> (3) that assumes other parties will oppose (or otherwise interfere with) the plan.[3]

In litigation, a party is concerned with at least two possible other parties—its opponents and the court. Courts are made up of judges, and judges—even the most conscientious ones—have innate biases and agendas of their own,[4] even the Supreme Court (which is largely assumed, rightly or not, to be pro-business).[5]

Strategy extends beyond simply winning the immediate case, however. For repeat litigants, securing favorable developments in legal doctrine for future cases can be more important than a single victory or loss. And legal doctrine emerges from the way in which courts are presented with cases, which in turn reflects strategic choices made by litigators. In the United States, federal courts limit themselves to deciding live controversies. And the selection of live controversies that arrive in court is the product of strategic choices that both the plaintiff and defendant have made—from which claims

[3] Brian Anderson & Andrew Trask, The Class Action Playbook xiv (2010).

[4] Chief Judge Dennis Jacobs of the Court of Appeals for the Second Circuit, for example, has said that judges have an ''inbred preference for . . . all things that need and use lawyers, enrich them, and empower them vis-à-vis other sources of power and wisdom.'' Dennis Jacobs, The Secret Life of Judges, 75 Fordham L. Rev. 2855, 2855 (2007). And Judge Richard Posner of the Court of Appeals for the Seventh Circuit has pointed out that judges cannot escape the life experience they bring to each case, no matter how conscientious they are. Richard A. Posner, How Judges Think 68–69 (2008).

[5] See, e.g., Robert Barnes and Carrie Johnson, Pro-Business Decision Hews to Pattern of Roberts Court, Wash. Post, Jun. 22, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062100803.html (last viewed Jul. 30, 2011); Associated Press, Is the Roberts Court Pro-Business? Aug. 5, 2010, available at http://www.cbsnews.com/stories/2010/06/10/politics/main6568825.shtml (last viewed Jul. 30, 2011). But see, e.g., David G. Savage, Justices Have Been Siding with Workers, Underdogs, L.A. Times, Mar. 13, 2011, available at http://articles.latimes.com/2011/mar/13/nation/la-na-court-unanimous-20110313 (last viewed Aug. 8, 2011); Hans Bader, *Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates That the Supreme Court Is Not ''Pro-Business,'' 2009–10 Cato S. Ct. Rev. 269, 283 (2010) (noting that ''business has lost ground repeatedly'' before the Supreme Court).

to bring to which cases to settle.[6] Given the high stakes involved in class actions, both sides invest heavily in strategic efforts to shape legal doctrine and, as a result, class action law around the trial and appellate federal judiciary is constantly pushed in divergent and inconsistent directions, the result of particular battles in front of particular courts.

About once a decade, the Supreme Court steps squarely into the middle of this fray like a referee at a heated homecoming game and rules certain tactics off-limits. The last time it did so was in 1997 in *Amchem Products, Inc. v. Windsor*, when it held that courts could not use class action settlements to sidestep the formidable problems of administering mass tort litigation.[7] This term it did so again, sweeping away a number of tactics both plaintiffs and defendants had developed in the years since *Amchem*. And it did so, at least in part, because of the way those issues were presented by the time they reached the Court. Of the several class action cases it decided, the centerpiece was *Wal-Mart v Dukes*. As we will see, for those interested in the debate over class actions, *Dukes* provides an excellent view of the strategic maneuvering that goes on, both between plaintiffs and defendants and among courts.

The *Dukes* decision provoked a loud outcry in the popular press, which for the most part reflected opinions about social politics rather than legal policy. Yet the decision is fairly straightforward doctrinally. And one of the Court's two holdings—a holding sufficient to reverse the lower court's opinion—was unanimous.

II. Creative Certification Strategies

Rule 23 of the Federal Rules of Civil Procedure authorizes the class action, a method of aggregating a large number of claims into a single lawsuit. Under Rule 23, the lawsuit begins with an individual plaintiff. If that plaintiff can convince the court that her claim is enough like those of the people she seeks to represent, the court certifies the case as a class action. Once the class is certified, the plaintiff offers proof of her individual claim at trial. If she wins, the whole class wins; if she loses, the whole class loses with her.

[6] See Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa L. Rev. 601, 603–05 (2001).

[7] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 619 (1997).

What makes class action strategy so interesting (and so complex) is that few class actions ever go to trial.[8] Instead, the real battle is over class certification itself. If the court certifies the class, then the plaintiffs have effectively won. If it does not, the defendants have. (Rule 23 recognizes this effect by allowing interlocutory appeals of the certification decision, because it usually sounds the ''death knell'' for one side or the other in the litigation.[9])

As a result, in the high-stakes game of class action litigation, plaintiffs will try any number of inventive tactics to get class actions certified. In its last major class action opinion, the Court remarked on the ''adventuresome'' tactics lawyers used in conjunction with Rule 23.[10] Similarly, defendants will get as creative as they can in opposing certification.

How does a plaintiff get a class certified? She must demonstrate that she meets a number of minimum prerequisites (described in Rule 23(a)) and that she meets one of three additional categories of lawsuit (described in Rule 23(b)).

Rule 23(a) lists four requirements, each of which is designed to test whether a proposed class is cohesive enough to justify a massive trial culminating in a one-size-fits-all verdict. Those requirements are: (1) numerosity (are there enough members to justify a class?); (2) commonality (is there a common issue that unites the class?); (3) typicality (is the named plaintiff typical of the class?); and (4) adequacy (will the named plaintiff protect the interests of the class above her own or her attorney's?).

Rule 23(b) lays out three additional categories for class actions. A plaintiff may bring a class action under Rule 23(b)(1) if she can show that winning her lawsuit would necessarily mean that some other potential plaintiff would have to lose an identical lawsuit. This happens in one of two circumstances: either the rights the plaintiff seeks

[8] Anderson & Trask, *supra* note 3, at 192 (2010).

[9] Fed. R. Civ. P. 23(f); see also Blair v. Equifax Check Serv., 181 F.3d 832, 834 (7th Cir. 1999) (''just as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight''). For more on the ''death knell'' doctrine, see Anderson & Trask, *supra* note 3, at 170–72 (2010).

[10] Amchem, 521 U.S. at 617–18 (''In the decades since the 1966 revision of Rule 23, class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one.'').

to enforce would require not enforcing someone else's rights or the plaintiff seeks a money award from a limited fund, so paying one plaintiff the full amount she deserves necessarily means not paying others. Rule 23(b)(2) covers cases where a plaintiff seeks some form of declaratory or injunctive relief. And Rule 23(b)(3) addresses cases in which a plaintiff seeks monetary relief; it requires a plaintiff to show that (1) common issues do not just exist but predominate over more individual issues and (2) the class action is superior to other methods of resolving the controversy. Rule 23(b)(1) and (b)(2) classes are known as ''mandatory'' classes: if a court certifies them, all class members are involved whether they like it or not. Rule 23(b)(3) classes are known as ''opt-out'' classes because individual class members may choose not to participate in the lawsuit and not to be bound by its verdict.

So the game for plaintiffs in class action litigation is to demonstrate that their lawsuit is full of common issues that can be tried with classwide evidence, so that an aggregated trial will not compromise the due process rights of either the defendant or the absent class members. The game for the defendants is to show that plaintiffs' proposed lawsuit is full of lurking individual issues, each of which must be given its proper due.

This past term, the Court largely addressed (and rejected) some of the more creative approaches to litigating class actions. In *AT&T Mobility, LLC v. Concepcion*, it held that, because there is no inherent right to try a case as a class action, arbitration clauses that waived the right to prosecute a class action were not per se unconscionable.[11] In *Morrison v. Australia National Bank*, the Court held that a securities class action with no connection to the United States (sometimes called a ''foreign-cubed'' class action because it involves foreign plaintiffs, foreign defendants, and foreign conduct) cannot be brought in a U.S. court under U.S. securities laws.[12]

The Court's class action rulings were not solely pro-defendant. In *Erica John Fund v. Halliburton*, it held that Rule 23 does not require a court to take the additional step of determining whether a securities fraud actually caused an individual investor's loss when certifying

[11] 131 S. Ct. 1740 (2011).

[12] 130 S. Ct. 2869 (2010).

a securities class action.[13] And in *Smith v. Bayer Corp.*, the Court held that if an earlier court has refused to certify a proposed class, the members of the proposed class are not barred from bringing another class action based on the same facts.[14]

Each of these rulings declined to read either extra powers (such as the implicit ability to trump an arbitration clause) or extra requirements (such as loss causation) into Rule 23. Instead, the Court has made clear that Rule 23 is a straightforward procedural device. That device allows a plaintiff to represent others who have been similarly wronged in an all-or-nothing trial, but it does not confer separate substantive rights of any kind. *Dukes* fits squarely into this way of looking at the Court's class action term. In *Dukes*, the Court took on several tactics that class action plaintiffs had been trying for some time. Those tactics included the following:

Seeking certification for money damages under Rule 23(b)(2) rather than Rule 23(b)(3). Rule 23(b)(2) has a storied history as a civil rights tool. It was specifically designed to mimic the civil rights class actions that had helped achieve desegregation.[15] As a result, Rule 23(b)(2) is far more concerned with injunctive or declaratory relief than it is with money damages. Rule 23(b)(3) is better designed to address claims for money damages. It has more thorough notice requirements, an opt-out procedure, and methods of ensuring that the litigation is actually a good idea. Plaintiffs developed the tactic of seeking monetary damages under Rule 23(b)(2) rather than Rule 23(b)(3) on the theory that the money they requested was not the primary relief they sought.[16] Were a case to go to trial, the poor fit of Rule 23(b)(2) for monetary class actions would be harder to ignore. But in most cases the plaintiffs' goal is to certify the class and then

[13] 131 S. Ct. 2179 (2011).

[14] 131 S. Ct. 2368 (2011).

[15] David Marcus, Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action, 63 Fla. L. Rev. 657, 660 (2011). For a contemporaneous account of how civil rights advocates used the class action device, see Comment, The Class Action Device in Antisegregation Cases, 20 U. Chi. L. Rev. 577 (1953).

[16] Sarah Dale, Reconsidering the Approach to 23(b)(2) Employment Discrimination Class Actions in Light of *Dukes v. Wal-Mart*, 38 Conn. L. Rev. 967, 979–88 (2006) (discussing cases in which plaintiffs sought certification of classes for money damages under Rule 23(b)(2)).

settle the case, rather than to try it in front of a jury.[17] And while courts in the 1990s and 2000s enforced Rule 23(b)(3) stringently, they were less rigorous about enforcing Rule 23(b)(2).[18]

Hybrid certification. If the two subsections offer differing advantages, why not invoke both? Also known as ''divided'' or ''composite'' classes, hybrid class actions, where the plaintiff seeks certification under both Rule 23(b)(2) and 23(b)(3), have long been a method for plaintiffs to avoid the problems with meeting the requirements of Rule 23(b)(3).[19]

Claim-splitting. Claim-splitting involves the strategic shaving of causes of action away from a complaint until only those that stand the best chance of certification remain. For example, in a case involving an alleged fraud, a plaintiff might forgo her fraud claim itself (because fraud claims are notoriously difficult to certify) but assert a breach-of-warranty claim invoking the same facts.[20] From the plaintiff's point of view, claim-splitting can be an extremely effective tool for turning an unwieldy individual case into something streamlined enough to try on a classwide basis.

Offering statistical proof to minimize individual issues. Often, a case may involve issues that would ordinarily require individualized proof, in particular, issues that involve causation of some kind, such as whether a particular worker's failure to obtain promotion was due to her gender (as she might claim) or her poor performance (as

[17] Mark A. Perry & Rachel S. Brass, Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles, 65 N.Y.U. Ann. Surv. Am. L. 681, 681 (2010).

[18] For more on hybrid certification under Rule 23(b)(2), see Anderson & Trask, *supra* note 3, at 38.

[19] See Fisher v. Va. Elec. & Power Co., 217 F.R.D. 201, 214 (E.D. Va. 2003) (''Instead of divided certification, a district judge may grant composite certification. Composite certification allows a court to certify the class under Rule 23(b)(2) for both monetary and equitable remedies and exercise its plenary authority under Rules 23(d)(2) and 23(d)(5) to provide all class members with personal notice and the opportunity to opt out, as if the class were certified under Rule 23(b)(3).''); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999). For more on hybrid certification, see Anderson & Trask, *supra* note 3, § 2.6.1 (2010).

[20] For more on claim-splitting generally, see Edward F. Sherman, ''Abandoned Claims'' in Class Actions: Implications for Preclusion and Adequacy of Counsel, 79 Geo. Wash. L. Rev. 483 (2011). For some recent examples of claim-splitting, see Mays v. Tenn. Valley Auth., 2011 U.S. Dist. LEXIS 50225, *28–29 (E.D. Tenn. May 10, 2011); Gates v. Rohm & Hass Co., 265 F.R.D. 208, 218 n.15 (E.D. Pa. 2010); Kelecseny v. Chevron USA, Inc., 262 F.R.D. 660, 673 (S.D. Fla. 2009).

the company might). As a result, plaintiffs' lawyers will often attempt to develop statistical proof that they argue can substitute for the individual proof required in individual actions.[21] While that proof might not be enough to establish the elements of an individual claim, the plaintiffs will argue that the class action device somehow changes the nature of the proof required.

Asking courts to decide certification without facts. For more than a decade, plaintiffs have asked courts to take their factual allegations as true when deciding certification motions. Their ground for doing so was language in a 1974 Supreme Court case, *Eisen v. Carlisle & Jacquelin*, that stated ''nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.''[22] Plaintiffs have argued (and a number of courts have agreed) that that language actively prohibited any inquiry into the merits of a class action claim.[23]

One of the places this tactic has been employed most aggressively is in the use of expert testimony. Plaintiffs often use expert testimony to support motions for certification.[24] If the defendants counter with expert testimony of their own,[25] or argue that the plaintiff's expert has not used a reliable or acceptable method to reach his conclusions

[21] Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 101 (2009) (''the flashpoints today over class certification concern the role of aggregate proof of a statistical or economic nature.''). For examples of this tactic, see McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2010 U.S. Dist. LEXIS 80002, *16 (N.D. Ill. Aug. 9, 2010) (plaintiffs offered statistical proof to demonstrate common employment-discrimination issues among African-American financial advisers in discrimination class action); In re Neurontin Mktg. & Sales Practice Litig., 244 F.R.D. 89, 111 (D. Mass. 2009) (plaintiffs offered statistical evidence to show that marketing campaign caused increase in off-label drug prescriptions in pharmaceutical marketing class action); In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 194 F.R.D. 484, 488 (D. N.J. 2000) (plaintiffs offered statistical proof of tendency for cars to catch fire as evidence of common causation in products liability class action).

[22] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[23] See, most recently, DG v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010) (''Despite Defendants' repeated suggestions otherwise, at the class certification stage Named Plaintiffs do not bear the burden of proving the veracity of their complaint's allegations.'').

[24] Nagareda, *supra* note 21, at 102–03.

[25] *Id*.

(often called ''invoking *Daubert*''),[26] the plaintiffs will then argue that ruling on the admissibility of the expert's testimony—or, alternatively, choosing between the experts—is a merits inquiry better left to trial.[27] The result of this tactic is that the plaintiffs' expert testimony becomes unassailable at class certification. At its worst, it means that so long as a plaintiff can find an expert, any expert, to testify that classwide evidence exists, she can meet her Rule 23 burden.

Each of these tactics came into play at some point in the *Dukes* litigation. And each had a role in shaping the final opinion by the Supreme Court. In short, the *Dukes* certification debate was less a sweeping statement on due process than it was a high-profile housecleaning.

III. The *Dukes* Certification Debate

Few would question that ending—or at least reducing—sex discrimination where possible is an admirable, even compelling goal. As a result, courts face a strong temptation to bypass some of the procedural hurdles that Rule 23 imposes in order to gain some kind of ''rough justice'' for victims of discrimination.

In the popular press, the debate over certifying the *Dukes* class was framed almost solely as a women's rights issue. Advocates sought to cast the Court's decision as one on whether women could enforce the right to equal treatment on the job. But there is a very real question as to whether the best means to combat sex discrimination is through class actions. This question is not just a matter of technical interest to lawyers. If a class representative loses at trial, she can doom the hopes of those absent class members with stronger, valid claims. This outcome will not be a problem if she is typical of the class and shares common issues with these class members. But if she is not, she may also doom the hopes of women with stronger—or just different—claims.

[26] Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993), identified the factors a court must consider when deciding whether to admit expert testimony at trial. Among those factors are (1) whether the expert's methodology can be proved wrong (its falsifiability); (2) whether the method has undergone publication and peer review; (3) the method's known or potential rate of error; and (4) whether the method enjoys general acceptance in the relevant expert community. *Id.* at 592–95.

[27] See, e.g., Brown v. Nucor Corp., 576 F.3d 149, 156 (4th Cir. 2009) (probing into basis of statistics plaintiffs offered to support commonality was impermissible merits inquiry).

Because the Supreme Court's rulings address the various strategic choices that each party makes along the way to class certification, it is worth rehearsing some of the procedural moves made throughout the *Dukes* litigation. Rehearsing the tactical moves each side made shows (1) the kind of inventive arguments made in high-stakes procedural battles and (2) how the issues were presented by the time they reached the Court.

The *Dukes* trial court opinion showcases a number of typical strategies used by each side in arguing for or against certification.[28] Since I have no special access to the plaintiff or defense attorneys in this case, the account I give is a reconstructed one. It identifies each party's strategy from the arguments they actually advanced. While this may lack the ''inside baseball'' quality of insider accounts, it has the advantage of a ''play at home'' version; this is the kind of strategic analysis most lawyers can (and should) employ when they read cases.

The case as certified involved seven plaintiffs, each of whom alleged that members of Wal-Mart's management had discriminated against her:[29]

- *Betty Dukes* is an African-American woman who was promoted to manager but then demoted allegedly after she complained about discrimination at Wal-Mart. She decided against applying for other management positions because she was ''discouraged'' by the discrimination she experienced; some of those positions were eventually filled by African-American women and a Hispanic woman.

[28] A trial court opinion is not a perfect source for determining plaintiffs' or defendants' strategies. Courts, like parties, characterize the facts of a given case to support their holdings. (For an excellent example, see Judge Posner's dissection of an opinion by Judge Patricia Wald in Richard A. Posner, Judges' Writing Styles, 62 U. Chi. L. Rev. 1421, 1436–43 (1995).) Nonetheless, assuming that most judges are conscientious despite their innate biases, one can treat a judicial opinion as an important and usually accurate secondary source for the arguments and strategies each side employs.

[29] Description of individual plaintiffs taken from Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1246–47 (9th Cir. 2007) (Kleinfeld, J., dissenting). It is interesting that, of the various opinions published in the *Dukes* litigation, the only one to describe the plaintiffs' claims is Judge Kleinfeld's dissent from the original appellate opinion. That fact is hardly surprising. Courts, like individual litigants, tend to pay more attention to the facts that favor their arguments; focusing on the plaintiffs' actual experiences tends to support arguments against certifying a class.

- *Patricia Surgeson* alleged that she was sexually harassed and then replaced by a man who got both a better title and a larger paycheck.
- *Cleo Page* was promoted to manager but alleged that she was denied a further promotion after being told ''it's a man's world.'' The position she sought went to another woman instead. While Page was later promoted to department manager, she had been passed over for other positions in favor of a white male, a Latina, and a white woman. She also claimed that she was paid less than a less experienced white man.
- *Chris Kwapnoski* alleged that her manager made sexist remarks. She also alleged that she had been passed over for various management positions in favor of less qualified men.
- *Deborah Gunter* also claimed that she was passed over in favor of less qualified men, some of whom she had trained. When she complained about the discrimination, she was fired.
- *Karen Williamson* alleged that, while she was qualified for—and actively sought out—management positions, she was never promoted. Meanwhile, she watched men receive promotions that were not posted.
- *Edith Arana* was an African-American woman who alleged that she was passed over for promotion to management because her store manager had said he ''did not want women.'' She was later fired. Wal-Mart claimed she was stealing time, while she claimed it was in retaliation for her discrimination complaints.

Wal-Mart, meanwhile, ''is the largest private employer in the world.''[30] At the time the class was originally certified, Wal-Mart had more than a million employees across 3,400 stores.[31]

The plaintiffs faced a number of difficulties in employing these individual accounts as reason to certify their proposed class. First, the individual facts of each plaintiffs' case varied significantly. Ms. Dukes, for example, had what was in essence a retaliation claim based on both racial and gender discrimination. Ms. Surgeson had a sexual harassment claim. And Ms. Kwapnoski had a straightforward discrimination-in-promotion claim. Given the sheer number of

[30] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 141 (N.D. Cal. 2004).

[31] *Id*.

women the plaintiffs sought to represent—who spanned the entire country and years of employment—it was likely these variations would only multiply. If the plaintiffs wanted to maximize their chances of certification, they would have to gloss over these variations and find a common issue that could unite disparate claims.

Second, while the plaintiffs stood the best chance of certification if they argued that there was a pattern and practice of sex discrimination at Wal-Mart,[32] they faced the problem that Wal-Mart had a strong central anti-discrimination policy in place—and in fact had won several diversity awards.[33] So if they tried to argue some kind of generalized practice, Wal-Mart's stated policies would undercut them.

The plaintiffs' solution to these problems was a three-part strategy: (1) they would argue an amorphous version of ''commonality,'' (2) they would seek certification under Rule 23(b)(2) instead of Rule 23(b)(3) (thus avoiding the predominance analysis that might have highlighted the variations among their claims), and (3) they would convince the court to use statistical evidence of widespread discrimination instead of looking at the facts of each individual case.

In defending the case, Wal-Mart argued that plaintiffs' proposed class was ''too large'' to certify—a phrase that deserves closer examination. As the trial court described its argument:

> [Wal-Mart] emphasizes that the proposed class covers at least 1.5 million women who have been employed over the past five years at roughly 3,400 stores, thus dwarfing other employment discrimination cases that have come before. In its view, these numbers alone make this case impossible.[34]

Wal-Mart argued that the size of the proposed class made the case ''historic in nature,'' and presumably without exact precedent.[35] It seems clear from the court's characterization that Wal-Mart was using size as a proxy for diversity: the larger and more sweeping the class in this case, the more variations in claims the court would have to address.

[32] *Id*. at 151.

[33] *Id*. at 154.

[34] *Id*. at 142.

[35] *Id*.

Nonetheless, the emphasis on sheer size was risky. The largest risk was that, by emphasizing size, Wal-Mart was in fact venturing into rhetorical terrain that was much friendlier to plaintiffs. Rule 23 specifically contemplates that a class may be too *small* to certify—that is the whole point of the numerosity requirement in Rule 23(a)(1). However, few (if any) cases hold that a given class is too *large* to certify. In fact, the stated purpose of Rule 23 is to aggregate small claims into large cases. Moreover, courts have traditionally viewed class actions as a way of balancing the scales between the ''little guy'' (a consumer or victim of discrimination) and a faceless corporation. That view is why advocates of class certification have long invoked David-versus-Goliath imagery.[36]

As it turned out, Wal-Mart's central theme was unfortunately chosen for another reason. When Wal-Mart first chose to emphasize size as a shorthand for diversity, the phrase ''too big to fail'' had not yet taken on the connotations that it would after the financial crisis of 2008.[37] But by the time the Ninth Circuit decided the case *en banc*, advocates of certification had summarized Wal-Mart's argument as ''too big to sue,''[38] echoing the now-disreputable ''too big to fail.''[39]

It is hard to say exactly how risky the ''huge and historic'' theme was. It was a clear goad to any trial court. This trial court, for

[36] See Katz v. Blanche Corp., 496 F.2d 747, 772 (3d. Cir. 1974) (''the social desirability of consumer class actions was to insure that a David plaintiff has a Goliath capability against the Goliath propensities of his adversary . . .''); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 348 (4th Cir. 1998) (''plaintiffs and some *amici* would portray franchisees as helpless Davids to the franchisor's Goliath,''); Arch v. Am. Tobacco Co., Inc., 175 F.R.D. 469, 496 n.28 (E.D. Pa. 1997) (''Plaintiffs claim that [their case] is 'David versus Goliath.'''').

[37] See Andrew Ross Sorkin, Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System–and Themselves (2009).

[38] Ariane de Vogue, Supreme Court Justices Seem Leery of Walmart Plaintiffs, http://abcnews.go.com/m/story?id=13248119&sid=77 (Mar. 29, 2011) (quoting Catholic University law professor Suzette Malveaux: '''If you are going to employ so many employees and be a worldwide player, [then] you assume the risk that you might be liable for billions of dollars of back pay. It's a function of the size of the company, it shouldn't immunize them from the law simply because they are big.''').

[39] See Alexandra D. Lahav, The Curse of Bigness and the Optimal Size of Class Actions, 63 Vand. L. Rev. En Banc 117, 118 (2010) (''[A]re some class actions 'too big to fail?' The slogan might mean that the class must be certified because the alternative is that the defendant who has broken the law on a large scale will be more likely to avoid legal responsibility for the full extent of its wrongdoing.'').

example, wound up taking the ''huge and historic'' theme as a challenge, holding that ''[i]nsulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—*simply because they are large*—would seriously undermine these imperatives.''[40] But ''huge'' and ''historic'' also raised red flags to the Supreme Court. And if one believes one will be railroaded by an unsympathetic trial or appeals court, why wouldn't one use the entire briefing process as a long certiorari petition? As it turned out, Justice Antonin Scalia began his opinion by calling the *Dukes* class action the ''most expansive'' the Supreme Court had ever faced.[41] So it appears Wal-Mart's rhetorical strategy ultimately succeeded.

The trial court heard seven hours of oral argument before certifying a class of ''[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.''[42]

The court appeared more concerned with remedying possible discrimination than it did with the manageability of the proposed class. In fact, it went so far as to note that it was issuing its opinion on the 50th anniversary of *Brown v. Board of Education*, an anniversary it claimed ''serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs.''[43]

The trial court's analysis of commonality did not consider whether the common issues would advance the litigation. Instead, it called the burden of establishing commonality ''permissive and minimal.''[44] It specifically said that a plaintiff could demonstrate commonality by

[40] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142 (N.D. Cal. 2004) (emphasis added).

[41] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

[42] Dukes, 222 F.R.D. at 142.

[43] *Id*.

[44] *Id*. at 166. This was not a baseless opinion. Many courts had decided that commonality was a minimal standard. See 7A Charles Alan Wright, et al., Federal Practice & Procedure § 1763, at 218 (3d ed. 2005) (''In other [cases], the court simply has stated that 'clearly' or 'certainly' common questions exist, without indicating the basis for that conclusion or shedding any light on the way Rule 23(a)(2) might be applied in other cases.'').

showing that class members shared either ''legal issues but divergent facts'' or ''a common core of facts but base their claims for relief on different legal theories.''[45]

The trial court identified two ''common issues'' in *Dukes*: (1) whether women, all other things being equal, were paid less than men in comparable positions and (2) whether women received fewer promotions to management than men, after longer waiting periods.[46]

The court found that the plaintiffs had presented evidence showing that each of these issues was common, including evidence of common compensation and promotion policies, a ''strong corporate culture which includes gender stereotyping,'' and, most importantly, ''a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion.''[47]

The court acknowledged that proving Wal-Mart discriminated against women by granting its store managers too much leeway would be difficult to establish with classwide proof.[48] But it maintained that that leeway—combined with its expert's conclusion that Wal-Mart's corporate culture was vulnerable to sex discrimination and plaintiffs' statistical evidence of disparities in pay and promotion—was enough to create an issue common to the class.[49] In other words, while the court acknowledged that subjective decisionmaking would likely lead to variations in how those decisions were made, it adopted plaintiffs' argument that Wal-Mart's ''strong corporate culture'' would ensure that those subjective decisions discriminated against women in a common fashion.[50]

The plaintiffs also presented statistical evidence that Wal-Mart's managers discriminated against women. Their expert, statistician Richard Drogin, had concluded that there were significant disparities between men's and women's compensation and promotion rates,

[45] Dukes, 222 F.R.D. at 145 (internal citations omitted).

[46] *Id*. at 141.

[47] *Id*. at 145.

[48] *Id*. at 149–50.

[49] *Id*. at 149–50.

[50] *Id*. at 153 (''Plaintiffs also rely on the expert testimony of Dr. Bielby to support their contention that gender stereotyping is likely to exist at Wal-Mart, and that it persists to the present day.'').

disparities that remained consistent across regions, and could only be explained by gender discrimination.[51]

Wal-Mart did not let this argument go unchallenged. It pointed out that if subjective decisionmaking might lead to stereotyping, its admittedly ''strong corporate culture'' coupled with its anti-discrimination record should pull managers back from the brink. Among other things, Wal-Mart promoted diversity in its company handbooks and training sessions, established explicit diversity goals, incorporated diversity into its performance assessments of management, and imposed penalties for any violations of its policy.[52] It contested the statistical evidence as well, both by highlighting the methodological flaws in the plaintiffs' analysis (having to do with the scope of the statistics) and by providing an alternative expert analysis of its own.[53]

The court admitted that the experts' opinions contained ''a built-in degree of conjecture,'' in particular because plaintiffs' sociological expert could not ''definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.''[54] But faced with a dispute between dueling statisticians and social scientists, it put off deciding whether any of their methods were sound. Instead, it claimed that deciding between the two experts' conflicting accounts would impermissibly decide the merits of the case.[55]

In other words, there was a vigorous dispute over whether the alleged ''common issue'' the plaintiffs identified was common at all. If the experts' methods were sound, then the plaintiffs could prove their allegations with classwide evidence. But if either's methods were flawed, there would be no common proof of discrimination. That would suggest that, if one wanted to show that the plaintiffs had met their burden of demonstrating commonality, one would have to make the factual finding that they had demonstrated the link between the two. Nonetheless, the trial court refused to explicitly find that final link, claiming that inquiry was best left until trial.[56]

[51] *Id*. at 154.

[52] *Id*.

[53] *Id*. at 154–55.

[54] *Id*. at 154.

[55] *Id*. at 155.

[56] *Id*. at 151.

The court certified the class under Rule 23(b)(2). At the trial level, Wal-Mart did not challenge certification of back-pay claims under Rule 23(b)(2).[57] Instead, it argued that the inclusion of punitive damages meant that monetary damages would predominate over any injunctive relief plaintiffs sought.[58] The trial court disagreed, stating that ''focusing on the potential size of a punitive damage award would have the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant.''[59] This reasoning, of course, assumes that one could not certify a class under Rule 23(b)(3), only under Rule 23(b)(2).

According to the trial court, the proposed class would be manageable at trial because the liability phase of the trial could focus solely on ''statistical analysis and evidence of system-wide policies and practices.''[60]

The trial court recognized that holding individual hearings to determine back pay was ''impractical on its face.''[61] Instead, it accepted plaintiffs' proposal to use a statistical formula to determine back pay.[62] The trial court conceded that ''a formula approach is certainly not the norm,''[63] but it decided that determining back pay by formula ''is a potential option where the employer uses largely subjective criteria for hiring or promotion decisions, objective requirements are minimal, and many more class members qualified for the positions than would have been hired or promoted even absent discrimination.''[64] The court also favored the formula approach because it would be ''virtually impossible'' to determine which class members would actually have been hired or promoted had there been no discrimination.[65] As a result, it decided that there was ''little point in going through the exercise of individual hearings.''[66]

[57] *Id*. at 170.
[58] *Id*.
[59] *Id*. at 171.
[60] *Id*. at 174.
[61] *Id*. at 176.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 176–77.

When working out how to identify potentially victimized class members, the court concluded that it could ''safely assume that all employees uniformly desire equal pay for equal work.''[67] This assumption is not consistent with the idea that Wal-Mart's policy of ''excessive subjectivity'' resulted in discrimination. If all employees want equal pay for equal work, and Wal-Mart largely promotes from within, then management should want equal pay for equal work as well. This logic directly contradicted the trial court's *other* finding that Wal-Mart's corporate culture was discriminatory.

The court admitted that its formula-based approach would result in a windfall for those who would have lost promotions to other class members.[68] But it decided that ''rough justice'' was better than no justice at all.[69] There is no question this was results-oriented reasoning. Rather than look at whether the proposed class met the requirements of Rule 23, it looked at what it considered to be the proper result, and reverse-engineered a holding that would enable that result. Indeed, given its references to *Brown v. Board of Education*, it appears that the trial court was aware that its opinion would be results-oriented.[70]

IV. The Appellate Opinions

Both parties appealed the ruling. Wal-Mart appealed because it believed that *any* certification of plaintiffs' proposed class was error. The plaintiffs appealed because the trial court had limited back pay to those class members still employed at Wal-Mart. The Ninth Circuit would not be a receptive audience for Wal-Mart. It has an established reputation for pushing legal boundaries to achieve results it deems just, even at the risk of reversal by the Supreme Court.[71]

[67] *Id*. at 184.

[68] *Id*. at 177.

[69] *Id*.

[70] It is no secret that *Brown v. Board of Education* was a results-oriented opinion. In fact, it has prompted a subgenre of scholarship (familiar to first-year law students everywhere) about when it is appropriate to depart from established legal principles to achieve a result most would consider an unqualified good. See Herbert Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 1–10 (1959).

[71] See Kevin M. Scott, Supreme Court Reversals of the Ninth Circuit, 48 Ariz. L. Rev. 341, (2006) (finding for the Ninth Circuit a reversal rate over the past 21 years of almost three times that of the next-highest federal circuit court).

In 2007, a three-judge panel of the Ninth Circuit affirmed the trial court's certification order in a 2-1 opinion. Like the trial court, it was not overly concerned about commonality.[72] It conceded that plaintiffs' theory of subjective decisionmaking, by itself, could not establish discrimination. But it found that the plaintiffs' evidence of corporate culture provided a ''nexus'' between the subjective decisionmaking and the evidence of pay and promotion disparities.[73] (It did not explain why that same corporate culture would not transmit Wal-Mart's express anti-discrimination policies.)

The panel explicitly held that merits inquiries were not appropriate at the certification stage, claiming that ''it has long been recognized that arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage.''[74] Building on that holding, the panel also held that a *Daubert* inquiry at the class certification stage was premature, and therefore it could ''avoid resolving 'the battle of the experts'''[75] by employing ''a lower *Daubert* standard . . . at this class certification stage of the proceedings.''[76] (It justified this departure in part by claiming that it was ''well-established'' that plaintiffs could use statistics to demonstrate class-wide discrimination.)[77] The Ninth Circuit also considered Wal-Mart's concerns about its right to raise individualized affirmative defenses to be merits-oriented.[78] And it held that neither Title VII nor any subsequent case law required individualized hearings to establish liability in discrimination suits, just that those were the usual methods employed for determining individual liability.[79]

Turning to Rule 23(b)(2), the panel conceded that ''Rule 23(b)(2) is not appropriate for all classes'' but decided that the trial court retained the discretion to decide *when* Rule 23(b)(2) certification was

[72] Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1225 (9th Cir. 2007) (''The commonality test is qualitative rather than quantitative—one significant issue common to the class may be sufficient to warrant certification.'').

[73] *Id*. at 1231.

[74] *Id*. at 1227.

[75] *Id*. at 1229.

[76] *Id*. at 1227 (internal quotation omitted).

[77] *Id*. at 1228.

[78] *Id*. at 1238.

[79] *Id*. at 1238–39.

appropriate.[80] It also held that plaintiffs' intent—rather than the award's size—determined whether monetary relief predominated. And it called the size of the monetary award (potentially billions) ''principally a function of Wal-Mart's size.''[81]

The Ninth Circuit appeared unconcerned by the fact that much of the class seeking injunctive relief could not in fact benefit from the injunction. Instead, it contented itself with the idea that former-employee class members would benefit from knowing that others would not suffer from discrimination ''as they once did.''[82] It also affirmed the district court's holding that back pay was equitable in nature and therefore appropriate for Rule 23(b)(2). ''[I]t is well-established that backpay is an equitable, make-whole remedy under Title VII that is fully consistent with Rule 23(b)(2), notwithstanding its monetary nature.''[83]

The decision was not unanimous. Judge Andrew Kleinfeld dissented. Noting that ''[w]hile a class action can have the virtue of assuring equal justice to all class members, it can also have the vice of binding them to something less than justice,''[84] he raised particular problems with the majority's findings on commonality, typicality, and the use of Rule 23(b)(2). He was particularly concerned about the possibility that the class would endanger the rights of women who had actually suffered discrimination in order to benefit women who had not.[85] Noting that each of these protections existed to prevent a court's riding roughshod over a litigant's due process rights, he asked, ''Since when were the district courts converted into administrative agencies and empowered to ignore individual justice?''[86]

The En Banc *Opinion*

Wal-Mart appealed the opinion to an *en banc* panel of the Ninth Circuit—which in that sprawling circuit does not comprise the entire court—but it fared no better than it had with the three-judge panel.

[80] *Id*. at 1234 (internal quotations omitted).

[81] *Id*. at 1235 (emphasis in original).

[82] *Id*.

[83] *Id*. at 1237.

[84] *Id*. at 1244 (Kleinfeld, J., dissenting).

[85] *Id*. at 1249.

[86] *Id*.

The *en banc* panel admitted that the class was ''broad and diverse.''[87] It decided, however, that Rule 23(a) requires different analysis from Rule 23(b). ''The lesson for future district courts is that, in a given case, the text of Rule 23(a), as compared to Rule 23(b), may require them to determine more or different facts (typically more under Rule 23(b)(3)) to determine whether the plaintiffs have met their Rule 23 burden.''[88] Despite its analysis of commonality, the *en banc* panel either would not or could not articulate the specific common issue. Instead, it held ''that the large class is united by a complex array of company-wide practices, which Plaintiffs contend discriminate against women.''[89]

Like the original Ninth Circuit panel, the *en banc* panel found that the plaintiffs had provided enough evidence of commonality to meet the requirements of Rule 23(a)(2). In particular, it found that they had presented evidence that there was a common pattern of discrimination because there were (1) a uniform management structure, (2) a strong, centralized corporate culture, and (3) gender disparities in every domestic region of the country.[90]

Like the lower courts, the *en banc* panel saw no contradiction between a strong, central corporate culture and a policy of excessive subjectivity in decisionmaking. ''Wal-Mart is incorrect, however, that decentralized, subjective decisionmaking cannot *contribute* to a common question of fact regarding the existence of discrimination.''[91] And, adopting the original panel's reasoning, it held that Wal-Mart's ''corporate culture'' created a nexus between the alleged discriminatory conduct and the statistical pattern the plaintiffs had identified.[92] That said, the panel found only that plaintiffs had established that Wal-Mart's culture was ''vulnerable'' to discrimination, not that discrimination actually existed.[93]

The *en banc* panel did announce that there *must* be a ''rigorous analysis'' of Rule 23's requirements, one that could delve into the

[87] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 598 (9th Cir. 2010) (en banc).

[88] *Id*. at 594.

[89] *Id*. at 598.

[90] *Id*. at 600.

[91] *Id*. at 612 (emphasis in original).

[92] *Id*. (internal citation omitted).

[93] *Id*. at 601.

merits.[94] It also spent a great deal of time correcting the original panel (and the trial court) about whether a court could engage in merits inquiries in order to do so.[95] That said, it tried to carve out an exception by saying that a court could cut short that merits inquiry under certain circumstances like those currently before it ''because the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions.''[96]

More curiously, the *en banc* panel decided that the trial court had not refrained from looking at merits issues.[97] Instead, it claimed that by listening to (and rejecting) Wal-Mart's arguments about Rule 23(a), the ''district court actually weighed evidence and made findings sufficient under the standard we have described above.''[98]

Rather than confront the question of whether to allow a *Daubert* challenge at certification, the *en banc* panel simply denied one had taken place. Instead, it claimed that Wal-Mart had challenged the ''persuasiveness'' of—rather than the methodology underlying—the conclusions of Wal-Mart's expert witness.[99] That said, the *en banc* panel did hint that it disagreed with applying a full *Daubert* analysis at the certification stage.[100] Nonetheless, it found that the statistical evidence would have passed *Daubert* muster.[101]

The *en banc* panel also held that, while ''Rule 23(b)(2) is not appropriate for all classes,'' it was appropriate where monetary relief was not the primary relief sought.[102] It based this holding on a sentence

[94] *Id*. at 581.

[95] See *id*. at 581–90. The *en banc* panel argued that the error in the trial court arose from a misreading of its earlier case *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975). Dukes, 603 F.3d at 589.

[96] *Id*. at 594

[97] *Id*.

[98] *Id*.

[99] *Id*. at 602. This account does not match the trial court's, which reported that Wal-Mart attacked the statistical evidence as ''substantially flawed.'' Dukes, 222 F.R.D. at 152.

[100] Dukes, 603 F.3d at 602 n.22 (''We are not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial. However, even assuming it did, the district court here was not in error.'') (internal citation omitted).

[101] *Id*. at 604.

[102] *Id*. at 615.

in the notes of the advisory committee on the 1966 amendments to the federal rules of civil procedure that mentioned Rule 23(b)(2) was not available where plaintiffs sought monetary relief ''exclusively'' or ''predominantly,'' reasoning that to hold otherwise would render the note redundant.[103]

So what standard would the *en banc* panel use for certifying a monetary damages class under Rule 23(b)(2)? ''Rule 23(b)(2) certification is not appropriate where monetary relief is 'predominant' over injunctive relief or declaratory relief.''[104] The panel was less sure what that meant in practice. It recommended a ''case-by-case'' analysis of the ''objective effect'' of the relief plaintiffs sought, in which the court could consider ''key procedures that will be used,'' and whether deciding on the relief would introduce ''new and significant legal and factual issues.''[105] The *en banc* panel also pointed out that ''even . . . circuits that are generally restrictive in certifying classes seeking monetary damages under Rule 23(b)(2)'' treated back pay as compatible with Rule 23(b)(2) certification.[106]

Finally, addressing Wal-Mart's objections to the fact that certifying the class would mean denying it the right to present individualized defenses at trial, the *en banc* panel called the trial plan ''tentative'' and noted that there was a ''range of possibilities'' that would allow a manageable trial consistent with due process.[107]

What possibilities were in that range? The *en banc* panel did not specify. But it did point to *Hilao v. Estate of Marcos*, one of the few class actions in the Ninth Circuit ever to go to trial, as an example of a workable class trial.[108] *Hilao* was a human-rights class action, brought under the Alien Tort Claims Act, that alleged that the late dictator Ferdinand Marcos had illegally tortured a number of Filipino citizens.[109] The class trial was divided into different phases.

[103] *Id*. at 615–16.

[104] *Id*. at 617.

[105] *Id*.

[106] *Id*. at 618.

[107] *Id*. at 625.

[108] Dukes, 603 F.3d at 625 (citing Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996)).

[109] The Alien Tort Claims Act, 28 U.S.C. § 1350 (2006), allows foreign nationals to bring tort claims in U.S. courts.

After the parties had tried the issue of liability, the plaintiffs presented the damages sustained by a random sample of the class as representative of the entire class.[110] The trial court assigned a special master to review the testimony of 137 class members.[111] The special master then presented a report to the jury recommending the damages for these class members, which would provide a statistically valid basis for determining damages for the rest of the class.[112] The defendants challenged the procedure, arguing that due process required each claim to be individually tried.[113] The trial court rejected the challenge, holding that ''[t]he use of aggregate procedures, with the help of an expert in the field of inferential statistics, for the purpose of determining class compensatory damages is proper.''[114] The Ninth Circuit affirmed the holding on appeal.[115]

The *en banc* panel in *Dukes* presumably believed that the trial court could adopt a similar method for resolving class members' claims. It is telling, however, that the panel did not offer any further guidance on how that trial could proceed.

There were two dissents from the *en banc* decision, one by Judge Sandra Ikuta (joined by four other judges) and one by Chief Judge Alex Kozinski. Judge Ikuta, in a long and measured dissent, pointed out a number of factors that would make trying a class action in this case more difficult, including the complexity of Wal-Mart's corporate structure, the varied ways in which the discretion Wal-Mart granted its managers played out in practice, and the different kinds of discrimination claimed by different class members who had submitted affidavits.[116] Judge Kozinski's separate dissent was shorter and more incendiary, concluding that the more than a million class members ''have little in common but their sex and this lawsuit.''[117]

So, by the time the case had made it through the lower courts, they had effectively ruled that:

[110] Hilao, 103 F.3d at 772.

[111] *Id*. at 782.

[112] *Id*. at 783.

[113] *Id*. at 785.

[114] In re Estate of Marcos Human Rights Litigation, 910 F. Supp. 1460, 1464 (D. Haw. 1995).

[115] Hilao, 103 F.3d at 786.

[116] Dukes, 603 F.3d at 628–52 (Ikuta, J., dissenting).

[117] *Id*. at 652 (Kozinski, C.J., dissenting).

- under the right circumstances, a plaintiff could certify a class for monetary damages under Rule 23(b)(2), even though the text of that subsection only provided for ''injunctive'' or ''declaratory'' relief;
- either a full *Daubert* inquiry was not necessary at the certification stage or a challenge to whether an expert's conclusions properly arose from his methods was not itself a *Daubert* challenge;
- the plaintiffs could satisfy Rule 23(a)(2)'s commonality requirement by alleging that managerial discretion resulted in pervasive discrimination; and
- trial by statistics did not violate due process, even if it precluded defenses that due process would require in an individual trial on the same subject.

Against the backdrop of these sweeping holdings, Wal-Mart appealed the case to the Supreme Court.

V. The Supreme Court

The Supreme Court granted certiorari to review two questions: (1) when plaintiffs can seek Rule 23(b)(2) certification for a class that seeks money damages and (2) *sua sponte*, ''[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).''[118] (Rule 23(a) applies to *all* class actions, regardless of the kind of relief the plaintiff seeks.)

The oral argument focused on two issues in particular. A number of justices, including Justice Ruth Bader Ginsburg, expressed concern about certifying a class seeking monetary damages under Rule 23(b)(2).[119] In addition, several justices, including Justices Scalia and Anthony Kennedy, probed at plaintiffs' theory of commonality. Justice Kennedy spotted what he called an ''inconsistency'' in the plaintiffs' position on commonality; namely, that Wal-Mart's corporate culture could transmit the informal stereotyping plaintiffs alleged,

[118] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (Mem).

[119] Tr. of Oral Arg. at 50, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277).

but not the anti-discrimination policy that actually existed.[120] Justice Scalia complained that he felt ''whipsawed'' by that same inconsistency.[121]

As a result, the Court's final decision should have come as no surprise to either party. The court held, 9-0, that Rule 23(b)(2) could not be used to certify a class seeking primarily money damages. It also held, 5-4, that the commonality requirement mandated identifying an issue whose resolution would be common to the entire class. And, in the course of reaching that holding, it also ruled on the extent to which a court could inquire into the merits of a class action at the certification stage, and the degree to which a court could rely on statistics as classwide proof of common issues.

A. The Applicability of Rule 23(b)(2)

The Court unanimously held that plaintiffs could not use Rule 23(b)(2) as an alternative means of certifying a difficult monetary-damages class. It stopped short of declaring that one could *never* certify a claim for monetary relief under Rule 23(b)(2) because the back pay that plaintiffs sought was too individualized to allow for certification under the rule.[122]

While the Court claimed not to address the ''broader question'' of whether Rule 23(b)(2) extended beyond injunctive and declaratory relief, its holding certainly limits the kinds of relief plaintiffs can seek under the section. A number of plaintiffs (and scholars sympathetic to them) had argued that if *any* form of relief bridged the gap between monetary and injunctive relief, it was back pay under Title VII.[123] (In fact, the *en banc* panel had adopted exactly that reasoning.)[124]

The Court's primary concern was that Rule 23(b)(2) does not allow class members to opt out of the litigation. Because classwide declaratory or injunctive relief is indivisible—that is, it applies to all class

[120] *Id*. at 28 (''Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that's going on. Then in the next breath, you say, well, now these supervisors have too much discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is.'').

[121] *Id*. at 29.

[122] Dukes, 131 S. Ct. at 2558–59.

[123] See, e.g., Suzette Malveaux, Class Actions at the Crossroads: An Answer to *Wal-Mart v. Dukes*, 5 Harv. L. & Pol'y Rev. (forthcoming 2011).

[124] Dukes, 603 F.3d at 618.

members equally or not at all—there is no need for an opt-out mechanism.[125] Nor is there any need for notice; in fact, neither Rule 23(b)(1) nor (b)(2) requires the court to provide anything other than ''reasonable'' notice to the class.[126] As the Court pointed out, Rule 23(b)(2) would not apply to a class seeking individualized injunctive relief.[127] So there would be no reason to use it where class members sought individualized monetary relief, either.[128]

The Court also pointed out that the structure of Rule 23(b) made it clear that Rule 23(b)(3) was the best mechanism for certifying a class for monetary damages.[129] Specifically, the additional protections Rule 23(b)(3) imposed (requiring findings that common issues predominated and that a class action was superior to other methods of resolving the dispute, and requiring class members to receive notice and an opportunity to opt out) served the purpose of protecting the due process rights of class members who did not want to forfeit their individual claims.[130] As the Court put it, they were ''missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class.''[131]

This was not the first time in the term that the Court had expressed a concern that there was a reason for the protections afforded to a class action. It did the same in *Concepcion* (another 5-4 majority opinion authored by Justice Scalia), when it decided that classwide arbitration was not a realistic alternative to individualized arbitration.[132] There, the Court reasoned that because classwide arbitration lacked the protections of a Rule 23 class action, it could violate the due process rights of the absent class members.[133]

Finally, the Court was unconvinced by the plaintiffs' argument that the history of the class action as a civil rights device required a

[125] Dukes, 131 S. Ct. at 2557 (citing Nagareda, *supra* note 21, at 132). The majority opinion relied heavily on the work of the late Professor Nagareda.

[126] *Id*. at 2558.

[127] *Id*. at 2557.

[128] *Id*.

[129] *Id*. at 2558.

[130] *Id*. at 2559.

[131] *Id*. at 2558.

[132] AT&T Mobility LLC, v. Concepcion, 131 S. Ct. 1740 (2011).

[133] *Id*. at 1752.

more permissive reading of Rule 23(b)(2) in a Title VII discrimination case.[134] As the Court pointed out, the plaintiffs in those historical desegregation cases sought only injunctive relief, not monetary damages.[135] As a result, there was no compelling reason to extend Rule 23(b)(2) certification to non-injunctive ''equitable'' relief, even in service of civil rights cases.

B. Commonality

When it granted certiorari, the Court *sua sponte* (without being asked) requested that the parties brief the question of whether the various parts of Rule 23(a) had been fulfilled in certifying the class. (In retrospect, it would appear that the conservative wing of the Court may have been looking at this issue from the time it received the briefs.)

Strictly speaking, it probably was not necessary for the Court to decide whether the plaintiffs had demonstrated commonality. The unanimous decision on the scope of Rule 23(b)(2) was enough to vacate the certification, and it was unlikely that the trial court would have certified the same class under Rule 23(b)(3). But the Court's decision did resolve several other debates that had raged in the lower-court proceedings (and elsewhere): specifically, the question of how much a court may look at the merits of a case and the implicit debate over whether a plaintiff's theory of commonality must be internally consistent. Given the Ninth Circuit's maneuverings during the course of the *Dukes* appeals, the majority may have believed that ruling on commonality would prevent another certification on shaky grounds that might evade higher-court review.

The gist of the opinion is as follows: commonality requires identifying questions that can yield common answers, not just questions that are common to the entire class. (What's the difference? The question ''Has Wal-Mart discriminated against women?'' is a common question, but it may not yield common answers: Wal-Mart may

[134] Dukes, 131 S. Ct. at 2557–58.

[135] *Id*. at 2558. This conclusion stood on firm historical ground. See The Class Action Device in Antisegregation Cases, *supra* note 15, at 578 (''One reason that the class action appears to be an advantageous method of securing relief for the group is that a favorable decree will in its terms apply to all class members.'').

have discriminated against some women under some circumstances but not against others under different circumstances.)[136]

Instead, the Court held that any common element ''must depend upon a common contention.''[137] For example, if the plaintiffs had all shared the same supervisor, they could argue that common evidence of his particular management practices would be common to all of them.[138] (The Court found it far less likely that, in a company as broad and diverse as Wal-Mart, all managers would discriminate against women if left to their own devices.) What was important to the Court was that the common issue be ''capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[139]

C. Inquiries into the Merits

While the Court did not treat it as a separate issue, it did squarely address whether a trial court could engage in merits inquiries in deciding class certification. And it did so in strong words:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.[140]

The Court attributed the continued confusion over the propriety of inquiries into the merits to a statement in *Eisen v. Carlisle & Jacquelin*.[141] In *Eisen*, the Court had held that a trial court could not shift the costs of class notice based on its opinion of which side would most likely prevail in the underlying litigation.[142] In *Dukes*,

[136] See Gaston v. Exelon Corp., 247 F.R.D. 75, 82 (E.D. Pa. 2007) (''Plaintiffs could simply propose the question 'has employer discriminated against class members' and always meet the commonality requirement. Obviously, something more is necessary.'').

[137] Dukes, 131 S. Ct. at 2551.

[138] *Id*.

[139] *Id*.

[140] *Id*.

[141] *Id*. at 2552 n.6 (discussing Eisen v. Carisle & Jacquelin, 417 U.S. 156 (1974)).

[142] 417 U.S. at 177.

the Court dismissed any further applications of that narrow holding as ''the purest dictum.''[143] In other words, the Court definitively settled the question of whether a court may inquire into the merits of a claim in deciding certification—if doing so will help it determine whether the plaintiffs have met their Rule 23 burdens, then it not only *can* inquire into the merits, it *must* do so.

The majority did not decide the question of when expert testimony could support a certification decision. But it did hint—in strong terms—that expert testimony supporting a motion to certify a class should pass the *Daubert* requirements.[144]

D. Trial by Formula

Finally, Justice Scalia's opinion addressed the various courts' reliance on statistical methods to avoid potential manageability and due process concerns. Justice Scalia referred to this tactic as ''Trial by Formula.'' As he described the tactic:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the back[ ]pay 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 back[ ]pay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.[145]

The Court held that ''Trial by Formula'' would violate the Rules Enabling Act. The Rules Enabling Act—which gave legal force to the Federal Rules of Civil Procedure—forbids interpreting any rule to ''abridge, enlarge or modify any substantive right.''[146] Since the proposed trial by formula would not allow Wal-Mart to assert valid defenses, it was (at best) modifying its substantive due process rights.[147]

[143] Dukes, 131 S. Ct. at 2552 n.6.

[144] *Id*. at 2553–54 (''The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so.'') (citations omitted).

[145] *Id*. at 2561.

[146] *Id*. (citing 28 U.S.C. § 2072 (b) (1934)).

[147] *Id*.

E. Justice Ginsburg's Dissent

Justice Ginsburg's dissent (which was joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan)[148] focused solely on the issue of commonality. It expressed concern that ''the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.''[149] According to the dissent, a common question need only be a ''dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.''[150] While the standard sounds similar to the one announced by the majority, the dissent believed that this standard was not demanding and could be met by a ''global'' issue that had some loose connection to the plaintiff's case.[151]

In this case, Justice Ginsburg believed that plaintiffs had met this less demanding standard. According to her, ''Wal-Mart's supervisors do not make their discretionary decisions in a vacuum.''[152] She was more convinced that the plaintiffs' evidence (including anecdotes from class members) ''suggests that gender bias suffused Wal-Mart's company culture.''[153]

Like the lower courts before her, Justice Ginsburg's dissent assumes the existence of pervasive sex discrimination, and then tries to reverse-engineer the mechanism that would explain that bias as the result of discrimination. If there are (1) discrepancies in pay and promotion at Wal-Mart, (2) a strong corporate culture, and (3) anecdotal evidence of bias among some supervisors, then there

[148] A number of commentators have argued that the fact that all three female justices were in the minority in this case may indicate that the majority is biased against women. It is hard to say whether this is the case, although Judge Ikuta's dissent from the *en banc* panel plainly shows that not all women share the same view of the case. On the one hand, as those judges candid enough to write about judging have noted, no one can escape his own prior experiences. Richard A. Posner, How Judges Think 68–69 (2008). On the other, the same minority dissented in *Concepcion*, joining an opinion by Justice Breyer. 131 S. Ct. at 1756 (Breyer, J., dissenting). Under these circumstances, it is just as likely that these justices share a common set of beliefs about how class actions should be tried.

[149] Dukes, 131 S. Ct. at 2562 (Ginsburg, J., dissenting).

[150] *Id*.

[151] *Id*. at 2565.

[152] *Id*. at 2563.

[153] *Id*.

must be (4) a strong corporate culture that encourages sex discrimination. In fact, the dissent was noticeably deferential to the trial court's findings. It made no attempt to resolve the tension identified between ''excessive subjectivity'' and ''strong corporate culture,'' most specifically why the ''strong corporate culture'' could not in fact have transmitted Wal-Mart's express policies *against* sex discrimination. It also did not address, let alone resolve, the *Daubert* issue.

By itself, Justice Ginsburg's dissent is not likely to have a large effect on class action practice going forward. If anything, it solidifies the reading that the majority's commonality analysis has real teeth, as opposed to being a minimal, easily met standard.

It is worth noting that not a single opinion in the *Dukes* litigation (save one section in the Supreme Court's opinion) was unanimous. Instead, at each stage, the issues were hotly contested even by the judges. At each stage, the contested issues relied largely on judges' preconceptions about the case, and on their inclinations to either promote or restrain the use of class actions in litigation generally. What these differences of judicial opinion mean in the long term is that the class action is far from dead. Instead, the debates over when class actions are appropriate and how they should be conducted will shift to other venues.

VI. The New Strategic Landscape

There is no question that, like *Amchem* before it, *Dukes* has changed some of the rules for class action attorneys. In particular, it has made it far more difficult to enjoy the benefit of certain tactics that had been in common use. But because lower courts rely on a mix of precedent, and have their own agendas, the *Dukes* opinion will not eliminate those tactics completely. So what will the strategic landscape look like over the next decade? While it is difficult to outinvent a group as collectively creative as class action lawyers, we can at least identify some of the immediate effects of the *Dukes* opinion.

Fewer hybrid classes. Now that the Court has rejected certifying class actions that seek individualized monetary damages under Rule 23(b)(2), plaintiffs should find hybrid classes significantly more difficult to certify. This difficulty is compounded by the Court's ruling limiting the kind of case in which a plaintiff could seek Rule 23(b)(2)

certification by explicitly stating that Rule 23(b)(2) is not available for all ''equitable'' relief.[154]

Dukes does not eliminate the hybrid class action completely. For those cases asserting some claims that are independently entitled to certification under different subsections, hybrid certification is still possible. However, this discussion effectively kills the tactic of asking courts to certify a money-oriented class under Rule 23(b)(2) rather than Rule 23(b)(3) and then fix the procedural deficiencies of the former by other means, such an order requiring separate notice.

More rigorous merits inquiries. For years, plaintiffs have invoked *Eisen* to dodge merits examination at the certification stage. Over the last decade, most appellate courts had chipped away at the mistaken reading that *Eisen* prohibited *any* merits inquiry during certification.[155] The *Dukes* ruling lays that mistaken reading to final rest.

But greater rigor in certification decisions is not necessarily an unqualified victory for defendants. One additional consequence is that it may become more difficult to prevail in certain early challenges to class actions that are flawed on their face. In the last few years, an increasing number of defendants have begun filing facial challenges to class actions, such as motions to strike class allegations.[156] The attraction is clear: if a defendant can rid itself of facially defective class allegations at the beginning of a case, it will not have to engage in the costly discovery that comes with a class certification battle.

A number of courts, however, have refused to hear such motions to strike on the ground that they are ''premature.''[157] These courts

[154] Dukes, 131 S. Ct. at 2560.

[155] See, e.g., Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001); Gariety v. Grant Thornton LLP, 368 F.3d 356, 365–66 (4th Cir. 2004); In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305, 316–17 (3d Cir. 2008). Nonetheless, as late as 2009, the Tenth Circuit was still holding that a trial court should accept a plaintiff's allegations as true at the certification stage. DG v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010).

[156] See, e.g., Bradley v. Mason, 2011 U.S. Dist. LEXIS 64877, *10 (N.D. Ohio Jun. 20, 2011); Adamson v. United States, 2011 U.S. Dist. LEXIS 62243, *5 *(D. Nev. Jun. 10, 2011). Motions to strike are often heard under the same standard as a motion to dismiss.

[157] See, e.g., Martin v. Ford Motor Co., 765 F. Supp. 2d 673, 680 (E.D. Pa. 2011); 2011 U.S. Dist. LEXIS 67718, *34 (D.N.J. Jun. 20, 2011).

have largely based their decisions on the plaintiffs' need to conduct discovery before testing the merits of their proposed class action.[158] To the extent that *Dukes* may be read as placing greater emphasis on the merits inquiries in a ''rigorous analysis,'' these courts have additional reasons to deny motions to strike without reaching their merits.

Another consequence may be more demanding requests for discovery from plaintiffs. If plaintiffs cannot fall back on their allegations, or on loosely defined common issues, they will need more facts demonstrating that their common issues can be resolved with classwide proof. This dynamic provides plaintiffs with additional justifications for seeking comprehensive—and expensive—discovery from defendants.[159]

Fiercer battles of the experts. In the course of deciding most class actions, the court must evaluate expert testimony. The Supreme Court declined to decide explicitly whether *Daubert* applies at the class certification stage. It did, however, hint that it would apply *Daubert* standards if necessary. Nonetheless, subsequent courts have already declined to take that hint to heart. For example, since the Court announced the *Dukes* opinion, the Eighth Circuit has already ruled that a trial court need not conduct a full *Daubert* inquiry when deciding whether to certify a class, distinguishing the Supreme Court's strong hint as ''dicta.''[160]

[158] Korman v. The Walking Co., 503 F. Supp. 2d 755, 762–63 (E.D. Pa. 2007) (calling motion to strike ''improper'' because it challenges merits of class proposal before plaintiff has benefit of discovery).

[159] See Thorogood v. Sears Roebuck & Co., 624 F.3d 842, 849 (7th Cir. 2010) (noting asymmetry in costs between plaintiff and defendant in class actions).

[160] See In re Zurn Pex Plumbing Prods. Liab. Litig., No. 10–2267, 2011 U.S. App. LEXIS 13663, *17 (8th Cir. Jul. 6, 2011) (*Daubert* inquiry ''cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings''). The Eighth Circuit did not describe what the ''targeted *Daubert* inquiry'' it allowed would look like. *Zurn Pex* keeps alive a circuit split over whether a court should rule on the admissibility of expert testimony at the class certification stage. On one side are the Second, Third, and Seventh Circuits, each of which holds that a court should engage in a full inquiry into expert qualifications before deciding class certification. See In re Initial Public Offering Secs. Litig., 471 F.3d 24, 36 (2d Cir. 2006); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008); Am. Honda Motor Co., Inc. v. Allen, 600 F.3d 813, 819 (7th Cir. 2010). On the other are the Fourth, Eighth, and Ninth Circuits, each of which holds that the expert inquiry can be put off until trial. Brown v. Nucor Corp., 576 F.3d 149, 156 (4th Cir. 2009); Dukes v. Wal-Mart Stores, Inc. 603 F.3d 571, 602 n.22 (9th Cir. 2010). (Since the Supreme Court

The result is that, for now, plaintiffs in these jurisdictions have a strong incentive to hire experts—no matter what their qualifications or methodology—to support motions for class certification. Since certification in many cases ends any real debate of the merits of the case, courts' continued refusal to engage in a full *Daubert* inquiry at certification means that even questionable expert testimony will sometimes be enough to meet Rule 23's requirements.

Less claim-splitting. In individual litigation, claim-splitting is hardly a concern: after all, the plaintiff is the master of her complaint, and if she wants to forgo asserting certain claims because others fit her strategy better, that's her prerogative.

Class actions, though, are different. The named plaintiff seeks to represent hundreds (or, in the case of *Dukes*, hundreds of thousands) of people who will never see the inside of the courtroom and will never talk to a lawyer about legal strategy. If she wins, so do they. But if she loses, so do they, and because they could have litigated those claims in the class action, they will be precluded from bringing a new case based on the same subject matter. So if a named plaintiff strategically decides to drop certain claims that are strong on the merits but likely to interfere with her chances of certification, then she has placed the interests of her burgeoning class action against those of the members who have strong other claims on the merits. (Since it is an open secret among judges that class actions are run not by the named plaintiffs but by their lawyers, it really is a case of the lawyers putting their interests ahead of class members'.[161])

The Court's decision supports the argument (often advanced by defendants) that claim-splitting is bad for absent class members. In rejecting plaintiffs' attempt to certify their class under Rule 23(b)(2) (which would mean that absent class members could not opt out), it worried that if the jury decided back pay were not available to the named plaintiffs, class members with stronger pay or promotion claims would be precluded from raising them in later litigation.[162] That discussion is the strongest statement out of the Supreme Court

did not decide the expert question, that portion of the Ninth Circuit's opinion was not overturned.)

[161] See Culver v. City of Milwaukee, 277 F.3d 908, 913 (7th Cir. 2002) (''Realistically, functionally, practically, [the lawyer] is the class representative, not [the plaintiff].'').

[162] Dukes, 131 S. Ct. at 2559.

yet that claim-splitting is a problem worth a court's attention. (Plaintiffs' lawyers seeking certification have tended to argue that claim-splitting is a phantom issue.)[163]

More challenges to commonality. Defendants have not traditionally challenged commonality because they have viewed those challenges as losing battles.[164] The *Dukes* opinion changes that strategic terrain. The Supreme Court has announced a test for commonality that is both easy to understand and has teeth. As a result, defendants can be expected to challenge commonality in more cases—and are in fact already doing so.[165]

In the longer term, the *Dukes* decision may also prompt class action complaints with better-articulated common issues because plaintiffs now have less to gain from keeping the nature of any common issues vague. To that extent, *Dukes* favors larger, more established plaintiffs' firms, which have the resources to thoroughly research and test a case before filing a complaint.

VII. Conclusion

The Court's decision in *Wal-Mart v. Dukes*, like its other class action rulings in the 2010–11 term, reflects an effort to ''reset'' class certification strategies. By passing judgment on the propriety of a number of the more strategic innovations in class action practice, the Court has cleared away doctrinal developments that did not necessarily reflect the intent of Rule 23.

In doing so, the Court did not put an end to the class action, or even just the Title VII class action. Instead, it recognized that certain

[163] See, e.g., Mays v. Tenn. Valley Auth., 2011 U.S. Dist. LEXIS 50225, *24 (E.D. Tenn. May 10, 2011); Bentley v. Honeywell, 223 F.R.D. 471, 483 (S.D. Ohio 2004).

[164] Anderson & Trask, *supra* note 3, at 154 (''At first blush, commonality appears difficult for a defendant to challenge.'').

[165] See United States v. Vulcan Soc'y, Inc., 2011 U.S. Dist. LEXIS 73660, *3 (E.D.N.Y. Jul. 8, 2011) (defendants moved for decertification of class in light of *Dukes* commonality ruling); MacGregor v. Farmers Ins. Exch., 2011 U.S. Dist. LEXIS 80361, *13–14 (D.S.C. Jul. 22, 2011) (refusing to certify collective action because of lack of common issues); Creely v. HCR ManorCare, Inc., 2011 U.S. Dist. LEXIS 77170, *3 (N.D. Ohio Jul. 1, 2011) (defendants requested reconsideration of certification in light of *Dukes*); In re Bisphenol-A Polycarbonate Plastic Prods. Liab. Litig., MDL No. 1967, 2011 U.S. Dist. LEXIS 73375, *19 (W.D. Mo. Jul. 5, 2011) (refusing to certify products-liability class because of lack of common issues).

tactics—such as identifying amorphous common issues and allowing plaintiffs to seek monetary relief while evading the strictures of Rule 23(b)(3)—did not comport with the requirements of due process. Nor did they serve the goals of the federal rules of civil procedure generally, which, as expressed in Rule 1, are supposed to ''secure the just, speedy, and inexpensive determination of every action.''

Dukes is hardly a revolutionary decision. While it discourages some procedural shortcuts, parties on both sides of class action litigation will still face strong incentives to develop adventuresome new tactics. *Dukes* is an important opinion, but it has not doomed the class action, nor even changed it much. All it has done is make the game of certification a little fiercer.