

IN PRACTICE

CLASS ACTIONS

Uncommon Application of the Commonality Requirement

Wal-Mart v. Dukes, 18 months later — what effect has the case had on class certification?

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Under Federal Rule of Civil Procedure 23(a), in order to certify a class, plaintiffs must satisfy four prerequisites, commonly referred to as: (1) “numerosity,” (2) “commonality,” (3) “typicality” and (4) “adequacy of the class representative.” On June 20, 2011, the U.S. Supreme Court decided *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), reversing a grant of class certification to a class of approximately 1.5 million female employees of Wal-Mart Stores. In its 5-4 decision, the court found that the class could not be certified because the plaintiffs failed to satisfy the “commonality” requirement.

Dukes promised to change the manner in which courts analyze class certification motions by creating a more stringent commonality standard. According to the *Dukes* court, it is not the ability to raise common questions that matters to class certification, but rather whether a class-wide proceeding can generate common answers apt to drive the resolution of the litigation. *Dukes* requires plaintiffs to show that “class members have suffered

the same injury, not merely a violation of the same law,” and that their common contentions are capable of class-wide resolution, meaning that the determination of their truth or falsity “will resolve an issue that is central to the validity of each one of the claims in one stroke.”

The court rejected the plaintiffs’ attempt to identify a common question through statistical and anecdotal evidence and denied class certification because of the variability of the circumstances, finding that the plaintiffs did not identify a specific employment practice that tied their claims together. The plaintiffs therefore could not prove their theory on a class-wide basis.

Since the ruling in *Dukes*, two cases from the U.S. Court of Appeals for the Third Circuit and six cases from the District of New Jersey have applied *Dukes* in deciding motions for class certification.

The Third Circuit had its first opportunity to apply *Dukes* in *Marcus v. BMW of North America*, 687 F.3d 583 (3d Cir. 2012). There, a class action was brought against BMW asserting claims for consumer fraud, breach of warranty and breach of contract as a result of a purchase of allegedly defective tires. While the Third Circuit vacated the certification order, finding the plaintiff’s claims did not satisfy the numerosity and predominance requirements, the court found that the commonality requirement was satisfied. Relying on the *Dukes* court’s



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statement that “even a single common question will do,” the court concluded that the issues of whether the tires were defective, whether defendant had a duty to disclose the defects and whether the defendant failed to disclose the defects were issues that applied to each of the plaintiff’s causes of actions and could be issues common to all possible class members. As such, while class certification was denied on other grounds, the more stringent commonality standard under *Dukes* was met.

The first opportunity to apply *Dukes* in the District of New Jersey was presented in *Carrera v. Bayer Corp.*, 2011 U.S. Dist. LEXIS 135198 (D.N.J. Nov. 22, 2011). The plaintiff brought suit claiming that defendants Bayer Corporation and Bayer HealthCare had deceptively advertised the product WeightSmart. Judge Jose Linares granted the plaintiff’s motion for class certification, relying on *Dukes*’ requirement that a common contention must be capable of driving class-wide resolution. He found that the commonality requirement was satisfied because whether WeightSmart was

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capable of enhancing metabolism was a common issue and because the question of whether a reasonable person would rely on the defendants' representations regarding the product involved common issues of law and fact.

In *Bell v. Lockheed Martin Corp.*, an employment discrimination class action, Judge Robert Kugler denied class certification to plaintiffs alleging that Lockheed Martin's company-wide practices and policies had a disparate impact on females. 2011 U.S. Dist. LEXIS 143657 (D.N.J. Dec. 14, 2011). The court noted that the policies the plaintiffs alleged to be discriminatory were substantially similar to the policies discussed in *Dukes*. Similar to the *Dukes* plaintiffs, the *Bell* plaintiffs alleged that their managers' discretion over pay and promotions was exercised disproportionately in favor of men. Following *Dukes*, the court rejected the statistical and anecdotal evidence of disparate impact that the plaintiffs put forth and found that that plaintiffs could not point to a specific employment practice that tied their claims together. The plaintiffs were unable to establish the existence of a common question.

Neither were the plaintiffs' claims subject to common answers. The fact that they worked in different locations and different departments, had different titles and reported to different supervisors precluded there being common answers. This was "precisely the type of allegation that the *Dukes* court rejected when it explained that for a plaintiff to satisfy the commonality standard, the claim 'must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor.'" The court concluded that because the plaintiffs could not identify a common mode of exercising discretion that pervaded the entire company, like the *Dukes* plaintiffs, the class could not be certified.

By contrast, in *Sullivan v. DB Investors*, the certification of two classes was affirmed. 667 F.3d 273 (3d Cir. 2011). The plaintiffs, a class of direct purchasers and a class of indirect purchasers of diamonds from De Beers SA and related entities, brought a class action alleging that the defendants had engaged in anticompetitive practices in violation of state and federal laws.

The court found that "the answers to questions about [defendants'] alleged misconduct and the harm it caused would be common as to all of the class members,

and would thus inform the resolution of the litigation." The court also found that the class members shared the similar legal question of whether the defendants engaged in a conspiracy to affect diamond prices. To prove that the defendants had in fact engaged in such a conspiracy, the evidence the plaintiffs would have to submit "would entail generalized common proof as to the implementation of [defendants'] conspiracy, the form of the conspiracy, and the duration and extent of the conspiracy." Furthermore, the plaintiffs shared common factual questions as to whether the defendants acted in concert to fix prices and monopolize the market for diamonds, and whether such activity caused price inflation. Because the commonality requirement as articulated in *Dukes* was satisfied, class certification was affirmed.

The court, in *McLennan v. LG Electronics USA*, echoed the *Dukes* court's emphasis on the fact that even a single common question satisfies the commonality requirement. 2012 U.S. Dist. LEXIS 27703 (D.N.J. Mar. 2, 2012). There, Judge William Martini certified a class of plaintiffs who alleged that LG Electronics had manufactured, marketed and sold defective refrigerators. The court held that the commonality requirement was satisfied because there were numerous questions capable of class-wide resolution, including whether the refrigerators contained common design or manufacturing defects, whether the defendant knew of the defects, whether the class members had suffered an ascertainable loss and whether the class members were entitled to recover damages. Because "[t]he answer to any one of these questions would meaningfully advance the litigation," the plaintiffs had established commonality.

In *In re Insurance Brokerage Antitrust Litigation*, a multidistrict litigation involving several class actions against various insurance companies and brokerage firms, the plaintiffs alleged that the defendants had violated federal antitrust laws, the Racketeer Influenced and Corrupt Organizations Act, various state statutes and common law. 282 F.R.D. 92 (D.N.J. 2012). Judge Claire C. Cecchi relied on *Dukes*' requirement that a plaintiff allege common questions that generate common answers apt to drive class-wide resolution in holding that the plaintiffs presented many common questions of law and fact. Those questions included whether the defendants engaged in a conspiracy

to divide the market for the sale of insurance and whether the defendants participated in a pattern of racketeering activity.

Judge Cecchi similarly certified a class for settlement purposes in *In re Philips/Magnavox TV Litigation*. 2012 U.S. Dist. LEXIS 67287 (D.N.J. May 14, 2012). The plaintiffs there claimed that televisions sold by Philips and Funai Corporation suffered from a design defect that made them inoperable and alleged consumer protection violations. The plaintiffs satisfied the commonality requirement because, as *Dukes* requires, several common questions of law and fact existed, including whether the televisions suffered from a design defect, whether the defendants had a duty to disclose the alleged defect, whether the defendants knew of the alleged defect prior to sale and whether the plaintiffs had actionable claims under the consumer protection statutes.

In *Goldenberg v. Indel*, the plaintiffs sought damages and injunctive relief on behalf of a profit-sharing plan pursuant to ERISA for defendants' alleged mismanagement of the plan. 2012 U.S. Dist. LEXIS 124219 (D.N.J. Aug. 30, 2012). In certifying the subclasses sought by the plaintiffs, Chief Judge Jerome B. Simandle found that common questions of law and fact existed which were subject to common answers. Such questions included whether the defendants breached their fiduciary duty, whether the investment strategy allocated too great a portion of the plan's assets to equity investments, and whether the defendants had failed to consider the plan participants' ages in implementing the investment strategy. These questions were capable of class-wide resolution as defined by *Dukes* — i.e., the determination of their truth or falsity would resolve an issue central to the validity of each claim in one stroke. As such, class certification was appropriate.

The above decisions demonstrate that in deciding motions for class certification after *Dukes*, federal courts in New Jersey require plaintiffs to demonstrate that questions common to the class will produce common answers that can resolve issues central to the validity of each claim. "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 131 S. Ct. at 2551. Questions that generate answers that do not resolve a claim would likely not satisfy the commonality requirement. ■