Limiting class actions: The full impact of Dukes

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Although it received great media attention, the significance of the U.S. Supreme Court's June decision in *Wal-Mart Inc. v. Dukes*, 131 S.Ct. 2541 (2011), was not appreciated when it was handed down. It was immediately recognized that the Court made it far more difficult to bring class action suits challenging employment discrimination. But a careful reading of the opinion indicates that it has the potential for limiting class actions in all areas.

In *Dukes*, the Court ruled that a class action of 1.5 million women who alleged sex discrimination by the company in pay and promotions could not go forward because they could not show sufficient commonality to their claims. Justice Antonin Scalia, writing for the majority in a 5-4 decision, explained that Wal-Mart had an official non-discrimination policy and that therefore many different individuals in various stores across the county made the employment decisions. The Court held that this was insufficient to show the commonality required for a class action under Rule 23(a) of the Federal Rules of Civil Procedure.

The Court also ruled, 9-0, that there could not be a damages claim in a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, unless the monetary relief is incidental to the injunctive or declaratory relief. Damages, however, could be sought under other parts of Rule 23, by far the most important aspect of the decision.

Most obviously, this is going to make class actions more difficult in the employment context. If it is a small workplace, with a single decision-maker, then there are unlikely to be a sufficient number of plaintiffs to warrant a class action. But if it is a larger workplace, where multiple people are making pay and promotion decisions, the Court refuses to allow a finding of sufficient commonality for it to be litigated in a class action. Plaintiffs' lawyers must search for Goldilocks: a class action small enough to meet the commonality requirement, but large enough to meet the numerosity requirement.

But the Court's rigorous approach to class certification is likely to have effects beyond just employment discrimination cases. First, the Court said that at the class certification stage there must be "significant proof" to which the trial court must extend a "rigorous analysis." In its discussion, the Court suggested that the *Daubert* standard for introduction of scientific proof at trial will also apply at the class certification stage of the litigation. (*Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993)). This will change and greatly increase the complexity of class certification determinations.

It is notable that there was significant evidence presented to show "commonality" and that the pay and promotion discrimination was a result of a corporate culture throughout Wal-Mart stores. The evidence showed that Wal-Mart allowed supervisors

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Law Practice
Jury finds little harm in TCW bond feud
A superior court jury tasked with deciding a messy Wall Street dispute returned a split verdict Friday that handed both sides vindication on some claims but no clear-cut victory.

Judges and Judiciary
Chief justice rails about bill
Chief Justice Tani Cantil-Sakauye has come out swinging against legislation that would strip the Judicial Council of much of its authority over local trial courts.

Discipline
Disciplinary Actions
Here are summaries of lawyer disciplinary actions taken recently by the state Supreme Court or the Bar Court, listing attorney by name, age, city of residence and date of the court's action.

Law Practice
On the Move
Hogan Lovells LLP appointed Megan Dixon as managing partner of its San Francisco and Silicon Valley offices.

Report shows law firm business strong
A report released last week by Wells Fargo Legal Specialty Group showed an increase in revenue, net income and profits per partner in the first half of the year, but industry watchers say the growth won't hold up through the end of 2011.

U.S. Court of Appeals for the 9th Circuit
9th Circuit sends Costco case back to trial court
The 9th U.S. Circuit Court of Appeals spiked a lower court's class certification ruling in a gender bias lawsuit against Costco Wholesale Corp. on Friday, but it gave the plaintiffs a second shot by sending the case back to the trial court.

Ruling calls into question laws restricting day laborers' solicitation
A Redondo Beach ordinance banning day laborers from standing on the street to solicit work is unconstitutional, the 9th U.S. Circuit Court of Appeals held Friday.

Judges and Judiciary
New presiding judge for San Diego court
Judge Robert J. Trentacosta will become the

to set pay within a range of about $2 per hour and that supervisors nationwide exercised their discretion to pay women less than similarly situated men.

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Similarly, the evidence showed that Wal-Mart gave store managers discretion about which employees to promote and promotions were often the result of a supervisor tapping an employee rather than a uniform process equally urging all employees to apply. In the aggregate, controlling for all other factors, men were promoted more than women. In some cases, men were promoted over women with better credentials and stronger personnel records.

But the Court rejected all of this as insufficient to meet the requirements for class certification. It found that the plaintiffs' statistical evidence of nationwide gender disparities was "insufficient" and speculated that the pay disparities between men and women "may be attributable to only a small set of Wal-Mart stores." The Court found the plaintiffs' expert witness not worthy of belief and "disregard[ed]" his testimony about the ways in which Wal-Mart's personnel policies and corporate culture allowed gender bias to infect thousands of pay and promotion decisions. It dismissed the 120 affidavits recounting evidence of discriminatory statements and decisions as insufficient given Wal-Mart's size and the size of the plaintiff class. Having brushed aside the evidence of bias and twice pointing out that Wal-Mart has a written policy prohibiting sex discrimination, the majority found that the gender disparities were the result of individual supervisor's decisions and must be litigated individually.

The Court's emphasis on "rigorous analysis" and the application of the *Daubert* standard at the class certification stage means that there will be much more attention to the underlying merits at this early point in the litigation. At the very least, it means that there will be far more aggressive battles at this stage. It will be harder for plaintiffs to go forward with class actions if the certification decision - which occurs before discovery - requires evidence sufficient to meet the *Daubert* test.

Second, in an aspect of the decision that has not been sufficiently appreciated, the Court made it much easier for federal appellate courts to overrule district court decisions on class certification. It is clearly established that a district court's decision with regard to class certification is to be reviewed on an abuse of discretion standard. 1-14A *"Moore's Manual of Federal Practice and Procedure,"* Section 14A.44. Thus, properly phrased, the issue before the Court was whether the district court abused its discretion in granting class certification.

It is difficult to reconcile the Court's approach in *Dukes* with an abuse of discretion standard of review. The district court made extensive findings as to why there was sufficient commonality to allow the class action to proceed. At no point did Justice Scalia's majority opinion suggest the slightest deference to the trial court. This signals that federal appellate courts need to give little deference to the district courts' determinations with regard to class certification; although the Court did not explicitly change the standard of review, it certainly was not applying an abuse of discretion standard. If this is followed, it is a quite significant change in the law and one that could create an additional obstacle to class certification.

It is impossible to understand *Wal-Mart v. Dukes* as other than hostility by the Court's conservative majority to class actions. In another case last term, *ATT Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), Justice Scalia, writing for the same five justices, spoke of the "in terrorem" effect of class actions on corporations and the pressure they place on businesses to settle even non-meritorious claims.

Undoubtedly, the Court was affected by the sheer size of the class action, the largest employment discrimination class action in American history. But the Court's majority failed to realize that this is a function of Wal-Mart being the largest employer in the United States. The Court wants to protect business from big class actions, but shows no sense of a need to protect employees from harms from big business. A class action is uniquely suited to a situation like this where a large number of people each lose a relatively small amount. But the Court has made it much more difficult for such class actions to go forward.

presiding judge of the San Diego Superior Court on Jan. 1.

San Francisco court announces changes
Presiding Judge Katherine Feinstein announced a number of changes Friday to compensate for 75 employees the court still expects to lay off.

Law Practice
Former L.A. official joins Greenberg
Linda Bernhardt, a land use specialist and former deputy mayor of Los Angeles, has joined Greenberg Traurig LLP in Santa Monica, the firm announced Friday.

Bar Associations
Blair urges California lawyers to take up African legal causes
Cherie Blair wants her fellow lawyers to remember the millions of people who live without the benefits of the rule of law.

Judges and Judiciary
Eastern District judge plans to take senior status
U.S. District Judge Garland E. Burrell Jr.'s plans to take senior status next year will open up a seat on the Eastern District branch.

State of the judiciary missing in action
The legislative session came to a close this year without Chief Justice Tani Cantil Sakauye giving a state of the judiciary speech to lawmakers, the first time that's happened in 15 years.

Government
Plaintiffs face restrictions in patent bill signed by President
The patent reform bill signed into law Friday by President Barack Obama includes bad news for plaintiffs claiming companies marked products with false patent numbers and for those suing large numbers of defendants.

California Supreme Court
Anti-SLAPP law protects attorney case assignment decisions
The state's anti-SLAPP law protects decisions that legal organizations make about attorney case assignments, the 4th District Court of Appeal ruled Friday.

Criminal
Lawyers concede DNA profiling case may be moot
Lawyers for defendant Jerry A. Pool advised the 9th Circuit that they now believe his appeal over the constitutionality of arrestee DNA profiling should be dismissed because the issue became moot when he pleaded guilty to a sex crime.