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Expert Analysis

Heightened Standards: What *Wal-Mart v. Dukes* Means for Future Class-Action And Consumer Finance Litigation

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"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties.'"[1]

In *Wal-Mart v. Dukes*, the U.S. Supreme Court vacated certification June 20 of arguably the largest class in U.S. history and considerably redefined class-action and consumer-finance litigation. The court resolved a circuit split on the "commonality" provision of Federal Rule of Civil Procedure 23(a)(2) and held that the plaintiffs must have "significant proof" ready to support their claim at the class certification stage. The court also held that the plaintiffs cannot seek individualized monetary relief under Rule 23(b)(2).

Although *Dukes* is a labor and employment case under Title VII, the court's decision will undoubtedly impact other class cases significantly, including an increasing number of consumer-finance class-action lawsuits.

BACKGROUND

In 2001 a group of female Wal-Mart current and former employees filed a putative class-action lawsuit in the U.S. District Court for the Northern District of California against Wal-Mart. The plaintiffs, who sought declaratory and injunctive relief, punitive damages, and back pay, alleged that Wal-Mart discriminated against them on the basis of their sex by denying them equal pay and promotions in violation of Title VII of the Civil Rights Act of 1964.[2] The plaintiffs later asked the District Court to certify a class of about 1.5 million female Wal-Mart current and former employees who asserted that the discretion their local supervisors exercised over pay and promotions violated Title VII. The District Court approved their certification motion.[3] Wal-Mart appealed the District Court's certification order, which the 9th U.S. Circuit Court of Appeals, in a divided *en banc* decision, substantially affirmed.[4]

Last December the Supreme Court granted Wal-Mart's petition for *certiorari* on the question of "[w]hether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) which, by its terms, is limited to injunctive or

corresponding declaratory relief, and if so, under what circumstances." The court also directed the parties to brief and argue the question "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." The court issued a 5-4 opinion, holding that the plaintiffs failed to satisfy Rule 23(a)'s commonality requirement, and a unanimous opinion holding that the plaintiffs' back-pay claims were improperly certified under Rule 23(b)(2).

This article explores how the *Dukes* court has clarified the "commonality" requirement under Rule 23(a), including how litigants can use statistical and other evidence to meet that requirement. The article discusses how the *Dukes* decision will now limit individualized damages in class actions seeking to proceed under Rule 23(b)(2). Finally, the article analyzes how *Dukes* could affect class action and aggregate litigation going forward, focusing particular attention on the decision's impact in consumer finance class actions and fair-lending lawsuits.

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WHAT THE DECISION MEANS

Significant proof required to show a common injury under Rule 23(a)(2)

Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure contain the standards under which a court determines whether it is proper to aggregate individual claims into a unified action.[5] Unless a class action is first "certified" under Rule 23, it cannot proceed to trial in federal court. Among the prerequisites to class certification, Rule 23(a)(2)'s requirement that the named plaintiffs share an "injury" in common with the class such that resolving their claims will resolve all class claims simultaneously is one of the most important.

In *Dukes*, a majority of the justices held that the putative class lacked this commonality requirement. The lower courts had ruled that the plaintiffs satisfied the commonality requirement by showing that Wal-Mart's discretionary pay and promotion policies raised the common question of whether the same corporate policy of discrimination had injured Wal-Mart's female employees. The court disagreed, holding that the plaintiffs failed to present sufficient evidence that a company policy of discrimination existed.

The court first observed that because the plaintiffs sought to sue about millions of employment decisions concurrently, there had to be "some glue to hold the alleged reasons for all those decisions together," such that an examination of each class member's claim would "produce a common answer to the crucial question *why was I disfavored*."[6] The court also reinforced its holding in *General Telephone Co. of South-west v. Falcon*[7] that Rule 23 is more than "a mere pleading standard."

In particular, the court emphasized that because "[a]ny competently crafted class complaint literally raises common 'questions,'"[8] plaintiffs must demonstrate "significant proof"[9] of commonality. To meet the commonality standard, plaintiffs must show that prospective class members have suffered a common injury from a common source. Moreover, the suit must be "capable of class-wide 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."[10] Lower courts must then conduct a "rigorous analysis" to determine if such proof is adequate.[11] The court was explicit that it "cannot be helped" that class-certification decisions will often "entail some overlap with the merits of plaintiff's underlying claim."[12]

The court next concluded that the *Dukes* plaintiffs failed to show the requisite "significant proof" of commonality. Initially, the majority rejected the *Dukes* plaintiffs' contention that individual class claims were linked by Wal-Mart's policy of vesting discretion uniformly in local managers. The court observed that the practice of allowing local managers to make decisions was itself "a policy *against* having uniform employment practices"[13] and that Wal-Mart's decentralized and subjective pay and promotion policy was "a very common and *presumptively reasonable* way of doing business."[14] The court therefore held that a company's decision to give individual managers discretion, standing alone, cannot be a common policy that creates discrimination.[15] The court did concede that discretion, if coupled with a "common mode" of discriminatory decision-making, could theoretically support a class-action lawsuit but found that the plaintiffs produced no evidence of such in this case.[16]

The court also rejected the plaintiffs' anecdotal, statistical and sociological evidence of gender discrimination at Wal-Mart. First, the court expressed "doubt" that the lower courts were correct in not subjecting the plaintiffs' expert testimony to a *Daubert* analysis.[17] Next, the court found that the proffered testimony and related evidence were "worlds away" from the significant proof that Wal-Mart operated under a general policy of discrimination.[18] Specifically, the court noted that although the plaintiffs' expert opined that Wal-Mart had a "strong corporate culture" that was "vulnerable to gender bias,"[19] he could not identify how or to what degree stereotypes affected individual managers' hiring decisions.[20]

The court further noted that the plaintiffs' statistical evidence failed to show gender bias on a store-by-store level, which the court reasoned was inconsistent with the allegation that Wal-Mart had maintained a uniform policy of discrimination.[21] Finally, the court rejected the 120 affidavits from class members describing their experiences of discrimination, noting such evidence was quantitatively inadequate for a putative class of roughly 1.5 million.[22] Thus, the court found that the plaintiffs failed to establish the existence of an injury common to both them and the other 1.5 million female Wal-Mart workers, and it vacated the Wal-Mart class on this ground.[23]

Individualized claims for monetary relief must meet higher test

Assuming a class can meet Rule 23(a)'s prerequisites, the class must also fit into one of the subcategories in Rule 23(b). In *Dukes*, all nine justices rejected class certification on the ground that class actions seeking individualized claims for monetary relief must meet a test more stringent than the one outlined in Rule 23(b)(2).

In the lower courts, the *Dukes* plaintiffs successfully argued that their class should be certified under Rule 23(b)(2), which applies when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole" because their request for back pay was merely "incidental" and they primarily sought injunctive relief from Wal-Mart. The high court rejected this approach, holding that Rule 23(b)(3) and not Rule 23(b)(2) applies "when each class member would be entitled to an individualized award of monetary damages."[24]

As the Supreme Court described it, the key to Rule 23(b)(2) class certification is "'the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[25] The Rule 23(b)(2) analysis, the court further explained, is not a question of balancing the comparative "predominance"

of claims for relief. That approach ignores a key distinction between mandatory Rule 23(b)(2) classes and Rule 23(b)(3) classes with opt-out rights.[26] The court's holding that the important question for Rule 23(b)(2) certification is whether the relief sought is "indivisible" versus "individualized" departs from the various "predominant relief" tests used by lower courts, all of which focused on the relationship between monetary and nonmonetary relief sought rather than the divisibility of the monetary relief sought.[27]

In addition, the Supreme Court also found that the 9th Circuit's proposed use of sampling and special masters to resolve individual damages using class wide statistics did not satisfy Rule 23(b)(2)'s requirements.[28] The 9th Circuit had pro-posed to determine individual damages by selecting "a sample set of the class members ... as to whom liability would be determined in depositions supervised by a master."[29] These back-pay damages for the sample set would then be multiplied by the well over 1 million remaining class members to determine the total class recovery. Other than depositions of sample set members, the 9th Circuit's approach did not include any individual proceedings to determine damages.[30] Accordingly, the Supreme Court rejected the 9th Circuit's "novel project" of a "trial by formula" as a way to satisfy Rule 23(b)(2)'s requirement to provide for individualized damages.[31]

The court's holding that the important question for Rule (b)(2) certification is whether the relief sought is "indivisible" versus "individualized" departs from the various "predominant relief" tests used by lower courts.

Finally, although it did not reach the issue, the high court found merit in Wal-Mart's argument that the claims for monetary relief under Rule 23(b)(2) violated the due-process clause because these claims would deprive Wal-Mart of the ability to defend against each individual's monetary claim.[32] Specifically, the court noted in dicta that there was a "serious possibility" that recovery of monetary damages under Rule 23(b)(2) could violate due process, even if the monetary claims do not predominate, because of the lack of notice and opt-out provisions for Rule (b)(2) classes.[33]

HOW *DUKES* AFFECTS CONSUMER FINANCE CLASS ACTIONS AND FAIR-LENDING LAWSUITS

Dukes is an employment discrimination and Title VII case, but the court's decision will make it harder to certify *all* class actions under Rules 23(a)(2) and (b)(2). The court's decision also offers several insights for litigating class-action claims of discrimination brought under the Fair Housing Act, Equal Credit Opportunity Act and the Civil Rights Act — claims that courts have evaluated by drawing on Title VII jurisprudence.[34]

First, the court's dicta concerning whether the *Dukes* plaintiffs had offered "significant proof" of commonality seems to undercut the central premise of many lending discrimination cases brought both by private plaintiffs and the U.S. Department of Justice in recent years — that affording discretion to branch managers or mortgage brokers is improper, or at least warrants scrutiny.[35] Specifically, one of the ways in which the court indicated a plaintiff could satisfy the commonality element in a discrimination case was to show a pattern or practice of discrimination. As to that method of proof, the court reaffirmed that, in a pattern-or-practice discrimination case, the discrimination at issue must be a company's "*standard operating procedure* ... rather than the *un*usual practice."[36] The court observed that giving discretion to local supervisors is "a very common and *presumptively reasonable* way of doing business" that alone "raises no inference of discriminatory conduct."[37]

The court's statements acknowledge commercial reality. Those statements should also provide support to financial services companies that use various forms of

discretion in their underwriting, pricing or servicing operations when defending class allegations that such discretion resulted in discrimination. At the regulatory level, the court's statements also should help companies explain lending programs that incorporate discretion to bank supervisors, who in recent years have been trained to view any elements of discretion within such programs as red flags for discriminatory conduct.[38]

Second, the court's strong suggestion that expert testimony should meet the more rigorous *Daubert* standard at the class-certification stage should make it harder for class plaintiffs in consumer finance cases to satisfy the second method of showing commonality that the court identified: proof of a biased testing or reviewing procedure.[39]

In consumer finance class cases, which often turn on expert testimony,[40] the court's heightened standards for expert testimony could prove to be a significant new obstacle for plaintiffs at the class-certification stage. For example, consider cases involving a seemingly neutral and consistently applied underwriting and pricing factor. The *Dukes* decision encourages, if not requires, a plaintiff to produce, at the class certification stage, credible *Daubert*-quality expert testimony that, although minority and non-minority borrowers were "comparably qualified" for a loan or loan price, minority borrowers either had loan applications rejected or paid more for their loans.

Similarly, the court's rejection of data sampling and "trial[s] by formula" as a way to recover individualized damages under Rule 23(b)(2) should remove a tempting approach to handling consumer finance class cases where data points like interest rates are readily available.[41] For example, consider a plaintiff who puts forth an economic model purporting to capture the relevant factors by which a lender prices loans and, thus, could theoretically calculate discrimination "harm" for each individual loan by determining the difference between the pricing that the model would anticipate and the actual pricing. The *Dukes* decision implies that a defendant in such a case has a right to have such harms individually determined so as to include unique factors that may have affected each loan's pricing (*e.g.*, consumer price negotiation, local market conditions for loans available to the consumer, etc.).

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Third, the *Dukes* decision may signal a revitalization of the court's reasoning in *Wards Cove Packing Co. v. Atonio*,[42] which both the majority and dissent cite with authority.[43] In *Wards Cove*, the court held that disparate-impact claims must be evaluated against a "qualified population" of individuals who possess similar characteristics4[4] and that employees need to identify a specific company practice as the source of discrimination.[45] Thus, *Wards Cove* limited the ability of plaintiffs to plead viable disparate-impact claims.

In response, Congress redefined "business necessity" and "legitimate employment goals," overturning portions of *Wards Cove*.[46] The case then fell into disfavor in employment cases, as did its holdings on "qualified population[s]" and specific practices.[47] The *Dukes* court's favorable treatment of *Wards Cove* may reflect an effort by some of the justices to rehabilitate certain of the tenets that supported the *Wards Cove* decision.

A reinvigorated *Wards Cove* would provide financial services defendants in fair-lending class cases (both against private plaintiffs and the U.S. Department of Justice) with a potentially useful tool. For example, the *Wards Cove* requirement

for plaintiffs to compare similarly "qualified pools" of applications, as translated into the fair-lending context, would likely require proof that *comparatively credit-worthy* minority borrowers suffered a disparate impact relative to white borrowers. Such comparisons may even extend to the level of effort required by borrowers to obtain credit or low-priced credit. In addition, a plaintiff would have to identify specific discriminatory lending practices that created the disparity. The vitality of *Wards Cove* is an issue to keep tracking.

Dukes *is the most recent in a series of Supreme Court decisions favoring individualized litigation and arbitration over the unwieldy machinery of class actions and class arbitration.*

HOW *DUKES* WILL IMPACT ALL CLASS ACTIONS AND OTHER AGGREGATE LITIGATION

Dukes is the most recent in a series of Supreme Court decisions favoring individualized litigation and arbitration over the unwieldy machinery of class actions and class arbitration.[48] For the reasons articulated above, and looking beyond its impact on consumer finance class actions, *Dukes* will likely shift the class-action landscape in many critical ways:

- Fewer class actions will be filed in federal courts, and of those filed, fewer will be certified.
- As claimants seek potentially friendlier state jurisprudence on the commonality question (where the *Dukes* decision is not binding), statewide classes based on state law will become more prevalent.
- Plaintiffs' counsel may seek to litigate claims through "mass actions" of large numbers of individual claimants rather than face rigorous class-action requirements.[49]
- Plaintiffs will define classes with more care, which likely will mean smaller class sizes, in order to withstand the heightened Rule 23(a)(2) standard in *Dukes*. For example, immediately after the court released its opinion, counsel for the *Dukes* plaintiffs stated they intended to pursue claims on the state, regional and potentially individual-store basis.[50]
- Consideration of evidence on the merits will become common at the class-certification stage. In the context of disparate-impact cases, plaintiffs will have to identify more clearly those specific policies or practices that have caused a discriminatory outcome.[51] Lower courts will also closely scrutinize the testimony of experts and the use of aggregated statistics and anecdotal evidence purporting to show discrimination in class actions.
- Any expert testimony provided at the class-certification stage will likely have to meet the more rigorous standards of *Daubert* (rather than a "sufficiently probative" or some lesser standard).
- The common practice of bootstrapping monetary claims into class actions alleged to be predominately seeking injunctive relief will be significantly curtailed. Although plaintiffs' ability to certify classes under Rule 23(b)(2) will be limited, defendants' ability to use Rule 23(b)(2) as a vehicle to structure nationwide class settlements will also be diminished.
- The *Dukes* majority leaves open "the serious possibility" of challenging future putative classes seeking certification under Rule 23(b)(2) by asserting the monetary claims violate due process even if they are not the predominate claims.

This argument may be useful to corporate defendants seeking to invalidate class actions brought in state courts.

The net impact of the *Dukes* decision is that plaintiffs will have a more difficult time obtaining certification of broad nationwide classes. Several portions of the *Dukes* decision also provide insight into how the court may address consumer finance litigation concerning allegations of discrimination. Because of an anticipated acceleration of plaintiffs' lawyers' efforts to avoid federal court jurisdiction, class actions and aggregate litigation will continue to pose real threats to corporate defendants. This will be especially true in the area of fair-lending and servicing litigation, which continues to receive scrutiny from banking regulators and government enforcement agencies as well as private plaintiffs.

NOTES

[1] *Wal-Mart Stores v. Dukes,* No. 10-277, 2011 WL 2437013, at *6 (U.S. June 20, 2011) (citing *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979)).

[2] *Id.* at *4.

[3] *Dukes v. Wal-Mart Stores,* 222 F.R.D. 137, 188 (N.D. Cal. 2004).

[4] *Dukes v. Wal-Mart Stores,* 603 F.3d 571, 628 (9th Cir. 2010) (*en banc*).

[5] Rule 23(a) reads:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) reads:

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

[6] *Dukes*, 2011 WL 2437013, at *7.

[7] 457 U.S. 147, 159 n.15 (1982) (noting in dicta that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class").

[8] *Dukes*, 2011 WL 2437013, at *7 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 131-32 (2009)).

[9] *Id.; see also Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 159 n.15 (1982).

[10] *Dukes*, 2011 WL 2437013, at *7.

[11] *Id.* (citing *Falcon*, 457 U.S. at 161).

[12] *Id.* & n.6 (rejecting the notion that *Eisen v. Carlisle & Jacquelin,* 415 U.S. 156, 177 (1974), prohibits an inquiry into the merits when deter-mining class certification). The *Dukes* finding that consideration of the merits concurrent with the class-certification decision is unavoidable could have far-reaching consequences. For example, the *Dukes* court itself expressly contemplated its finding could affect securities class actions. *See Dukes*, 2011 WL 2437013, at *7 n.6. Read in combination with another recent decision of the court, *Erica P. John Fund Inc. v. Halliburton Co,* 2011 WL 2175208 (U.S. 2011), the *Dukes* decision seems to imply that class-action plaintiffs may have an easier time proving securities fraud if they use the "fraud on the market" theory and prove at class certification that shares were traded on an efficient market. *Dukes*, 2011 WL 2437013, at *7 n.6; *see also* Kevin M. LaCroix, *Will Wal-Mart Stores v. Dukes Affect Securities Cases?*, The D&O Diary (June 27, 2011), *available at* http://www.dandodiary.com.

[13] *Dukes*, 2011 WL 2437013, at *9 (emphasis in original).

[14] *Id.* (emphasis added).

[15] *See id.*

[16] *Id.*

[17] *Id.* at *8 (discussing *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993)). The *Daubert* standard was later codified in the 2000 revision of Federal Rule of Evidence 702.

[18] *Dukes*, 2011 WL 2437013, at *8.

[19] *Id.* at *8 (citing *Wal-Mart*, 222 F.R.D. at 192).

[20] *Id.* (noting that the expert "could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking").

[21] *Id.* at *10.

[22] *Id.*

[23] *Id.* at *11-12.

[24] *Id.* at *12.

[25] *Id.* (quoting Nagareda, *supra* note 8, at 132).

[26] *Dukes*, 2011 WL 2437013, at *14 ("The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of class adjudication over individual adjudication nor cures the notice and opt-out problems. We fail to see why the rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request — even a 'predominating request' — for an injunction."). The majority also recognized that this would create "perverse incentives" for plaintiffs to limit their claims to certain injuries to ensure that nonmonetary claims predominate, leaving class members with other injuries collaterally estopped from recovering damages. *Id.*

[27] Before *Dukes*, there was a circuit split as to when monetary relief predominates and thereby requires a class to be certified under the more stringent requirements of Rule 23(b)(3). Four circuits had held that monetary relief must be "incidental" to injunctive or declaratory relief for plaintiffs to remain within 23(b)(2). The 2nd Circuit looked to the plaintiff's "subjective intent" in filing the lawsuit. And the 9th Circuit, in the underlying *Dukes* decision, had held that the monetary damages cannot have "superior strength, influence or authority" vis-à-vis the injunctive relief.

[28] *Dukes*, 2011 WL 2437013, at *15.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Brief for Petitioner at 43, *Wal-Mart Stores v. Dukes,* 2011 WL 2437013 (S. Ct. 2011) ("The 9th Circuit expressly recognized that, as to some class members, 'unequal pay or non-promotion was due to something other than gender discrimination,' but nonetheless endorsed procedures that would let them recover anyway while barring Wal-Mart from presenting its otherwise available defenses to those claims. ... The 9th Circuit's decision also violates Wal-Mart's right to litigate the issues raised ... guaranteed ... by the due-process clause, which includes the right to present every available defense.") (citations and internal quotations omitted). *See also id.* at 36, 38, 56. For a detailed discussion of the historical background of class-action due-process

arguments, *see generally* Mark Moller, *Class Action Defendants' New Lochnerism,* --- Utah. L. Rev. ---- (forthcoming 2011).

[33] *Dukes*, 2011 WL 2437013, at *13. Already, counsel in a related case has filed a supplemental brief to the court, arguing that *Dukes* has left open this due-process question and the court should resolve it. *See* Supplemental Brief for Petitioners, *Philip Morris USA Inc. v. Jackson,* No. 10-735 (U.S. June 21, 2011). While the court ultimately denied *certiorari*, this due-process argument remains a potential avenue to challenge class certification with any monetary recovery under Rule 23(b)(2) in the future.

[34] *See, e.g., Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.,* 417 F.3d 898, 903 (8th Cir. 2005) (applying the Title VII disparate impact analysis of *Chambers v. Omaha Girls Club,* 834 F.2d 697, 702 (8th Cir. 1997) to an FHA claim). Some courts have met such unquestioning reliance to Title VII precedent in the credit-discrimination context with skepticism. *See, e.g., Lattimore v. Citibank,* F.S.B., 151 F.3d 712, 712 (7th Cir. 1998) (Posner, C.J.).

[35] *See, e.g.,* Consent Order at 3, *United States v. AIG Fed. Sav. Bank,* No. 1:10-cv-00178-JJF (D. Del. Mar. 19, 2010); Settlement Agreement, *United States v. Long Beach Mortgage Co.,* No. 96-6759 (C.D. Cal. 1996) (including allegations of discrimination by applying non-risk-related, discretionary premiums to loans, including broker-originated loans); *Ramirez v. Greenpoint Mortgage Funding,* No. C08-0369, 2010 WL 2867086 (N.D. Cal. July 2010) (granting class-certification motion based on 9th Circuit's *Dukes* opinion in case alleging disparate pricing stemming from mortgage broker discretion). For further examples of private class actions claiming discretion as the source of commonality, *see, e.g., Barrett v. H&R Block Inc.,* No. 80-10157-RWZ (D. Mass. Mar. 21, 2011); *Taylor v. Accredited Home Lenders Inc.,* 580 F. Supp. 2d 1062 (S.D. Cal. 2008); *Garcia v. Countrywide Fin. Corp.,* No. 07-1161-VAP, 2008 WL 7842104 (C.D. Cal. 2008). For a full discussion of the AIG Bank settlement, *see* Benjamin P. Saul, *DOJ Settlement With AIG Subsidiaries May Signal Expanded Lender Liability and Aggressive Enforcement of Fair Lending Laws,* A.B.A. Consumer & Civil Rights Litig. Newsletter (Winter 2011).

[36] *Dukes*, 2011 WL 2437013, at *7 n.7 (quoting *Teamsters v. United States,* 431 U.S. 324, 358 (1977)) (emphasis added). Under the ECOA, federal agencies must refer cases to the Justice Department for possible lawsuits whenever they believe that there is a pattern or practice of discouraging credit. 15 U.S.C. § 1691e(g). For a recent example of a Justice Department ECOA pattern-or-practice lawsuit, *see* complaint, *United States v. Nixon State Bank,* No. 11-cv-488 (W.D. Tex. June 17, 2011), *available at* http://www.stopfraud.gov/news/nixon-state-bank-complaint.pdf.

[37] *Dukes*, 2011 WL 2437013, at *9.

[38] *See, e.g.,* Interagency Fair Lending Examination Procedures, at 2 (August 2009) (noting a "risk factor" a bank examiner should identify as a preliminary matter would be "the extent to which discretion in pricing or setting credit terms and conditions is delegated to various levels of managers, employees or independent brokers or dealers").

[39] *Dukes*, 2011 WL 2437013, at *8.

[40] *See, e.g.,* Raymond H. Brescia, *The Worst of Times: Perspectives on and Solutions for the Subprime Mortgage Crisis*, 2 Albany Gov't L. Rev. 164, 209 (2009) (discussing the use of expert testimony in fair-lending racial discrimination lawsuits).

[41] *Id.* at *15.

[42] 490 U.S. 642 (1989), *superseded by statute on other grounds,* 42 U.S.C. § 2000e – (k).

[43] The *Dukes* majority cited to *Wards Cove* and reaffirmed that the case is still good law for the proposition that that plaintiffs must identify a specific discriminatory practice. *Dukes*, 2011 WL 2437013, at *10. Justice Ruth Bader Ginsburg's partial dissent also quoted *Wards Cove* to note that an "undisciplined system of subjective decision-making" may be the basis for a disparate-impact discrimination claim. *Id.* at *19 (Ginsburg, J. dissenting).

[44] *Wards Cove*, 490 U.S. at 651.

[45] *Id.* at 657.

[46] Civil Rights Act of 1991, Pub. L. No. 102-166 (1991).

[47] *See, e.g., Ricci v. DeStefano,* 129 S. Ct. 2658, 2699 (2009) (referencing the "now-discredited decision in *Wards Cove*").

[48] In *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011) (Scalia, J.), the court held that consumer arbitration agreements containing class-action waivers are enforceable under the Federal Arbi-tration Act. In *Stolt-Nielson S.A. v. AnimalFeeds International Corp.,* 130 S. Ct. 1758 (2010), the court held that a party cannot be compelled to arbitrate on a class-wide basis where an agreement did not expressly require disputes to be resolved on behalf of a class. In *American Express Co. v. Italian Colors Restaurant,* 130 S. Ct. 2401 (2010), the court vacated a decision of the

2nd Circuit, holding that an arbitration clause forbidding class-wide recovery was unenforceable if it prevented the plaintiffs' "only reasonably feasible means of recovery" and remanded the cases for reconsideration in light of *Stolt-Nielsen*. *In re Am. Express Merch. Litig.*, 554 F.3d 300, 320 (2d Cir. 2009).

[49] *See, e.g., Am. Bankers Co. v. Alexander,* 818 So. 2d 1073 (Miss. 2001). For a detailed comparison of so-called "mass action litigation" in Mississippi, which does not permit class actions, to class actions in the rest of the country, *see* Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation,* --- Miss. C.L. Rev. ---- (forthcoming).

[50] Nina Totenberg, *Supreme Court Limits Wal-Mart Discrimination Case,* Nat'l Pub. Radio (June 20, 2011), *available at* http://www.npr.org/2011/06/20/137296721/supreme-court-limits-wal-mart-discrimination-case. According to *Dukes* attorney Joseph Sellers, "What we will look for on a region- or store-wide basis is some evidence to which we can attribute to top-level people in the region or in the store. ... I don't read the majority as saying you can never have a class [action] where there is evidence attributable to higher-level people." *Id.*

[51] *Dukes*, 2011 WL 2437013, at *10 (citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988)).



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