Put Up Your *Dukes*: Supreme Court Hands Advertisers New Weapons to Fight Spurious Class Actions

Employers are heralding the U.S. Supreme Court's decision this week in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, No. 10-277 (June 20, 2011), which decertified a class of 1.5 million current and former Wal-Mart employees. Although the *Dukes* plaintiffs alleged gender discrimination, the Court's ruling will have broad impact, and advertisers should take note.

The *Dukes* decision offers advertisers new ammunition to oppose class certification in false advertising class actions. Here are three especially important aspects of the ruling to note:

- **Common *questions* of fact and law do not justify a class action, unless those questions have common *answers* for all putative class members.**

The Supreme Court recognized that with clever lawyering, almost any class action complaint can raise "common questions" of fact and law. Thus the existence of common questions, according to the Court, will not justify class certification. Rather, a class is appropriate only if the *answers* to those questions are common to all class members.

The Ninth Circuit found that the *Dukes* class members were bound together by the common question of whether Wal-Mart maintained a common set of policies that resulted in gender discrimination. That's not good enough. According to the Supreme Court, for the class to be certified, the plaintiffs would need to show that, as a result of this common policy, all of the putative class members were *injured* and injured *in the same way*.

In advertising cases, class plaintiffs can no longer rest on boilerplate allegations that class members are united by common questions of what the ads say and whether those claims are true. Rather, after *Dukes*, plaintiffs should be required to prove that all putative class members saw the ads, suffered injury, and were injured in exactly the same way.

- **To certify a class, plaintiffs seeking money damages *must* show that common issues of fact and law "predominate" over individual issues.**

Traditionally, courts have been reluctant to certify class actions on allegations of false advertising because plaintiffs failed to meet the "predominance" requirement of Rule 23(b)(3) – the Rule that authorizes class actions for money damages only when issues common to the class *predominate* over issues specific to individual class members. Common issues in false advertising cases are routinely overwhelmed by individual issues – including what ads, if any, a putative class member saw, what messages he or she took away, and whether those messages were material to the person's decision to purchase.

But, in allowing the Wal-Mart class to be certified, the Ninth Circuit gave plaintiffs a roadmap to circumvent the predominance requirement. The Ninth Circuit held that, when plaintiffs are primarily seeking an injunction, the predominance requirement of Rule 23(b)(3) does not apply and, even so, plaintiffs can recoup money damages.

The Supreme Court disagreed. If plaintiffs are seeking monetary damages, the Court held that the predominance requirement of Rule 23(b)(3) must be met – a burden that the Court found the *Dukes* plaintiffs could not meet.

- **Plaintiffs' burden of proof at the class certification stage is a heavy one.**

The fact that plaintiffs bear the burden of proving the perquisites of class certification is well-established. The Court made clear in *Dukes* that this burden is a heavy one.

The *Dukes* plaintiffs offered expert testimony showing that, at Wal-Mart, fewer women were promoted and given raises than at other businesses. Based on other testing, experts for the plaintiffs testified that gender discrimination was the only credible explanation for such disparities. The Court conducted a "rigorous" analysis of the facts – the plaintiff's evidence, the experts' opinions and depositions – and ultimately rejected all of it.

Moreover, in certifying the class, the Ninth Circuit gave significant weight to the testimony of the named class plaintiffs and anecdotal reports of discrimination from 120 other female Wal-Mart employees. Class plaintiffs in advertising cases often rely on similar anecdotal evidence that some consumers found an ad misleading or purchased the product on a mistaken belief.

The Supreme Court was unimpressed. Even assuming the stories of the named plaintiffs and other Wal-Mart employees who provided testimony were true, the Court held that the anecdotal experiences of "some" class members did not prove that "all" class members had viable claims of gender discrimination.

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Time will tell whether the *Dukes* ruling will stem the onslaught of abusive class actions. But, for now, the decision gives advertisers reason for hope. ◆