TWO DISTRICT COURTS INTERPRET *DUKES* TO REQUIRE "RIGOROUS ANALYSIS" IN ANTITRUST CLASS CERTIFICATION DECISIONS

Introduction: In *Wal-Mart Stores, Inc. v. Dukes*,[1] the Supreme Court held that the largest employment discrimination case in U.S. history—which alleged that Wal-Mart had discriminated against 1.5 million current and former female employees with respect to pay and promotion—was improperly certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Most observers predicted the decision would significantly impact employment discrimination litigation. Whether *Dukes* would affect class certification in other contexts, including antitrust, was less certain.[2] Two recent federal district court decisions—*Kottaras v. Whole Foods Market, Inc.* from the District of Columbia and *In re Live Nation Concert Antitrust Litigation* from the Central District of California—show that *Dukes* has already influenced class analysis in antitrust cases within the two circuits where the law was most favorable to certification.

***Dukes v. Wal-Mart Stores*:** The Supreme Court found the lower courts' class treatment of the claims against Wal-Mart contrary to Rule 23 in two respects. First, the Court found plaintiffs had proffered insufficient evidence to demonstrate that a common question—whether all class members had been injured by a "general policy of discrimination"—linked all 1.5 million members of the putative class, as required by Rule 23(a).[3] Second, the Court found the district court improperly aggregated plaintiffs' back-pay claims pursuant to Rule 23(b)(2), which permits a court to certify only injunctive relief claims, and should have evaluated those claims instead under Rule 23(b)(3), which governs certification of monetary relief claims.[4]

***Dukes's* Applicability to Antitrust:** In most putative antitrust class actions, certification decisions turn on the predominance inquiry of Rule 23(b)(3), not Rule 23(a), which was at issue in *Dukes*. Courts typically assess whether, at trial, class members will seek to prove they were injured by defendants' conduct using evidence that is predominantly common to all class members or, instead, specific to individual class members. Apart from concluding that the back-pay claims in *Dukes* should have been analyzed under Rule 23(b)(3), the Court did not rule on the scope of the Rule 23(b)(3) inquiry.

The Supreme Court, however, did address whether a trial court must look beyond the pleadings and analyze the case record to determine whether class representatives can establish all elements of Rule 23. Until early last decade, many courts—relying on the statement in *Eisen v. Carlisle &*

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1 131 S. Ct. 2541 (2011).

2 *See* Ellen Meriwether, *The "Hazards" Of Dukes: Antitrust Class Action Plaintiffs Need Not Fear The Supreme Court's Decision*, 26 ANTITRUST 18 (Fall 2011).

3 *Dukes*, 131 S. Ct. at 2545.

4 *Id*. at 2565-66.

Jacqueline[5] that a court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"—declined to look beyond the pleadings. More recently, numerous courts of appeals have concluded that approach had been based on a misreading of *Eisen*. Those courts have invoked the Supreme Court's decision in *General Telephone Co. of Southwest v. Falcon*[6] instead, holding that courts must subject certification motions to "rigorous scrutiny" and that class representatives must present evidence sufficient to establish each element of Rule 23. Prior to *Dukes*, the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits had adopted varying formulations of the "rigorous analysis" standard.[7] The D.C. Circuit adhered to the lower *Eisen* standard,[8] and the Ninth Circuit had not adopted a consistent position.[9]

Dukes confirmed that courts must apply a more stringent standard to class certification motions: "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." Moreover, citing *Falcon*, the Supreme Court recognized that courts must apply a "rigorous analysis" to plaintiff's evidentiary showing, even if it "entail[s] some overlap with the merits of the plaintiff's underlying claim." The Court also "doubt[ed]" that a motion to exclude unreliable expert testimony was improper at the class certification stage but did not need to decide that issue, as plaintiff's expert testimony, even if considered, was not sufficient to support certification.[10]

The Court's observations about the "rigorous analysis" standard have now been followed by two district courts in high-profile antitrust litigations within the D.C. Circuit and the Ninth Circuit.

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5 417 U.S. 156, 177 (1974).

6 457 U.S. 147 (1982).

7 *See, e.g.*, *Gintis v. Bouchard Transp. Co., Inc.*, 596 F.3d 64 (1st Cir. 2010); *In re Initial Pub. Offering Sec. Litig.*,483 F.3d 70 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305 (3d Cir. 2009); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005); *Szabo v. Bridgeport Machs., Inc*., 249 F.3d 672 (7th Cir. 2001); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009); *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256 (11th Cir. 2009). Following *Dukes*, the Sixth Circuit recently adopted the "rigorous analysis" test. *Gooch v. Life Investors Ins. Co. of Am.*, 2012 WL 410926, at *8 (6th Cir. 2012).

8 *See, e.g.*, *In re Nifedipine Antitrust Litig.*, No. 08-8014, 2009 U.S. App. LEXIS 3643 (D.C. Cir. Feb. 23 2009); *In re Rand Corp.*, No. 02-8007, 2002 U.S. App. LEXIS 13683 (D.C. Cir. July 8, 2002).

9 *See, e.g.*, *Blackie v. Barrack*, 524 F.2d 981 (9th Cir. 1975); *Moore v. Hughes Helicopters, Inc.* 708 F.2d 475, 480 (9th Cir. 1983); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005). Following *Dukes*, a Ninth Circuit panel cited *Dukes* for the proposition that "rigorous analysis" applies to class certification decisions. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011).

10 *Dukes*, 131 S. Ct. at 2551, 2554.

***Kottaras v. Whole Foods*:** Plaintiffs in *Kottaras* were Los Angeles County residents who shopped at Whole Foods and Wild Oats Markets before the two grocery chains merged.[11] Following the Federal Trade Commission's challenge to the merger, plaintiffs filed suit, alleging the post-settlement merger foreclosed competition in the organic foods market in Los Angeles, leading to supra-competitive prices at Whole Foods as compared to its pre-merger pricing when Whole Foods competed with Wild Oats. Plaintiffs subsequently moved for class certification.

In support of the class motion, plaintiffs' expert opined that both the existence and amount of damages suffered by each individual Whole Foods shopper could be determined using class-wide evidence. Defendants' expert disagreed based on evidence that showed that Whole Foods shoppers bought highly differentiated "baskets" of products. While the price of some of those products increased post-merger, the majority decreased in price. Defendants' expert therefore concluded that determining which post-merger Whole Foods' customers were injured required an individualized inquiry into the items each customer purchased.

The *Kottaras* court recognized that plaintiffs' class motion turned on the level of scrutiny applicable to plaintiffs' expert, whose analysis the court found suspect. The D.C. Circuit had reviewed numerous class certifications under the more lenient "colorability" standard, based on *Eisen*. The district court recognized that the *Eisen* standard posed only a "low hurdle" and that plaintiffs' expert and supporting evidence likely could meet that standard. Yet, rather than following D.C. Circuit precedent, the district court applied the more stringent *Dukes* standard and undertook a rigorous analysis of "the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take." The district court found plaintiffs' expert testimony insufficiently reliable, and concluded that plaintiffs failed to prove all elements of Rule 23.[12]

***In re Live Action Concert Antitrust Litigation*:** On March 23, 2012, the U.S. District Court for the Central District of California issued a long-awaited decision on a collection of motions in *In re Live Concert Antitrust Litigation*, including defendants' motions for summary judgment and to decertify the class.[13] This consolidated action is the latest chapter in the decade-old litigation alleging that Clear Channel and related entities engaged in anticompetitive conduct in the promotion of live music concerts. In a related action filed in 2002 in the Southern District of New York, the district court denied plaintiff's motion for certification of a nationwide class of concert ticket purchasers on the grounds that the putative class's antitrust claims required a separate analysis for each of several relevant geographic markets; the Second Circuit affirmed.[14]

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11 2012 WL 259862 (D.D.C. Jan. 30, 2012).

12 *Kottaras*, 2012 WL 259862, at *4-6, 11.

13 *In re Live Concert Antitrust Litig.*, No. 06-ml-01745, 2012 WL 1021081 (C.D. Cal. March 23, 2012).

14 *Heerwagen v. Clear Channel Commc'ns, Inc.*, 435 F.3d 219 (2d Cir. 2006).

A district court in the Central District of California, however, certified five classes in 2007 related to five geographic markets. The district court applied then-governing Ninth Circuit precedent, which precluded district courts "from resolving factual disputes—and, in particular, weighing conflicting expert testimony—at the class certification stage."[15]

In its March 23 decision, the district court revisited its 2007 decision in light of *Dukes*. The district court found *Dukes* had announced a "significantly different standard" for reviewing a class certification motion—*i.e.*, "rigorous analysis" of the factual record, even if it overlaps with underlying case merits—from the standard the district court had applied in 2007. Thus, its prior certification order "was based on a legal standard that is no longer in effect, which precluded the Court from undertaking a meaningful analysis of either the underlying facts of the case or the representations of the parties' respective experts. As such, that order has little to no precedential value at this point in the litigation." Rather than decertifying the class it previously certified, however, the district court granted summary judgment, which mooted defendants' motion for decertification.[16]

Conclusion: The recent decisions in the *Kottaras* (Whole Foods) litigation and the *Live Concert Antitrust Litigation*, both in jurisdictions that had applied more lenient certification standards, suggest that *Dukes's* express adoption of the "rigorous analysis" standard in the employment context will lead to closer scrutiny of class certification motions in antitrust cases.

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15 *In re Live Concert Antitrust Litig.*, 2012 WL 1021081, at *2. The Court cited only *Dukes* as authority for this "significantly different" standard, although, as noted above, a Ninth Circuit panel applied the "rigorous analysis" test in the employment context following *Dukes* in *Ellis*. 657 F.3d at 980.

16 *In re Live Concert Antitrust Litig.*, 2012 WL, at *2.