Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Paradigm Shift On Commonality

Law360, New York (August 24, 2011) -- In the aftermath of the U.S. Supreme Court's historic decision in Wal-Mart Stores Inc. v. Dukes,[1] much has been said about its effect on nationwide civil rights class actions. However, the Dukes decision is also likely to have a significant impact on a variety of other types of class action cases, in particular consumer fraud actions. The Supreme Court's ruling, with its focus on the requirement under Federal Rule of Civil Procedure 23(a)(2) that there be "questions of law or fact common to the class," has, perhaps inadvertently, set a higher bar for plaintiffs at the class certification stage.

In Dukes, the Supreme Court denied class certification to a class of approximately 1.5 million female Wal-Mart employees who claimed that the company's business practice of allowing its managers unfettered discretion over promotions and compensation led directly to their suffering from discrimination at the hands of those same managers. At the core of the court's decision was its conclusion that the plaintiffs had provided no "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[2] Without such proof, the plaintiffs could not show that a classwide proceeding had "the capacity ... to generate common answers apt to drive the resolution of the litigation."[3]

In the abstract, this was simply a routine exposition of the "commonality" prerequisite of Rule 23(a)(2). To succeed in obtaining class certification, plaintiffs must satisfy each of the four prerequisites of Rule 23(a) and then must qualify under one of the categories described in Rule 23(b). Prior to Dukes, the commonality prerequisite was frequently seen as a fairly low hurdle to overcome. However, by placing the emphasis on common answers rather than on common questions, the Dukes decision has stiffened a requirement that had previously been "easily met."[4] Justice Ruth Bader Ginsburg, in her dissent in Dukes, neatly summarized the change: "The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer 'easily satisfied.'"[5]

This paradigm shift is likely to have significant implications in the consumer fraud context, where "[c]laims requiring individual proof of reliance are [already] generally not amenable to class certification."[6] In the typical consumer fraud class action case, plaintiffs' lawyers recognize that in order to win at the class certification stage, they must ensure that the case is cast with a focus on the company's common misrepresentations (or omissions) to its customers, rather than on the customers' individualized response to the sale of a company's product. Plaintiffs primarily use two strategies to overcome Rule 23(a)(2)'s "commonality" requirement: the "see what sticks" strategy and the "10,000 foot" strategy.

Both of these strategies are premised on the notion that the Rule 23(a)(2) requirement is "easily met." The "see what sticks" strategy is a response to the oft-cited rule that "[t]he commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members."[7] In the past, plaintiffs have seen this as an open invitation to attempt to meet the commonality requirement by raising purportedly common questions "in droves,"[8] in the hope that the court will find at least one that satisfies the commonality requirement. To increase their odds, plaintiffs will raise questions at the most general level possible (i.e., the "10,000 foot" strategy). The Dukes court provided a few examples of such questions — "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice?" — and definitively concluded that "[r]eciting these questions is not sufficient to obtain class certification."[9]

In the consumer fraud context, similar "common questions" might include, "Did all of us plaintiffs purchase Company X's products," or "Were we all misled by Company X's misrepresentations?" In some cases, plaintiffs may indeed be able to show that a company established a uniform policy under which its sales agents were all provided a standard script that contained a material misrepresentation or omission. Such cases will be mostly unaffected by the court's decision in Dukes. A formal, general policy of discrimination, or a sales pitch containing a misrepresentation or omission is no different than a warranty or negligence claim premised on a universal and inherent product defect. Such cases typically have little trouble satisfying the Rule 23(a)(2) commonality requirement because they tend to raise a critical question common to all members of the class.[10]

However, most companies do not supply their sales agents with a required script containing a clear misrepresentation. In such cases, aggrieved plaintiffs often seek to emphasize purported omissions made by the company's sales agents. In doing so, plaintiffs hope to convince a court that the common question that binds the purported members of the class is whether the company failed to disclose certain material information to all of them.

The Dukes decision has broad implications for these sorts of cases because of the way the court refocused attention on the commonality requirement. In essence, the Dukes decision blended Rule 23(a)(2)'s commonality prerequisite into Rule 23(b)(2)'s predominance standard. Justice Ginsburg noted this in her dissent: "The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions 'predominate' over individual issues. And by asking whether individual differences 'impede' common adjudication, ... the Court duplicates 23(b)(3)'s question whether 'a class action is superior' to other modes of adjudication."[11]

One of the first consumer fraud class action decisions of the post-Dukes era exemplifies this intertwining of commonality and predominance standards. In re Bisphenol-A (BPA) Polycarbonate Plastics Prods. Liability Litig.,[12] purchasers of baby bottles and sippy cups sued the defendants for failing to advise them that their products contained BPA, an FDA-approved substance whose safety is the subject of ongoing debate.

After quoting Dukes on the standard for Rule 23(a)(2)'s commonality prerequisite, the court determined that the case did indeed present common factual issues that would advance the litigation — issues such as "[t]he nature and content of any particular Defendant's advertising and other disclosures" and "[e]ach Defendant's knowledge, over time, about the science regarding BPA."[13] But the court also noted that "[i]n contrast to the common issues, there are many critically important individual issues."[14] In particular, the court felt that an individual plaintiff's knowledge of BPA's existence and the surrounding scientific controversy over its safety was a "legally significant" issue.[15]

After spending nearly 10 paragraphs on its analysis of Rule 23(a)(2)'s commonality of factual issues requirement, the court was comparatively sparing in its two-paragraph analysis of Rule 23(b)(2)'s predominance standard. The court simply reiterated the same individual factual issues it had been concerned about in its commonality analysis, and then briefly concluded that those individual issues would predominate due to the "staggering" amount of time and resources that would be required to resolve them.[16] Thus, as Justice Ginsburg had predicted, the Supreme Court's emphasis on Rule 23(a)(2)'s commonality requirement in Dukes focused the In re BPA court's attention on that requirement to such a level that Rule 23(b)(2)'s predominance requirement became nearly redundant.

This subtle paradigm shift will likely have significant implications for plaintiffs seeking class certification in the consumer fraud context and beyond. Because reliance is often a key element that plaintiffs must prove in the consumer fraud context, there is always a tenuous balance between individual issues and common questions in such cases. Prior to Dukes, the commonality requirement did not involve an inquiry into that balance and was rarely a matter of dispute among opposing parties as defendants chose to save their most pointed arguments for issues that were not so "easily met." However, as Justice Ginsburg predicted, that strategy will likely change, with the commonality requirement becoming a tougher front in the battle for class action certification.

--By Brian Hill and Jonathan Kossak, Miller & Chevalier

Brian Hill is a member in the Washington, D.C., office of Miller & Chevalier. He focuses on complex commercial cases and has experience litigating cases involving fiduciary and other professional liability, class actions, government contract disputes and false claims, and intellectual property rights.

Jonathan Kossak is an associate in the firm's Washington office and focuses his practice on complex civil litigation, white collar defense and government investigation matters.

[1] 131 S. Ct. 2541 (June 20, 2011).

[2] Id. at 2553.

[3] Id. at 2551.

[4] In re Vitamins Antitrust Litig., 209 F.R.D. 251, 259 (D.D.C. 2002)

[5] Dukes, 131 S. Ct. at 2562 (Ginsberg, J., dissenting)

[6] In re Zurn Pex Plumbing Prods. Liability Litig., No. 10-2267, 2011 U.S. App. LEXIS 13663, at *34 (8th Cir. July 6, 2011).

[7] Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997).

[8] Dukes, 131 S. Ct. at 2551.

[9] Id.

[10] In re Zurn Pex Plumbing Prods. Liability Litig.

[11] Dukes, 131 S. Ct. at 2566 (Ginsberg, J., dissenting).

[12] MDL No. 1967 (W.D. Mo. July 5, 2011).

[13] Id. at *20.

[14] Id. at *21.

[15] Id. at *26.

[16] Id. at *29-30.