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The Impact Of Dukes On Antitrust Class Actions

Law360, New York (June 24, 2011) -- Litigators waited with baited breath for the U.S. Supreme Court's decision in Dukes v. Wal-Mart Stores, which they hoped would be a watershed opinion on Rule 23's requirements for class certification. It appears, however, that Dukes did not quite live up to that hope or hype for antitrust cases, although the opinion does offer a few points worthy of consideration by those seeking or opposing class certification in antitrust class actions and may offer some guidance in this area of the law.

Dukes was a gender discrimination class action brought against Wal-Mart, on behalf of 1.5 million current and former female employees, for backpay and injunctive and declaratory relief. The class plaintiffs' theory of the case was that Wal-Mart's policy of allowing individual store managers to determine promotions and raises, within limits and subjectively in their individual discretion, disparately impacted all female employees across all of Wal-Mart's 3,400 stores in the U.S. Slip op., at 1-2, 4. The district court certified the class (not entirely as the plaintiffs wished), and the Ninth Circuit affirmed (for the most part).

In a 5-4 decision, the Supreme Court reversed, holding that class certification was not appropriate, primarily because no common questions of law or fact existed. A crucial issue is that the court reversed for the plaintiffs' failure to satisfy Rule 23(a)'s requirement of commonality, not Rule 23(b)(3)'s requirement that common questions of law or fact predominate questions affecting individual members of the class and that the class action device is "superior to other available methods for fairly and efficiently adjudicating the controversy." Slip op., at 8.

The court expressly disclaimed that it was speaking to Rule 23(b)(3)'s predominance and superiority inquiry. Id. at 5 n.2. This disclaimer is critical because of the low threshold for meeting Rule 23(a)'s commonality requirement — only one common question suffices. See Opinion of Ginsburg, J., (concurring in part and dissenting in part), at 2.

Thus, Dukes is a somewhat extreme case in its total absence of questions common to the class. This extremity derived from the plaintiffs' theory of the case, which was simply that all female employees of Wal-Mart had been disparately impacted by the exercise of their superiors' discretion in granting promotions or raises. Because the plaintiffs did not allege a policy of discrimination common to the plaintiff class, the only way for the plaintiffs to show common injury was to show the existence of the disparate impact.

Not surprisingly, Justice Antonin Scalia's opinion for the majority acknowledges that, in such a case, "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" e.g., disparate impact as opposed to intentional discrimination. Slip op., at 9. Class plaintiffs' "claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor" or a disparate impact. Id. Further, this common contention "must be of such a nature that it is capable of classwide resolution." Id.

It is thus clear from the court's opinion that the necessary proof of commonality and its concomitant proof of the merits of the case was entirely driven by the class plaintiffs' theory of the case, that is, that individual Wal-Mart store managers' exercise of discretion uniformly impacted all female employees.

It is also clear that, contrary to the hopes of those opposing certification in antitrust cases, the court did not mandate an inquiry into the merits. Nor did it require the plaintiffs to prove at the class certification stage that they would ultimately prevail on any issue of liability. Dukes was thus consistent with the court's holding this term in Erica P. John Fund Inc. v. Halliburton Co., No. 09-1403 (June 6, 2011), where the court reversed a denial of class certification for requiring securities fraud plaintiffs to prove, at the class stage, the liability element of loss causation.

Justice Scalia wrote only that "Rule 23 does not set forth a mere pleading standard," and therefore "'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" Slip op., at 10 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982)). In Dukes, probing an issue that was relevant to the merits was necessary because the issue "necessarily overlap[ped]" with proof of commonality. See slip op., at 11 ("In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination.").

Because the result and reasoning in Dukes was driven by the plaintiffs' theory of discrimination and injury by disparate impact, the case does not promise to be of much help in antitrust cases, which involve either the concerted or unilateral business practices of one or more defendants. A plaintiff bringing an antitrust class action premised on certain conduct that simply harmed a particular class of plaintiffs in a disparate manner would not survive a Rule 12(b)(6) motion to dismiss.

An antitrust plaintiff must allege and prove that the defendants' conduct is of a certain type falling within the prohibitions of the antitrust laws. For per se price-fixing and group-boycott claims, proof of anti-competitive effect is unnecessary; the plaintiffs' need only demonstrate that the defendants engaged in the prohibited conduct, the proof of which is common to all class members.

Even for rule-of-reason and monopolization cases, proof of the anti-competitive and pro-competitive effects of the defendants' conduct also will largely turn purely on the defendants' business practices and economic principles. (While competitor responses are certainly relevant, competitor class actions are unlikely.)

Antitrust plaintiffs also must prove that they have suffered "antitrust injury," i.e., "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 489 (1977).

Again, because this focuses on the type of conduct and the general nature of that conduct's effects, it is often susceptible to common proof. Because only one common question of law or fact is sufficient to meet Rule 23(a)'s commonality requirement, any one of the many above questions common to class plaintiffs in antitrust cases is likely to satisfy the Dukes standard.

Further, in rejecting certification in Dukes under Rule 23(b)(2)'s provision for class actions where injunctive or declaratory relief "is appropriate respecting the class as a whole" (such as cases brought against racial segregation) the court wrote, "we think it clear that individualized monetary claims belong in Rule 23(b)(3)" and thereby come within that

provision's predominance and superiority rubric, slip op., at 22, which the court expressly disclaimed to address. In antitrust cases, certification often turns on the Rule 23(b)(3) inquiry.

The lesson of Dukes for antitrust cases is that, in analyzing whether class certification is appropriate under the commonality requirement of Rule 23(a) — and possibly the other requirements of Rule 23(a) and the predominance and superiority inquiry of Rule 23(b)(3) — litigants and courts should focus on the plaintiffs' theory of liability.

This is a sensible, practical inquiry, because in asking whether the class plaintiffs' claims are susceptible to common proof, the fundamental question is: What exactly are the plaintiffs trying to prove? Focusing the class certification inquiry through this lens has the potential to sharpen and thereby shorten the class certification process, which both proponents and opponents of the class action device are likely to appreciate.

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