By Christopher Keleher

Class inaction: U.S. Supreme Court reins in class actions

The Supreme Court's 2010 term was an embattled one for the class action. The Court made headlines in *Wal-Mart v. Dukes* when it dashed the hopes of 1.5 million Wal-Mart employees who had brought a class action against the corporate giant.[1] *Dukes* vacated the class certification because the class members' experiences were not sufficiently common to satisfy Federal Rule of Procedure 23(a)(2). While *Dukes* has cast a pall over the class action bar, the full impact of the Court's commonality analysis is still being gauged.

Lost in the clamor of *Dukes* was the prosaic but more profound decision of *AT&T v. Concepcion*.[2] Decided two months before *Dukes, Concepcion* also decertified a class. But unlike *Dukes, Concepcion* gutted more than 20 state laws prohibiting class action waivers in arbitration agreements.[3] Under *Concepcion*, corporations can now inoculate themselves from class actions by simply inserting class waiver language into their standard-form contracts. The future of consumer and employee class actions is thus clouded.

While *Dukes* and *Concepcion* bear no factual or legal resemblance, they are two points on the same continuum. Whether lauding or lamenting this jurisprudence, one thing is certain – it hollows out the class action. Before delving into *Dukes* and *Concepcion*, this article examines the Rule 23 elements.

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Certifying a class under Federal Rule of Civil Procedure 23(a)

Rule 23 governs class certification in federal courts.[4] To establish certification under Rule 23(a), a party must demonstrate:

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

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

(3) the claims of the representative typify those of the class, and

(4) the representative will adequately protect class interests.[5]

Certification is proper only if the trial court is convinced, "after a rigorous analysis," that Rule 23(a) has been satisfied.[6] The first element, numerosity, is usually easy to demonstrate. However, numerosity requires more than simply counting the claimants.[7] As courts reject numerical baselines, the impracticability of joinder turns on the facts of each case.[8] In *Philadelphia Electric Co. v. Anaconda American Brass Co.,* the court certified a class of 25 members, reasoning that 25 is a "large number when compared to a single unit."[9] Accordingly, the court saw "no necessity for encumbering the judicial process with 25 lawsuits, if one will do."[10] Plaintiffs sometimes deflect the presence of individualized or divergent questions by invoking the large number of claims.[11] But numerosity does not exist in a vacuum – a plaintiff still must satisfy commonality, typicality and adequacy.[12]

Commonality requires plaintiffs demonstrate that the class members have suffered the same injury.[13] A class is unfeasible when factual divergence makes it impossible to meld individual plaintiff experiences. Prior to *Dukes*, any one common question of law and fact satisfied commonality.[14] While this is still true, *Dukes* further mandates that the question be answered in a way that is common to all class members.[15] Thus, to demonstrate commonality, the common question must be resolved in "one stroke" for all class members.[16]

Typicality focuses on the relationship between the class and named plaintiff.[17] Typicality concerns the nature of the class representative's claim, not the specific facts from which it arose.[18] Thus, factual differences will not thwart typicality if the representative's claim arises from the same event as the rest of the class.[19] However, certification is precluded if there are conflicting legal theories between the named plaintiff and other class members.[20] For example, in *Retired Chicago Police Ass'n v. City of Chicago,* the Seventh Circuit affirmed denial of class certification on claims regarding lifetime health care benefits.[21] Typicality was not satisfied because different groups of class members received different representations from varied sources – retirement seminars, pamphlets and word of mouth.[22]

The adequacy inquiry consists of two parts. First, the named plaintiff must be an adequate class representative.[23] Because the class representative must protect the interests of the class as a whole, adequacy necessitates that the representative and class members' interests be aligned.[24] Second, the class counsel must be adequate.[25] This is established by pre-filing investigation efforts, experience, knowledge of law, and the resources counsel will commit to representing the class.[26]

Certifying a class under Federal Rule of Civil Procedure 23(b)

Upon satisfying Rule 23(a), plaintiffs must then demonstrate that one of the three requirements of Rule 23(b) is met.[27] Rule 23(b) divides class actions into three types.[28] An action qualifies under Rule 23(b)(1) if individual adjudication of the controversy would prejudice either the party opposing

the class or the class members themselves.[29] A Rule 23(b)(2) class consists of a group seeking declaratory or injunctive relief.[30] This class must show the defendant acted in a way "generally applicable" to class members, making class-wide declaratory or injunctive relief appropriate.[31]

A Rule 23(b)(3) class consists of class members seeking monetary damages.[32] Rule 23(b)(3) contains two requirements: predominance and superiority.[33] These elements ensure "economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness ... ."[34]

To satisfy predominance, questions of law or fact pertaining to the class must predominate over individual plaintiff questions.[35] The necessity of individualized proof or legal assertions precludes predominance.[36] While similar to Rule 23(a)'s commonality requirement, Rule 23(b)(3) is more stringent.[37] For example, in *Portis v. City of Chicago, Ill.,* a class alleged that taking two hours to release an arrestee made the detention unreasonable.[38] The Seventh Circuit reversed because "one detainee's circumstances differ from another's" and thus common questions did not predominate.[39]

Rule 23(b)(3) also requires that a class action be the superior method to adjudicate.[40] Small recoveries do not incentivize individual suits, and a class action transforms the paltry into the worthwhile. Superiority is thus lacking when individual claims are sufficient to justify litigation.[41]

A class action brought in state court will not change the analysis. Indiana class actions are governed by Indiana Trial Rule 23.[42] Trial Rule 23(A) sets forth the prerequisites to a class action, which mirror Federal Rule of Civil Procedure 23(a).[43] Trial Rule 23(B) provides when a class action is maintainable.[44] This provision also follows Federal Rule 23(b). Thus, "because Indiana Trial Rule 23 is based on Rule 23 of the Federal Rules of Civil Procedure, it is appropriate to consider federal court interpretations when applying the Indiana rule."[45]

Even when plaintiffs satisfy the class requirements and a class is certified, all is not lost for defendants. A class certification can be altered or amended prior to final judgment where subsequent facts call into question whether continued class action treatment is proper.[46] Since the decision to decertify

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mirrors the decision to deny certification in the first instance, the analysis is the same.[47]

In short, the requirements of Rule 23 are relatively straightforward. But application, as *Wal-Mart v. Dukes* demonstrates, can be another matter.

Wal-Mart v. Dukes

Comprising the largest class action ever, the plaintiffs in *Dukes* asserted gender discrimination on behalf of 1.5 million female employees and supervisors of Wal-Mart.[48] The plaintiffs contended that local managers' discretion over pay and promotions favored men, and because Wal-Mart knew of this effect, its refusal to limit the discretion was disparate treatment violating Title VII.[49] In other words, Wal-Mart's inaction gave rise to a biased corporate culture that impacted every female Wal-Mart employee. The plaintiffs sought backpay, injunctive and declaratory relief, and punitive damages.[50]

The Northern District Court of California certified a class of "all women employed at any Wal-Mart domestic retail store at any time since Dec. 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."[51] A divided Ninth Circuit *en banc* affirmed the class certification order.[52] The Ninth Circuit endorsed the use of a special master to select a random sample of claims for trial and then extrapolate the results class-wide.[53] The court further concluded that the backpay claims could be certified as part of the Rule 23(b)(2) class because they did not predominate over the claims for declaratory and injunctive relief.[54]

Granting a writ of *certiorari*, the Supreme Court reversed.[55] The Court rejected the Ninth Circuit's determination that the defendant's right to present individual defenses could be preserved by allowing it to defend randomly selected sample cases.[56] This "Trial by Formula" approach contravened the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," including the defendant's right to litigate its statutory defenses to individual claims.[57] But the crux of the case was commonality. Fractured 5-4, the Court found insufficient common questions of law or fact.[58] Emphasizing that the Rule 23 analysis is more than a pleading standard, the plaintiffs had to present significant proof of common questions of law and fact.[59] Because commonality overlapped with the underlying merits, the Court examined whether Wal-Mart engaged in a pattern of gender discrimination.[60]

The plaintiffs presented three types of evidence to establish commonality: (1) statistical evidence about gender-based pay and promotion disparities; (2) anecdotal reports of discrimination from 120 female employees; and (3) expert testimony from a sociologist who analyzed Wal-Mart's practices.[61] The Court was not swayed. None of the evidence constituted "significant proof" of a general policy of discrimination at Wal-Mart.[62] Gender-based disparities at the national and regional level could not establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[63]

The class challenged the corporate policy of local supervisor discretion. But it was this discretion that precluded a uniform employment practice and, in turn, commonality.[64] Commonality requires

class members to suffer the same injury, not merely violations of the same law.[65] Class allegations about a Title VII injury "gives no cause to believe that all their claims can productively be litigated at once."[66] Claims must instead depend on a common, class-wide resolvable contention. The Court offered two examples – first, an employer's "biased testing procedure to evaluate both applicants for employment and incumbent employees."[67] Second, a class would be proper "if the discrimination manifested itself in hiring and promotion practices in the same general fashion ... ."[68] But *Dukes* lacked such allegations, and a common policy of decentralized decisions was not enough. The plaintiffs thus failed to identify a "common mode of exercising discretion that pervades the entire company."[69]

The dissent disputed the Court's Rule 23(a) commonality holding.[70] It charged the majority with "import[ing] into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment."[71] Unlike the majority, the dissent found the employees' evidence compelling. Furthermore, commonality should be "easily satisfied," requiring only "a single question of law or fact common to the members of the class."[72] The majority improperly highlighted the dissimilarities of the class rather than recognizing the common claim: that Wal-Mart's personnel policies resulted in unlawful discrimination in pay and promotions.[73] As such, the dissent found the district court's identification of a common question – whether Wal-Mart's policies engendered unlawful discrimination – "hardly infirm."[74]

While split on commonality, the Court unanimously held the plaintiffs' claims for backpay were improperly certified under Rule 23(b)(2). Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief."[75] Therefore, claims for individualized relief such as backpay could not be certified under Rule 23(b)(2).[76] The Rule's history and structure established individualized monetary claims are more conducive to Rule 23(b)(3), which has the protections of predominance, superiority and the right of class members to opt out.[77] Notably, the Court declined to decide whether claims for monetary relief "incidental" to injunctive or declaratory relief could ever be certified under Rule 23(b)(2).[78]

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The lesson of *Dukes*: efficiency over access

Dukes strengthened the commonality element of Rule 23(a)(2) in holding that a class must show each member's claim depends on a common contention. *Dukes* also narrowed the applicability of Rule 23(b)(2), forcing classes into the more onerous Rule 23(b)(3). The implications of these holdings are simple. Employment class actions alleging intentional discrimination will be more difficult to establish. The Court was unimpressed with the anecdotal and statistical evidence in *Dukes*, demanding something more concrete. Thus, the best defense against a class action like that in *Dukes* might be as simple as a company directive to supervisors to follow the law. Additionally, *Dukes* will force plaintiffs seeking class certification to narrow the scope of the class and focus on specific policies that establish a discriminatory effect. Plaintiffs might also simply avoid the class mechanism altogether and file suits with large numbers of claimants.

Another potential consequence of *Dukes* is a shift to the states. Classes based on state law may increase as claimants seek more amenable state commonality laws. The vast majority of states (43), including Indiana, as noted above, have class action statutes that align with Rule 23.[79] However, few mirror Rule 23, leaving plaintiffs with room to scrutinize state idiosyncrasies. For those states that do not align with Rule 23, there is even more room to maneuver. Wisconsin embodies this point. Wisconsin's class action statute provides, "[w]hen the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."[80] The Wisconsin statute does not include Rule 23 requirements such as adequacy of the class representative and superiority.[81] More critically, it does not mention predominance.[82] Intrepid class counsel may find state courts a more conducive atmosphere now that the Supreme Court has tightened Rule 23 requirements.

In sum, *Dukes* will make life for the plaintiff's bar difficult. *Concepcion* could make it unbearable.

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AT&T v. Concepcion

Plaintiffs brought a class action against AT&T because it advertised discounted cell phones while charging sales tax on the full price.[83] Filed in the Southern District Court of California, the suit was brought on behalf of customers who had overpaid the $30.22.[84] AT&T demanded the claims be submitted to individual arbitration because the service agreement mandated arbitration and prohibited class actions. But under California law, arbitration clauses with class action waivers were *verboten*.[85] AT&T argued California law was preempted by the Federal Arbitration Act ("FAA"), which permits written arbitration agreements.[86] Relying on the California Supreme Court rule in *Discover Bank v. Superior Court,*[87] the District Court and Ninth Circuit held AT&T's class action waiver provision was unconscionable under California law, but like *Dukes*, the Supreme Court reversed.[88]

The Court held that §2 of the FAA preempts the *Discover Bank* rule that collective arbitration waivers in consumer contracts are unconscionable. The rule was disproportionally used to invalidate arbitration agreements and impeded FAA aims.

The Court acknowledged that §2 permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[89] But the Ninth Circuit's reading of §2 was overbroad. "Although §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[90] California's rule was thus incompatible with the FAA. Nor was it an anomaly – more than 20 states had laws proscribing class action waivers. But such laws stymied Congress' effort to promote arbitration.[91] Class-wide arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[92] With respect to preemption by the FAA, the Court left no doubt. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[93] But when a generally applicable doctrine such as unconscionability is at issue, the analysis becomes more complex.[94]

Thus, the Court's motivations in *Concepcion* were simple. The lure

of arbitration was being dulled as class arbitration was becoming too slow and costly, undermining its *raison d'être*. The switch from bilateral to class arbitration further sacrificed the informality of arbitration and created procedural morass. State-made obstacles to arbitration thus needed to be removed. As for consumers, the Court noted "the times in which consumer contracts were anything other than adhesive are long past."[95] Indeed, the consumer-friendly nature of AT&T's arbitration process embodied that very point.[96]

The opinion drew a sharp dissent from four justices. The dissent decried the majority's reasoning, contending that class arbitrations are perfectly appropriate ways to resolve claims that are minor individually but significant in the aggregate.[97] Invoking principles of federalism, the dissent pointed out that Congress cannot "cavalierly preempt" causes of action under state law.[98] The majority's assertion that tension existed between arbitration and class treatment left the dissent puzzled. "Where does the majority get its contrary idea – that individual, rather than class, arbitration is a fundamental attribute of arbitration?"[99] The dissent concluded, "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[100]

The lesson of *Concepcion*: the sacrosanct right to enforce arbitration classes

Concepcion may present an unbridgeable chasm for certain types of classes, namely those emanating from transactional relationships such as shareholders and corporations, customers and companies, employees and employers. It is these relationships that engender arbitration agreements with class action waivers. Under *Concepcion*, if corporations insert arbitration clauses into their employment and service contracts, classes in those contexts could be eviscerated.

While it is unclear how expansively *Concepcion* will be applied and its effect on unconscionability tests, two cases demonstrate a foreboding trend for plaintiffs. In *Wolf v. Nissan Motor Acceptance Corp.*, a captain in the Army Reserves was deployed overseas.[101] A year earlier, he had leased a new car and paid $600 in advance costs.[102] The Servicemembers Civil Relief Act ("SCRA") provides that reservists are entitled to terminate such leases

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and recover the upfront costs when called to active duty.[103] When the car company refused to refund the money, the captain filed a class action on behalf of all other service members.

The lease agreement contained an arbitration clause with a class action waiver, and per *Concepcion*, individual arbitration was required.[104] The plaintiff argued that public policy should render the class action waiver unconscionable.[105] Describing the argument as "persuasive," the U.S. District Court of New Jersey nevertheless had to "take note of the recent decision" in *Concepcion*.[106] "New Jersey precedent notwithstanding, the Court is bound by the controlling authority of the United States Supreme Court."[107] Thus, no "public interest articulated in this case, either in connection with the SCRA or New Jersey law" could override the class action waiver.[108]

Wolf is not an anomaly. The U.S. District Court of Colorado denied class action status for students in their lawsuit against a college in *Bernal v. Burnet,* and *Concepcion* was the catalyst.[109] The students alleged the school had misrepresented its tuition costs, accreditation status and job prospects for graduates.[110] But class action status was thwarted by the arbitration clauses the students signed at enrollment.[111] Finding the plaintiffs had to submit to individual arbitration, the court noted its hand was forced: "[t]here is no doubt that *Concepcion* was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals."[112]

Applications of *Concepcion* are not relegated to the district court. In *Green v. SuperShuttle Int'l, Inc.,* the Eighth Circuit applied *Concepcion* to affirm a district court decision enforcing a class waiver in a uniform franchise agreement.[113] Plaintiffs argued the class action waiver in uniform franchise agreements was unenforceable under Minnesota law. The Eighth Circuit determined this argument was too akin to the consumers in *Concepcion* who challenged a class waiver provision on California law. "Our reading of *Concepcion* convinces us the state-law-based challenge involved here suffers from the same flaw as the state-law-based challenge in *Concepcion* – it is preempted by the FAA."[114] The Eleventh Circuit held similarly in

Cruz v. Cingular Wireless, LLC, which addressed the validity of AT&T's class-action waiver in the face of public policy challenges.[115] The *Cruz* plaintiffs filed a class action under Florida's unfair-trade laws, challenging AT&T's practice of charging them $2.99 a month for an optional "roadside assistance plan" they never ordered.[116] When AT&T moved to compel arbitration, the plaintiffs argued the arbitration clause violated Florida public policy because it immunized AT&T from liability for unlawful trade practices. The Eleventh Circuit disagreed. "[T]o the extent that Florida law would be sympathetic to the Plaintiffs' arguments here, and would invalidate the class waiver simply because the claims are of small value, ... and many consumers might not know about or pursue their potential claims ..., such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted."[117]

Wolf, Bernal, Green and *Cruz* are harbingers. Yet the basis for these decisions, *Concepcion*, arguably read the FAA too expansively. The FAA did not seek to preempt state laws. Rather, the FAA simply gives parties the right to include arbitration in their contracts and for courts to respect such clauses. Moreover, the FAA was premised on the notion that parties to arbitration agreements would have equal bargaining power. The typical consumer-corporation relationship is anything but. Regardless, as case law is demonstrating, *Concepcion* will prove problematic for consumer and employee class actions.

Summation

Class actions are often derided as benefiting lawyers more than aggrieved class members. When attorneys are awarded millions in fees and class members get coupons, this argument is borne out. Yet, the deterrence effect of class actions cannot be denied. The class mechanism ensures businesses do not abuse their size. It also empowers individuals who would otherwise be left without a remedy.

Dukes and *Concepcion* have narrowed the class action. Indeed, certain types of classes now face an existential crisis. If plaintiffs cannot circumvent these holdings, the proliferation of class litigation will halt. ⚖

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