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William L. Monts III
Hogan Lovells US LLP

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William L. Monts III[1]

I. INTRODUCTION

Class action lawsuits are a staple of private antitrust litigation in the United States. Over the last four decades, they have become particularly prevalent in price-fixing cases involving consumer products in which the number of potentially injured individuals is great but individual damage claims, as measured by the so-called "overcharge," are relatively small even after trebling. These cases aggregate large numbers of relatively small claims with the aim of resolving them in an efficient, cost-effective manner. Such aggregation permits adjudication of claims in which the amount in controversy would otherwise be too trivial to justify the time and expense of litigation.

The class action has also become a potent legal weapon. Because antitrust defendants are jointly and severally liable for all damages caused by anticompetitive conduct, few antitrust class actions are ever tried. Most defendants simply are not willing to bear the risk of potentially massive liabilities, even when they believe that plaintiffs' claims are weak. As a result, the outcome of an antitrust class action often turns on the question of class certification. If a class is certified, the case typically settles, often with substantial payments to the plaintiff class. If, on the other hand, a class is not certified, the case often ends. Thus, class certification has, as a practical matter, become the dispositive legal issue in virtually all antitrust class actions, as it is in many other types of class adjudications.

On June 20, the United States Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*,[2] one of the most consequential opinions concerning class actions rendered by the Court in many years. Although *Dukes* was not an antitrust class action—the suit alleged that defendant Wal-Mart Stores, Inc. had engaged in a pattern and practice of sex discrimination in the promotion and discipline of employees—the Court's decision has broad application to all class actions regardless of the substantive area of law from which the underlying claims arise. *Dukes*, therefore, is likely to have significant effect on the way antitrust class actions are litigated by heightening the focus on whether named plaintiffs can show with common evidence that an allegedly anticompetitive practice injured all members of the putative class. That has been a focus of antitrust class actions in the lower courts in recent years, and the Supreme Court's holding in *Dukes* is likely to sharpen that inquiry.

II. The Decision

To understand the legal holding in *Dukes*, it is necessary to have some understanding of the facts of the case. Wal-Mart Stores, Inc. is the largest private employer in the United States. It owns and operates more than 3,400 "big box" retail outlets throughout the nation and employs

[1] Partner, Hogan Lovells US LLP.
[2] 131 S. Ct. 2541 (2011).

more than one million people. Named plaintiff Betty Dukes and two other women who were employed or had been employed by Wal-Mart sued the company claiming that they were subjected to discrimination in promotion and discipline on account of their sex. They sued under the Title VII amendments to the 1964 Civil Rights Act,[3] which, among other things, prohibit gender-based employment discrimination, and sought to represent a nationwide class of approximately 1.5 million women currently and formerly employed by Wal-Mart.

According to the Court, pay and promotion decisions at Wal-Mart are generally committed to the broad discretion of local managers who exercise it in a subjective manner. The named plaintiffs did not allege that Wal-Mart had any express corporate policy against the advancement of women. Instead, they claimed that local managers exercised discretion disproportionately in favor of men, which they asserted constituted an employment practice that had a disparate impact on female employees. They also contended that Wal-Mart was aware of the effect of these exercises of discretion and refused to take action to constrain that discretion, which resulted in the disparate treatment of female employees. Named plaintiffs alleged that both forms of discrimination were common to all of Wal-Mart's female employees and sought certification of a nationwide class consisting of all women employed at any Wal-Mart retail store in the United States who were or might have been subjected to Wal-Mart's challenged pay and promotions policies and practices. The District Court certified that class, and the Ninth Circuit affirmed.

The Supreme Court reversed. The Court began its analysis by noting that all class actions in U.S. federal courts must satisfy four basic requirements: (1) numerosity—the class must be so numerous that all of its members cannot be practicably joined as parties to the action; (2) commonality—there must at least one question of law or fact common to the class as a whole that is to be decided in the proceeding; (3) typicality—the named plaintiff's claim must be typical of those held by members of the class; and (4) adequacy—the named plaintiff and class counsel must be able to represent the class adequately and not have interests that conflict with those of class members. *Dukes* turned on the second of these requirements: commonality.

Historically, the commonality requirement has been applied leniently. As long as at least one legal or factual question applied to all class members collectively, the courts have generally found that prong of the class action test satisfied. *Dukes* reorients the commonality inquiry and makes it more stringent. In deciding commonality, the Court said, what matters

> is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[4]

Under this standard, the existence of a common question does not turn on the named plaintiff's ingenuity in reciting legal and factual issues that might apply to all members of the class but, rather, the ability of the named plaintiff to show that such questions can be resolved on a classwide basis through evidence applicable to all class members.

[3] 42 U.S.C. § 2000e-1 *et seq.*

[4] *Dukes*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97, 132 (2009) (emphasis in original)).

In *Dukes*, as the Court noted, the common question was why any particular employee was disfavored. Given the discretion vested in Wal-Mart managers to decide pay and promotion issues, the Court said, that inquiry involved "literally millions of employment decisions."[5] Unless "some glue" holds the reasons for those myriad distinct decisions together, the Court held, no common question exists "because it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[6] The Court then examined the evidence presented below and concluded that the named plaintiffs had not provided that "glue."

III. Applying *Dukes* to Antitrust Class Actions

How will *Dukes* be applied to antitrust class actions? Predictions of this sort are always hazardous, but there appear to be two distinct possibilities. *Dukes* holds that the existence of a common question turns on whether the answer to the relevant legal or factual question may be determined with proof applicable to the proposed class as a whole. In one sense, there may be such a question in virtually every single antitrust case. For example, antitrust class actions often allege the existence of a conspiracy to fix prices, divide customers or geographic territories, or rig bids. Concerted action is an indispensable element of a claim under section 1 of the Sherman Act;[7] whether an illegal agreement exists among the defendants is often thought to be a central issue in antitrust class actions. In many such cases, proof of a conspiracy can be made on a classwide basis from common evidence. Since even the *Dukes* Court noted that the existence of a single common question may be enough to satisfy the commonality requirement, one might conclude that many antitrust cases will meet that test.

But *Dukes* can be read another way, which would place a greater burden on plaintiffs. *Dukes* holds that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[8] That requirement "does not mean merely that they have all suffered a violation of the same provision of law."[9] Rather, "the common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[10] In applying this commonality analysis to the class sought to be certified in *Dukes*, the Court focused on those matters that were determinative of the outcome of the underlying claims in the case. [11] That suggests that class certification turns not on the ability of an antitrust plaintiff to identify a common question capable of classwide resolution through common proof, but a common question that is *of consequence to the resolution of the case to be litigated*.

If *Dukes* is read in that fashion, then whether anticompetitive behavior exists may not be enough alone to establish commonality. Many antitrust class actions arise after a successful criminal prosecution of one or more defendants. For example, when the U.S. government prosecutes one or more businesses for price-fixing and obtains convictions, the question of whether a conspiracy exists is often not a major issue—at least as to convicted defendants—in

[5] *Id.* at 2552.
[6] *Id.* (emphasis in original).
[7] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
[8] *Dukes*, 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 157 (1982)).
[9] *Id.*
[10] *Id.*
[11] *Id.* at 2553.

any subsequent private class action litigation. Instead, the question of significance is whether the named plaintiff and proposed class members have suffered a cognizable injury caused by the unlawful agreement and, if so, the quantum of damages resulting from those injuries.

Private antitrust cases differ in a crucial respect from government enforcement proceedings. While the government must only show that a violation of the antitrust laws has occurred to obtain judgment, private plaintiffs must go further. They must prove antitrust injury, which is an injury in fact that (i) is of the type the antitrust laws are designed to prevent and (ii) flows from an anticompetitive aspect of the challenged practice.[12]

Most antitrust class actions seek damages for class members who are allegedly harmed by anticompetitive conduct. While injunctive relief may be important to the class in some instances, it is not often the principal relief sought. When the government has successfully prosecuted a criminal antitrust case, substantial monetary fines for corporations and prison sentences for individuals usually end the challenged anticompetitive behavior. Likewise, successful government civil actions generally result in injunctions against the allegedly harmful practice, thus making additional private injunctive relief superfluous at best. By contrast, antitrust class actions are typically brought by plaintiffs' lawyers who work on a contingency basis and are compensated by taking a judicially-approved percentage of the amount that they recover for the class. Thus, having a pool of money to divide between class members and counsel is a fundamental premise of the case.

Given that damages are the ultimate goal of most private antitrust class actions, the existence of antitrust injury may well be *the* central issue to be litigated in a case, particularly when a prior judgment in a government proceeding may establish a prima facie case on the underlying substantive violation. The interesting question arising from *Dukes* is whether courts will treat the question of a substantive violation, which may readily be established on a classwide basis through common evidence, as sufficient alone to meet the Rule 23(a) commonality requirement or look to the substance of what is really at issue. If the former, then *Dukes* may not ultimately alter commonality analysis significantly in antitrust class actions. If the latter, then *Dukes* may portend a significant change in how antitrust class actions are decided.

Even if *Dukes* does not substantially alter commonality analysis in antitrust class actions—in other words, if the underlying substantive violation is enough to establish the existence of a common question—the Court's reasoning is likely to bolster what has been an emerging trend in antitrust class actions, namely that the Rule 23 standards are not mere pleading hurdles and that trial courts must conduct a "rigorous analysis" of the Rule 23 requirements before certifying a class.[13] *Dukes* reiterates that trial courts must conduct a "rigorous analysis" of the Rule 23 factors before certifying a class and makes clear that such analysis can involve a preliminary consideration of the merits. In antitrust damages class actions, that "rigorous analysis" may not necessarily take place under the commonality requirement of Rule 23(a).

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[12] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (antitrust injury required to recover damages even when underlying antitrust violation is per se illegal); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (private plaintiff must show antitrust injury to obtain injunctive relief); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (private plaintiff must show antitrust injury to recover damages).

[13] *Dukes*, 131 S. Ct. at 2551-52. On the emerging trend in the lower courts, *see, e.g.,* In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008); In re New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008).

Satisfying the requirements of Rule 23(a) is not enough to certify a class seeking damages. In addition, the named plaintiff must meet two other requirements imposed by Rule 23(b)(3): (1) predominance—the common questions must predominate over individual questions; and (2) superiority—the class mechanism must be superior to individual actions for resolving the claims in the case.

In recent years, predominance has become a significant focus in antitrust class actions. Whether each class member suffered an actual injury is an individual question. Merely because one member of the class has been harmed by a violation does not necessarily mean that another class member has been harmed, much less that there is common evidence of harm to both. There may, of course, be some cases in which there is substantial common proof that each class member has been injured as a result of the challenged conduct and, in those cases, the common questions will, in fact, predominate over individual questions. But that will not be true in every case.

Dukes makes clear that class proceedings must generate a classwide answers to injury inquiries through common proof. When a case challenges anticompetitive conduct in markets characterized by individual price negotiation, customized products, or competitive bidding, for example, it may be quite difficult to determine the effect of the behavior on individual class members. In those situations, *Dukes* mandates that trial courts determine whether there is common evidence applicable to the entire class that can demonstrate harm to each class member. If so, common questions are likely to predominate and, assuming the other Rule 23 factors are met, a case may proceed as a class action. If not, however, then even assuming that a common question is found to exist in an antitrust class action, it is not likely to predominate and class treatment will not be warranted.

Finally, it is important to note that *Dukes* does not permit class action plaintiffs to use claims for injunctive relief to obtain certification of a class that seeks damages. The *Dukes* plaintiffs had sought and obtained in the lower courts certification of a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[14] The *Dukes* plaintiffs, however, also sought backpay, a form of monetary relief. Such individual claims for monetary relief, the Court held, are proper only when they meet the requirements of Rule 23(a) and satisfy the more exacting predominance and superiority requirements of Rule 23(b)(3). While the Court held open the theoretical possibility that monetary relief that is merely "incidental to injunctive or declaratory relief" may be appropriate in a class actions certified under Rule 23(b)(2),[15] it effectively eliminated that possibility that Rule 23(b)(2) may be used as a backdoor to circumvent then predominance and superiority requirements of Rule 23(b)(3) when monetary damages are a significant part of the relief sought in a class action. That will almost certainly be the situation in most antitrust class actions.

IV. Conclusion

The ultimate effect of *Dukes* on antitrust class actions will obviously have to await its application to specific factual situations in the lower courts. But at this early stage, it seems fair to

[14] Fed. R. Civ. P. 23(b)(2).

[15] *Dukes*, 131 S. Ct. at 2557.

say that *Dukes* is likely to have a significant impact on the way antitrust class actions are litigated; either by making the question of classwide impact of allegedly antitrust competitive practices a significant factor in the determination of whether a common question exists, or by reinforcing the recent trend among the lower courts placing substantial focus on that issue in deciding whether common issues predominate over individual issues in damages class actions.

In either event, *Dukes* portends an end to any mechanical application of the class-certification standards to allegations of an antitrust complaint and instead signals that plaintiffs will be required to make evidentiary showing that classwide harm can be ascertained through common proof.