Litigating Multidistrict Employment Actions After ‘Dukes’

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THE U.S. Supreme Court’s June 2011 decision in Wal-Mart Stores Inc. v. Dukes, a gender discrimination action seeking certification of a nationwide class of all female Wal-Mart employees, has been heralded by a number of employment defense lawyers as a major blow against employment class actions under Federal Rules of Civil Procedure 23(a) and 23(b)(2). While employee rights attorneys have been quick to point out limitations to Justice Antonin Scalia’s opinion, few dispute that the decision clarifies a plaintiff’s burdens in certifying a class. Many employment lawyers agree that, on balance, Dukes is helpful to the defense of employment class actions under the applicable provisions of Rule 23.

Fewer commentators, however, have explored the impact of Dukes on multidistrict employment litigation against employers and the strategic implications of such litigation. Through multidistrict employment litigation, parties with overlapping individual and class-based claims grounded on one or more common facts centralize actions from multiple federal court jurisdictions under the auspices of a single district court judge for pre-trial purposes. Pursuing multidistrict litigation of overlapping employment actions filed in district courts throughout the country can transform litigation by rendering discovery more manageable and dispositional rulings more consistent. Despite such potential benefits, the decision to do so should be undertaken only after a searching review of the strategic considerations.

The Decision

In 2000, Betty Dukes and several other named plaintiffs brought a class action lawsuit against Wal-Mart in the U.S. District Court in San Francisco. Seeking to represent in excess of 1.5 million women across more than 3,400 nationwide stores, Dukes alleged that Wal-Mart discriminated against its female workforce in connection with pay and promotions. She claimed Wal-Mart had a decentralized decision-making process through which the managers in each of the stores made subjective, and gender-biased, pay and promotion decisions. She sought injunctive and declaratory relief, punitive damages, and backpay.

The class certification battle in Dukes focused on the plaintiff’s burdens under Rules 23(a) and 23(b)(2). To satisfy Rule 23(a)’s commonality requirement, Dukes argued that Wal-Mart’s policies allowed managers to exercise excessive subjectivity in pay and promotion decisions which, in turn, provided a conduit for gender bias that affected all putative class members in a common fashion. Dukes tried to show under Rule 23(b)(2) that, through alleged discriminatory practices, Wal-Mart acted or refused to act on grounds that applied generally to the class so that final injunctive relief or corresponding declaratory relief would be appropriate respecting the class as a whole. Dukes argued that the monetary relief she sought on behalf of the putative class did not predominate over the proposed injunctive and declaratory relief.

After the case worked its way through the district court and the Ninth Circuit Court of Appeals, the Supreme Court held that Dukes did not satisfy Rule 23(a) commonality since she could not show that either (i) Wal-Mart operated under a general policy of discrimination; or (ii) there was “some glue holding together the alleged reasons for [the millions of employment decisions].” The Court also held that the individualized monetary claims raised by Dukes could not be maintained under Rule 23(b)(2) because the backpay she sought was not incidental to the proposed injunctive or declaratory relief. The Court ruled that the monetary claims are more properly raised under Rule 23(b)(3), which would require a showing that questions of law or fact common to class members predominate over any questions affecting only individuals and that a class action is the superior vehicle to fairly and efficiently adjudicate the controversy.

The Impact

Dukes makes Rule 23 certification of nationwide and vast multi-state, multi-facility class actions premised on a policy of decentralized, subjective decision-making more challenging for two reasons. First, the commonality factor is more difficult to satisfy across such a wide geographic and operational scope. Second, Rule 23(b)(3), the other procedure available to litigants seeking class-wide monetary damages, requires that a plaintiff demonstrate not only that commonality exists, but that common questions of fact or law predominate over individualized issues.

The Dukes decision may incentivize plaintiffs to pursue state-wide or regionally based class actions...
in search of a less arduous burden of establishing commonality. If that occurs, employers would need to defend against overlapping actions, class-based and individual, in multiple regions throughout the country, rather than more massive nationwide actions. Thus, while *Dukes* creates challenges for employment law plaintiffs pursuing certain nationwide Rule 23 class actions, it may very well result in challenges for employers contending with more numerous, geographically-segmented actions with overlapping claims and putative classes.

Multi-jurisdictional litigation of this nature challenges employer-defendants in several respects. Decentralized discovery involving overlapping actions often is inefficient. Although there are methods available to coordinate duplicative discovery in multiple districts, parties may not agree to them and federal courts are not required to employ them. Deposition testimony or documents produced in one case may be used by one party against another in overlapping actions in other district courts. More numerous, geographically segmentated actions with overlapping claims and putative classes may result in conflicting rulings from one federal district to another. A ruling on a legal issue in one case could result in collateral estoppel disputes in another.

**The Multidistrict Litigation Option**

Employers defending against overlapping lawsuits in multiple jurisdictions have several options to render the litigation more manageable. Tried and true options include seeking a stay in one case pending resolution of another, voluntarily cooperating with the courts and counsel to coordinate discovery, and consolidating the multiple proceedings under Rule 42 of the Federal Rules of Civil Procedure. Complex and overlapping putative class actions, however, may warrant a different approach.

Transfer and centralization of related cases into one court under the multi-district litigation (MDL) process, codified at 28 U.S.C. §1407, may be available to a party. This is achieved by motion to the Judicial Panel on Multidistrict Litigation (JPML), whose function is to decide whether pending, related federal cases should be transferred to one court for coordinated pre-trial proceedings and, if so, to which district court.

Under the MDL process, overlapping federal cases are centralized in one court (the transferee court) and then remanded to their original courts (the transferor courts) for trial. Related cases filed after the original consolidation can be transferred to the transferee court as “tag-along” cases. Centralization has the salutary effect of expediting the litigation of multiple overlapping cases, conserving the parties’ and the courts’ resources, eliminating duplicative discovery, and preventing conflicting judicial rulings.

Multi-district litigation, while potentially beneficial to employers defending overlapping putative class actions in several federal courts, is not a panacea. Because the JPML has no jurisdiction over state court cases, only federal cases can be centralized under the MDL process. This obstacle may be overcome by removing state court cases to their respective district courts, from where they can, in turn, be centralized with other federal cases. The centralization solution, therefore, is not available for cases that are not removable.

The JPML considers three factors in deciding whether to centralize cases: (i) the cases must share one or more common questions of fact; (ii) centralization must result in the convenience of the parties and witnesses; and (iii) centralization must promote the just and efficient conduct of such actions. If the threshold test is satisfied, the JPML must select a district court and judge to whom it will assign the centralized cases.

Not all cases, however, are centralized. An informal survey of JPML decisions during 2010 and 2011 reveals that the JPML denied a significant proportion of the centralization requests involving wage and hour class actions. The factors that weighed against centralization included the small number of actions involved, geographic proximity of the actions that enabled judges to work in a coordinated manner, dissimilar stages of discovery, the involvement of the same counsel in multiple actions and jurisdictions, and the extent to which parties opposed centralization.  

**Strategic Considerations**

While the MDL process affords procedural advantages to employers and employees alike, there are important strategic concerns that parties should consider when formulating their arguments in support of or opposition to centralization. Both sides, for example, should consider choice of law issues. When deciding federal law claims, the transferee court will apply the law of the circuit in which it is located. In making or opposing a motion under §1407 and Rule 6.2 of the Rules of Procedure of the JPML, plaintiffs seeking to certify a class may request a ruling on an issue by the transferor court which will be more favorable, it may delay centralization until that court renders a decision. Too lengthy a delay, however, may undercut a party’s ultimate attempt to centralize actions if significant discovery occurs in multiple actions or if some of the actions are too advanced for other reasons.

The collateral estoppel doctrine also should be considered by parties seeking or opposing centralization. Litigating overlapping actions in multiple courts rather than centralizing them can result in a ruling by one court that might bar the litigation of identical issues in other courts. Consider two hypothetical nationwide class actions, both seeking unpaid overtime wages and premised on alleged misclassification of employees as exempt from overtime wage requirements. The first is comprised of exempt employees who sue a defendant in the Southern District of New York seeking unpaid overtime only under the Fair Labor Standards Act (FLSA). The second is comprised of the same nationwide class of exempt employees who sue the same defendant in the Central District of California under both the FLSA and California law.

If the cases are not centralized and the New York court decides the misclassification issue in favor of the plaintiffs before the California court has an opportunity to rule on the issue, the plaintiff in the California case might argue that the ruling collaterally estops the defendant from litigating the FLSA claim...
in the California action. By the same token, if the New York court decides the misclassification issue against the plaintiffs, the defendant would seek to bar the re-litigation of that issue in the California court. The New York court’s ruling on the FLSA claim likely would not have preclusive effect on the claim brought under California law, since the claims would not be identical.

The decision to seek centralization of actions also may have a significant impact on the selection of lead counsel for multiple plaintiffs. While the parties suing an employer have common interests, they will not necessarily neatly coordinate their efforts, even when their lawsuits are centralized through the JPML. The fourth edition of the Manual for Complex Litigation recognizes that “[f]ew decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel, an appointment that may implicitly promise large fees and a prominent role in the litigation.”

Trial court judges in the transferee court are advised by the Federal Judicial Center to take an active part in the decision on the appointment of lead counsel and are cautioned that deferring to proposals by counsel without independent examination invites problems down the road. The transferee court’s selection of lead counsel, charged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues, may alter the landscape of litigation previously in the transferor court. Because the transferee court considers the experience of counsel in litigating similar class actions, a defendant can benefit from centralization where counsel in the individual cases lack such experience or are less cooperative. The risk always exists, however, that the selected lead counsel will not be the defendant’s first choice or, for that matter, the choice of one or more of the plaintiffs. Defendants usually consider the implications of the selection process and possible outcomes before seeking centralization.

In the final analysis, defendants and plaintiffs alike must weigh the advantages and disadvantages of centralization carefully. The consequences of forgoing this critical analysis can be costly, even when compared to litigating overlapping cases in separate districts. In no respect is that more true than in regard to an issue that can impact the plaintiffs’ odds of securing class certification.

The Class Certification Dilemma

Pre-certification class action defendants walk a tightrope when advocating centralization under §1407, a concern now heightened by the Dukes decision. After Dukes, plaintiffs pursuing classwide litigation of employment claims are likely incentivized to seek certification under Rule 23(b)(3), which requires a showing that common questions predominate over individualized issues. An employer-defendant seeking to convince the JPML that multiple putative class actions should be centralized under §1407 must balance the need to establish one or more common questions of fact against the risk that, in doing so, it will make concessions that will lessen or even obviate the plaintiffs’ certification burden under Rule 23(b)(3). “Be careful what you wish for” is sound advice here.

At least two relatively recent decisions by the JPML on motions to centralize wage and hour putative class actions under §1407 should heighten employer-defendants’ sensitivity to this issue. In In re CVS Caremark Corp. Wage and Hour Employment Practices Litigation, the JPML observed that in recent years it routinely centralized FLSA and state wage and hour dockets when it “had reason to believe that the defendants’ relevant corporate employment policies applied consistently throughout their locations or that their common practices would outweigh any limited variances at individual localities or offices.” The JPML denied the defendants’ §1407 motion, however, because the duties of the employees appeared to be subject to significant local variances or would entail significant localized discovery. In In re Rite Aid Corp. Wage and Hour Employment Practices Litigation, the JPML denied centralization of six wage and hour actions in four districts because discovery was likely to require an individualized factual inquiry into the job duties performed by each employee. The panel observed that the defendants failed to demonstrate that any common questions of fact were sufficiently complex and/or numerous to warrant centralization.

Has the JPML applied to wage and hour putative class actions a centralization standard similar to the Rule 23(b)(3) certification standard? Rule 23(b)(3), grounded on a showing that common rather than individual questions predominate, is clearly a heightened standard compared to the §1407 standard. Section 1407(a) plainly establishes a minimal and sufficient showing of one, not multiple, common facts. Employer-defendants who conclude that the JPML is utilizing a more rigorous standard for wage and hour class actions, if not a broader selection of employment actions, and respond with an array of evidence regarding common questions of fact run an increased risk of jeopardizing their chances of defeating class certification down the road. A defendant eager to achieve centralization of multiple actions through the JPML may argue its way into later certification of a class on the basis of its advocacy regarding factual and legal commonalities among putative class members.

Employers who do not believe the JPML is utilizing an enhanced §1407 standard should remain vigilant as well. Motions for centralization should note clearly the distinction between Rule 23(b)(3) and §1407 standards and state unequivocally that the requisite profile of proof for centralization does not rise to a level sufficient to satisfy the standard for class certification. In short, class action defendants must avoid overreaching when pursuing centralization.

Conclusion

The impact of the Supreme Court’s Dukes decision is not limited to nationwide Rule 23 actions. More state-wide and regional, rather than nationwide, employment actions are likely. Multidistrict litigation of overlapping actions is an attractive option when the burden associated with disaggregated discovery and the risk of conflicting rulings is significant, as is often the case. Before pursuing centralization of putative class actions before the JPML, however, litigants should understand thoroughly the strategic implications of multidistrict litigation and the showing necessary to meet the standard for centralization.

2. Id. at 2552.
5. Id.
7. Id. at 1379.