Employee Class Actions Four Years After Wal-Mart v. Dukes

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Lawsuits arising out of the workplace are one of the fastest growing areas of litigation in the country today. The U.S. Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes was anticipated bring the growth of class actions in the employment context under control. In the immediate aftermath of Dukes, commentators predicted that the decision would result in a significant, drastic reduction in employee driven class-action claims, and Dukes unquestionably “raise[d] the bar for plaintiffs seeking class certification and, accord-


ingly, constitute[d] a win for employers,” because plaintiffs’ attorneys now face, “much greater obstacles when pursuing class actions.”

The limitations to class action claims of discrimination provided in *Dukes* have had far-reaching implications for Title VII claims and class action lawsuits brought under Federal Rule of Civil Procedure 23. But the landmark decision “has not led to the demise of the class action, or even a reduction in employment class actions.”


4 Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy, 2010-2011* CATO SUP. CT. REV. 319, 355 (2011) (stating that *Dukes* “has not doomed the class action” but instead has simply made “the game of certification a little fiercer”).

5 *Id.* See also Mac R. McCoy and D. Matthew Allen, *Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011*, Bus. L. TODAY, Jan. 23, 2012, at 1, available at http://apps.americanbar.org/buslaw/blt/content/2012/01/article-1-mccoy-allen.pdf (stating that *Dukes* “effectively reinvigorated” requirements of certification, “which had been treated by some courts as very easy to satisfy.”).


This article reviews *Dukes* and the circuit court employment class certification decisions that have evolved from it and other landmark Supreme Court decisions impacting employment related class actions. While the trend remains favorable to employers, four years after *Dukes*, plaintiffs attorneys have begun to have success with new tactics. As a result, the ultimate legacy of *Dukes* in the employment law context remains uncertain.

I. *Dukes* and its Predecessors

A. *General Telephone Co. of Southwest v. Falcon* 6

In the post-*Dukes* era of class-action jurisprudence and analysis, it is nearly impossible to find an opinion or article that does not use the phrase “rigorous analysis,” a phrase many lawyers associate with *Dukes*. Despite the spike in popularity of the phrase post-*Dukes*, it was not introduced by the Court in that decision, but was first coined more than twenty years earlier in *General Telephone Co. of Southwest v. Falcon*. In *Falcon*, the Court

*Dukes*, employment class actions are now comprised of a smaller, regional class and are framed more narrowly, “in terms of a single policy or practice that applies to the entire class.”
held, “a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”

In Falcon, like Dukes, the trial court certified an employment discrimination class action. The class included some members who were denied promotion allegedly because they were Mexican-American. Other members of the class were denied being hired altogether allegedly because of their race. All members were included in the same class based on an “across the board” rule that a named plaintiff employee complaining of one allegedly discriminatory practice could represent class members complaining of a different practice. This across the board rule was based on a presumption that all the class claims were fairly encompassed within the named plaintiff’s claim, satisfying Rule 23(a)(3) typicality. The Supreme Court rejected the rule and its presumption of discrimination. In reversing the Fifth Circuit’s affirmation of class certification, the Court made clear that when considering class certification, “[a]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable,” and that “a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” The Court noted that in carrying out this mandate it “may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”

The Court’s opinion in Falcon signaled the potential for a shift in the Court’s treatment of class certification. Unlike Dukes, Falcon did not have the impact on lower federal courts that its recent decisions indicate the Supreme Court intended, driven largely by a concern that courts would be too willing to decide questions of certification with an eye to the underlying merits of the case. In the years between Falcon and Dukes, class counsel and courts alike often relied on language in an earlier Supreme Court decision, Eisen v. Carlisle & Jacquelin, to avoid reaching the merits at the class certification stage. In Eisen, the Court ruled that “nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” This language in Eisen “quickly came to stand for a general rule prohibiting any preliminary investigation of the merits at the certification stage,” despite the Court’s seemingly contradictory directive in Falcon.

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7 Id. at 161 (emphasis added).
8 See Johnson v. Georgia Highway Exp., Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (holding that any victim of racial discrimination in employment may maintain an “across the board” attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination).
9 Id. at 160.
10 Id. at 161 (emphasis added).
11 457 U.S. at 161.
13 Id. at 177.
15 457 U.S. at 161.
B. Wal-Mart Stores v. Dukes

Members of both the plaintiffs’ and defense bars recognized that *Dukes* would have a significant impact on employment related class action claims. Prior to the publication of the Court’s decision in *Dukes*, plaintiffs’ attorneys predicted that the court’s decision would be a vindication of the use of the class action process to secure women’s rights for equal treatment on the job. Defense counsel had high hopes that *Dukes* would rein in the rapid growth of class action claims. *Dukes* provided an important test case because the purported class consisted of more than a million Wal-Mart employees across 3,400 stores. The size of the class and factual differences raised serious questions about the commonality element required to establish a class.

The putative class in *Dukes* was represented by seven named female plaintiffs, each of whom alleged that members of Wal-Mart’s management had discriminated against her. Their discrimination claims ranged from sexual harassment to failure to promote.16 Each of the plaintiffs’ claims varied to a greater or lesser degree. As a result, the putative class that may have been impacted by the claims of any one class representative were extraordinarily large. A class this size presented a significant threat to Wal-Mart, but the risks to the purported class in *Dukes* were equally high. If class representatives lost at trial, they could doom the hopes of absent class members with stronger, perhaps more valid claims. In this respect, the named plaintiffs faced the significant hurdle of demonstrating that they were typical of the class and shared common issues with all other class members, as required by Rule 23(b) of the Federal Rules of Civil Procedure.

The District Court, which accepted plaintiffs’ argument that the class shared commonality under Rule 23(b)(2), focused on two of the plaintiffs’ commonality arguments in its ruling. First, all other things being equal, women were paid less than men in comparable positions.17 Second, women received fewer promotions to management positions than men.18 The court found that the plaintiffs presented evidence showing that each of these facts raised issues that were common. The statistical evidence plaintiffs presented demonstrated that there were common compensation and promotion policies affecting all women; a strong Wal-Mart corporate culture, which included gender stereotyping; and most importantly, a common feature of excessive subjectivity, which provided a conduit for gender bias

16 The seven named plaintiffs made the following allegation: Betty Dukes was an African American woman who was promoted to manager, but then demoted allegedly because she complained about discrimination at Wal-Mart; Patricia Surgeson alleged that she had been sexually harassed and then replaced by a man who received a better title and larger paycheck; Cleo Page was promoted to manager, but allegedly was denied further promotion after she was told it was a man’s world; Chris Kwapnoski alleged that her manager made sexist remarks; Deborah Gunter claimed that she was passed over in favor of less qualified men, some of whom she even trained; Karen Williamson claimed that although she was qualified and actively sought out management positions, she was never promoted; and, Edith Arana alleged that she was passed over for promotion to management because the store manager allegedly said he did not want women.

17 Id. at 155-160.

18 Id. at 160-165.
that affected all members of a class in a similar fashion.\textsuperscript{19}

Both a three-judge panel of the Ninth Circuit and later the Ninth Circuit sitting \textit{en banc} affirmed the district court’s certification order.\textsuperscript{20} Like the district court, the panel found that the plaintiffs’ corporate culture evidence provided a nexus between the subjective decision-making of Wal-Mart managers and the evidence of pay and promotion disparity. The \textit{en banc} court also found that plaintiffs showed a common pattern of discrimination resulting from a uniform management structure, a strong centralized corporate culture, and gender disparity in every domestic region of Wal-Mart.\textsuperscript{21} The Ninth Circuit also held that a \textit{Daubert} inquiry at the class certification stage was premature, and therefore it would avoid resolving the battle of the experts by employing a lower \textit{Daubert} standard at the class certification stage of the proceeding.\textsuperscript{22}

With regard to Rule 23(b)(2), the Ninth Circuit concluded that the trial court retained the discretion to grant certification under Rule 23(b)(2).\textsuperscript{23} The court was not persuaded by Wal-Mart’s argument that certification would be improper because much of the putative class seeking injunctive relief could not in fact benefit from the injunction.\textsuperscript{24} While the panel agreed with Wal-Mart that those individuals no longer employed by Wal-Mart when the complaint was filed lacked standing, the court did not find that fact fatal to class certification.\textsuperscript{25}

By the time the \textit{Dukes} case had proceeded through the district court and the Ninth Circuit, the effective decisions in place were:

1. Under the right circumstances, plaintiff could certify a class for monetary damages under Rule 23(b)(2) even though the text of that subsection only provided for injunctive or declaratory relief;
2. Plaintiffs could satisfy Rule 23(a)(2) commonality requirements by alleging that a corporate culture or collective managerial decisions resulted in pervasive discrimination;
3. A full \textit{Daubert} inquiry was not necessary at the certification stage or, in the alternative, a challenge to whether an expert’s conclusion properly arose from his method was not itself a \textit{Daubert} challenge; and,
4. Trial-by-statistics did not violate due process, even if it precluded defenses that due process would require in an individual trial on the same subject.

C. The Supreme Court’s Decision

The Supreme Court held in a unanimous decision that Rule 23(b)(2) could not be used to certify a class seeking

\begin{itemize}
\item \textsuperscript{19} \textit{Id.} at 151.
\item \textsuperscript{20} See \textit{Dukes v. Wal-Mart Stores}, Inc. 509 F.3d 1168 (9th Cir. 2007); \textit{Dukes v. Wal-Mart Stores}, Inc. 603 F.3d 571(9th Cir. 2010).
\item \textsuperscript{21} \textit{Dukes v. Wal-Mart Stores}, Inc. 509 F.3d. at 1168.
\item \textsuperscript{22} \textit{Id.} at 1178-1179.
\item \textsuperscript{23} \textit{Id.} at 1175-1176.
\item \textsuperscript{24} \textit{Id.} at 1189
\item \textsuperscript{25} \textit{Id.}
\end{itemize}
primarily money damages. It also held in a 5 to 4 decision that the commonality requirement mandated that plaintiffs identify an issue whose resolution would be common to the entire class. In reaching this holding, the Court also provided guidance on the extent to which a trial court could inquire into the merits of the class action at the certification stage and the degree to which the trial court could rely on statistics as class-wide proof of common issues.

The Court unanimously held that the plaintiff could not use Rule 23(b)(2) as an alternative means of certifying a class that sought monetary damages. While the Court did not claim to address the broader question of whether Rule 23(b)(2) extended beyond the injunctive and declaratory relief, its holding limited the kind of relief plaintiffs can seek under this section. The Court’s primary concern was that Rule 23(b)(2) does not allow class members to opt-out of the litigation. Class-wide declaratory injunctive relief is indivisible and applies to all class members equally, or not at all. The Court noted that the structure of Rule 23(b)(3) provided the best mechanism for certifying a class for monetary damages because of the protections it provides, and because the opt-out provisions of Rule 23(b)(3) protect the due process rights of class members who do not want to forfeit their individual claim.

On the issue whether the various parts of Rule 23(a) had been fulfilled in the certification of the class, the Court primarily focused on plaintiffs’ theory of commonality. The Court held that the common element necessary to sustain a finding of commonality must depend upon a common contention. If, for example, the plaintiffs had all shared the same supervisor, they could argue that the common evidence of his particular management practices would apply to all of them. What was important to the Court was that the “common issue” be capable of class-wide resolution, which means that the determination of its truth or falsity will resolve the issue that is central to each plaintiff in one stroke.

The Court also squarely addressed whether a trial court could engage in merit inquiry when deciding class certification. The Court attributed the continued confusion over the propriety of these inquiries to the earlier statement made in Eisen v. Carlisle & Jacquelin, that the Court found “nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” However, in Eisen, as the Dukes Court noted, “the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine

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27 Id.
28 Id. at 2558.
29 Id. at 2557.
30 Id. at 2558-2559.
31 Id.

32 Id. at 2551-2557.
33 Id. at 2552.
34 Id. at 2551.
35 417 U.S.156 (1974). The Supreme Court held that the trial court could not shift the cost of class notice based on its opinion of which side would most likely prevail in the underlying litigation.
36 Id. at 177.
the propriety of certification under Rules 23(a) and (b) . . . but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants . . . .

The Court dismissed any further application of that narrow holding as the “purest dictum” and settled the question that the trial court may inquire into the merits of a claim in deciding certification.

Finally, the Court held that the statistical methods used by the plaintiffs to avoid potential manageability and due process concerns (dubbed “trial by formula” by Justice Scalia) violates the Rules Enabling Act. Since the proposed “trial by formula” would not allow Wal-Mart to assert valid defenses, permitting such a practice would limit Wal-Mart’s substantive due process rights and was appropriately rejected by the Court.

III. The Legacy of Dukes

Dukes significantly altered the landscape of class action litigation, and particularly the landscape of employment cases. The Court made clear that plaintiffs must affirmatively demonstrate compliance with the Federal Rules of Civil Procedure governing class actions, specifically Rule 23. In the wake of Dukes, employers have enjoyed increased success in defeating nationwide class certifications, but are now faced with multiple, regional mini-classes brought by employees using a strategy that has been called “death by a thousand cuts.” This section outlines the progeny of Dukes, as well as the new strategies that plaintiffs have introduced to avoid the Dukes holding.

A. Comcast Corp. v. Behrend

In Dukes, the Court reconfirmed its ruling in Falcon that courts considering Rule 23(a) class certifications must complete a rigorous analysis that sometimes “necessarily overlaps” with the merits.

What remained unclear after Dukes, however, was whether the same rigorous analysis standard applied to (i) the resolution of questions of predominance under Rule 23(b), specifically Rule 23(b)(3), in addition to the question of commonality under Rule 23(a); (ii) claims arising outside the employment context; and (iii) the determination of whether class representatives can prove the amount of damages with class-wide proof. As set forth below, in 2013 in Comcast Corp. v. Behrend, the Supreme Court in a 5–4 decision answered each of these questions in the affirmative.

In Comcast, the Supreme Court reversed certification of a class of Comcast subscribers. The Court held that the plaintiffs had not met the predominance requirement of Rule 23(b)(3) because they had not adequately demonstrated that

37 Dukes, 113 S. Ct. at 2552, n. 10.
38 Id.
39 Id.
41 133 S.Ct. 1426 (2013).
42 Dukes, 113 S. Ct. at 2252.
43 133 S.Ct. at 1429.
damages were “susceptible of measurement across the entire class for Rule 23(b)(3) purposes.” 44 Specifically, the Court ruled that class certification is not proper when “damage calculations will inevitably overwhelm questions common to the class.” 45

In Comcast, the plaintiffs, who were subscribers to Comcast’s cable television programming services, alleged that the defendant violated antitrust laws by using an anticompetitive “clustering strategy” in which it concentrated its operations in certain markets, thereby eliminating competition and driving up prices for programming. Plaintiffs sought class certification under Rule 23(b)(3), which requires for certification that “questions of law or fact common to class members predominate over any questions affecting only individual members.”

Before the district court, the plaintiffs advanced four theories of antitrust impact. The court accepted only one of those theories as susceptible to proof on a class-wide basis. Pursuant to that theory, Comcast’s alleged clustering strategy deterred competition from companies that provided alternative telecommunications capabilities using infrastructure already in place. These companies are called “overbuilders.” The district court permitted plaintiffs to seek to prove antitrust injury based solely on this “overbuilders” theory.

To show that damages could be measured on a class-wide basis, the plaintiffs relied on a statistical regression model that measured the effect of the four antitrust impacts on cable prices. The expert who designed the regression model acknowledged that it did not isolate damages resulting only from the overbuilder theory but instead included damages attributable to all four theories of antitrust impact, three of which the court had rejected. Accordingly, the defendant argued that the the class should not be certified, in part, because the plaintiffs failed to prove that damages resulting from overbuilder deterrence could be calculated on a class-wide basis.

The district court declined to consider the defendant’s argument and certified the class. 46 A divided Third Circuit affirmed, holding that “[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages.” 47 Instead, all that is necessary is that plaintiffs “assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.” 48

The Supreme Court reversed, holding that the rigorous analysis standard set forth in Falcon and reiterated in Dukes applies with equal force to class certification of antitrust claims under Rule 23(b) such that the district court was required to assess whether the expert’s damages methodology could apply class-wide. 49 Quoting both Falcon and Dukes, Justice Scalia, writing for the majority noted that “[b]y refusing to entertain arguments against respondents’ damages model that bore on the

44 Id. at 1435.
45 Id. at 1433.
48 Id.
49 133 S.Ct. 1426.
propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.”\(^{50}\) The Court stated that the plaintiffs fell “far short of establishing that damages are capable of measurement on a class-wide basis”\(^{51}\) because plaintiffs statistical model “failed to measure damages resulting from the particular antitrust injury on which petitioners’ liability in this action is premised.”\(^{52}\) As such, the damages model could not establish the predominance of a common damages question rendering certification of the class was improper. The Court explained that “at the class certification stage (as at trial) any model supporting a plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.”\(^{53}\) To hold otherwise, would be to be to hold that “at the class-certification stage any method of measurement is acceptable so long as it can be applied class-wide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.”\(^{54}\)

Justices Ginsburg and Breyer, writing for the dissent, attempted to limit the impact of the majority decision, stating that “the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a class-wide basis,” and that the ruling was good “for this day and case only.”\(^{55}\) The dissent also criticized the majority for “consider[ing] fact-based matters.”\(^{56}\) According to the dissent, the predominance requirement “scarcely demands commonality as to all questions” and that “when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.”\(^{57}\)

One interesting aspect of the Comcast decision is that it did not reach the issue of whether a district court must conduct a Daubert evidentiary analysis when considering a motion to certify a class. This omission from the Court’s decision was surprising given the fact that, in granting certiorari, the Supreme Court sought review of “Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show the case is susceptible to awarding damages on class-wide basis.”\(^{58}\) Based on that question, the parties focused much of their briefing and oral argument on issues related to admissibility of the plaintiffs’ expert report and application of Daubert in class certification cases.\(^{59}\) While some commentators feel that the Court dodged the issue, it explained that it could

\(^{50}\) Id. at 1432-1433.

\(^{51}\) Id. at 1429.

\(^{52}\) Id. at 1433.

\(^{53}\) Id. (quoting ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)).

\(^{54}\) Id.

\(^{55}\) Id. at 1436, 1437 (Ginsburg, J. and Breyer, J. dissenting).

\(^{56}\) Id. at 1439 (Ginsburg, J. and Breyer, J. dissenting).

\(^{57}\) Id. at 1436-1437 (Ginsburg, J. and Breyer, J. dissenting).

\(^{58}\) Id. at 1435 (Ginsburg, J. and Breyer, J. dissenting).

\(^{59}\) Id.
not decide that question because the defendant did not object to the admissibility of the plaintiffs’ expert’s testimony and thereby failed to preserve the issue for appellate review.60

Comcast is significant because it lays to rest any argument that Falcon’s requirement and Dukes endorsement of the “rigorous analysis” standard is limited to certification under Rule 23(a) or Title VII claims. While it remains to be seen exactly what the impact of Comcast will be on class certification, what does seem clear is that, in antitrust and non-antitrust cases, all Rule 23 elements, including damages, require “rigorous analysis” regardless of whether the certification inquiry overlaps with the merits. Just over one year after the decision was announced, it appears as though class certification decisions have fallen into one of the following three groups: (1) decisions applying Comcast and denying class certification because Rule 23(b)(3) was not satisfied; (2) decisions applying Comcast and denying class certification because Rule 23(b)(3) was not satisfied; and (3) decisions taking a middle approach by employing Rule 23(c)(4) and maintaining class certification as to liability only, leaving damages for a separate, individualized determination.61 Set forth below is a discussion of how various circuits have dealt with Comcast and a few of the cases worth watching.

B. The Comcast Effect

In the immediate wake of Comcast many commentators predicted that the Court’s decision would be a new arrow in defense counsels’ quivers. To be certain, the Court did, for the first time, explicitly confirm that the “rigorous analysis” standard required by Falcon and Dukes in the Rule 23(a) context extends to Rule 23(b)(3). That said, many of the circuits that have had the opportunity to address Comcast in considering Rule 23(b)(3) certifications have, at the least, dulled the arrow a bit.

I. Fifth Circuit

One area of confusion left by the Comcast Court is whether an analysis of the damages theory is always required at the class certification stage. The Fifth Circuit recently answered this question in the negative in upholding class in In re Deepwater Horizon. In that case, the plaintiffs alleged damages resulted from the BP PLC oil spill. In upholding certification despite the lack of a formula for determining class-wide damages, the court, relying in part on the Comcast dissent, ruled that submission of a formula for class-wide measurement of damages is not a prerequisite to certification under Rule 23(b)(3).62 Specifically, the court said, “nothing in Comcast mandates a formula for classwide measurement of damages in all cases. Even after Comcast, therefore, this holding has no impact on cases such as the present one, in which predominance was based not on common issues of damages but on the numerous common issues of liability.”63

60 Id. at 1426, n.4.
62 See In re Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014), petition for reh’g en banc denied, No. 13-30095, 2014 WL 2118614 (5th Cir. May 19, 2014).
63 Id. at 815.
2. Sixth and Seventh Circuits

In both the Sixth Circuit case of *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* 64 and the Seventh Circuit case of *Butler v. Sears, Roebuck & Co.*, 65 the plaintiffs alleged that washing machines had a design defect and or manufacturing defect. In both cases, the alleged issues arising from the alleged defects manifested for only a very small percentage of purchasers. Despite these facts, the *Whirlpool* court affirmed certification of a class of all Ohio residents who purchased twenty-one different washing machine models, 66 and the *Sears* court affirmed certification for a class of buyers of twenty-seven different models in six different States, the relevant laws of which vary. 67 The defendant in each case appealed to the Supreme Court. In both cases, the Court granted the petitions, vacated the holdings and remanded for consideration in light of *Comcast*. 68

On remand, the Sixth and Seventh Circuits both upheld the class certifications and relied on similar reasoning in so doing. In both cases, the courts distinguished *Comcast* as a suit where plaintiffs sought to certify both liability and damages. 69 In the Sixth Circuit the *Whirlpool* court concluded that *Comcast* did not alter the outcome of its prior decision regarding a liability-only class, because “no matter how individualized the issue of damages may be, the determination of damages ‘may be reserved for individual treatment with the question of liability tried as a class action.’” 70 Similarly, in *Sears*, the Seventh Circuit was working with a liability-only class when it reaffirmed certification on the grounds that damages experienced by individual class members could be determined following a liability ruling as permitted by Rule 23(c)(4). 71 Judge Posner, writing for court stated that, “[i]t would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment to require that every member of the class have identical damages.” 72

In July 2014, the Seventh Circuit continued applying a narrow interpretation of *Comcast* when it vacated the district court’s denial of class certification in *In re IKO Roofing Shingle Products Liability Litigation*. 73

The plaintiffs in *IKO* were purchasers of organic asphalt roofing shingles who allege that the defendant falsely represented that the shingles met an industry standard known as ASTM D225. Plaintiffs asked the district court to certify a class that would cover IKO’s sales in eight states since 1979 and the district court declined to do so. In making its ruling, the district court relied in part on *Comcast* in requiring proof that plaintiffs “will expe-

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64 678 F.3d 409 (6th Cir. 2012).
65 702 F.3d 359 (7th Cir. 2012).
66 678 F.3d at 421.
67 702 F.3d at 363.
69 See *Whirlpool*, 722 F.3d 838, 860 (6th Cir. 2013); *Sears*, 727 F.3d 796, 800 (7th Cir. 2013).
70 722 F.3d at 859 (quoting Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)).
71 727 F.3d at 800.
72 Id. at 801.
rience a common damage’’ and that their claimed damages ‘‘are not disparate.’’74 Because there would be inevitable differences in the individual plaintiffs’ experiences with the defendant, the district court denied to certify the class pursuant to Rule 23(b)(3).75

In vacating the district court’s ruling, a Seventh Circuit panel disagreed with the district court’s reading of Dukes and Comcast as requiring plaintiff to demonstrate ‘‘commonality of damages.’’ The Seventh Circuit, in delivering its most narrow reading of the Supreme Court’s decisions yet, held that these cases require only that class plaintiffs, like any other plaintiff, match their theory of loss to their theory of liability.76 The court then distinguished the present case from Comcast noting that the plaintiffs had two ‘‘theories of damages that match[ed] their theory of liability.’’77 It noted that following the district court’s interpretation of Dukes and Comcast would render consumer products class actions ‘‘impossible’’ and its previous holding in Sears incorrect.78

Although each of these cases arose outside the employment context, it is clear that each one frustrates an employer’s ability to argue disparate damages as a basis for denying class certification.

3. Ninth Circuit

Another question left unanswered by the Court in Comcast is whether individualized damages determinations alone are sufficient to defeat class certification. The Ninth Circuit was confronted with this question in Leyva v. Medline Industries.79 In Leyva, a state law wage and hour case, the court held that Comcast did not preclude class certification, despite the fact that each class member’s damages were different, because evidence suggested that the employer could ‘‘efficiently’’ calculate damages using information in a computer database.80 Therefore, even though highly individualized and fact-specific, there was a workable class-wide damages theory.81 In reaching its decision the court recognized that ‘‘damages determinations are individual in nearly all wage-and-hour class actions,’’82 and ‘‘[i]n this circuit ... damage calculations alone cannot defeat class certification.’’83

The court, citing Leyva, reiterated its position in the more recent case of Jimenez v. Allstate Ins. Co.84 In Jimenez, the lead plaintiff and about 800 other Allstate employees in California alleged that Allstate has a practice or unofficial policy of requiring its claims adjusters to work unpaid off-the-clock overtime in violation of California law.85 The court affirmed the lower courts certification of the class finding that the plaintiffs had established that common questions existed pursuant to Rule 23(a)(2) and that those common

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74 Id. at *3.
75 See id.
76 Id. at *4.
77 Id.
78 Id. at *3.
questions predominated pursuant to Rule 23(b)(3). The common questions were:

(i) whether class members generally worked overtime without receiving compensation as a result of Defendant’s unofficial policy of discouraging reporting of such overtime, Defendant’s failure to reduce class members’ workload after the reclassification, and Defendant’s policy of treating their pay as salaries for which overtime was an “exception”; (ii) whether Defendant knew or should have known that class members did so; and (iii) whether Defendant stood idly by without compensating class members for such overtime.

Additionally, the common question of “whether Allstate had an ‘unofficial policy’ of denying overtime payments while requiring overtime work predominated over any individualized issues regarding the specific amount of damages a particular class member may be able to prove.” In concluding that class treatment was, therefore, a superior method adjudication, the court noted that, contrary to Allstate’s position that it was entitled to individualized determination of each employee’s eligibility for back pay, “statistical sampling of class members could accurately and efficiently resolve the question of liability, while leaving the potentially difficult issue of individualized damage assessments for a later day.”

On February 27, 2015, Allstate filed a petition for writ of certiorari asking first, “Whether the court of appeals erred in holding, in conflict with decisions of the Second, Fifth, Eighth, and Eleventh Circuits, that the requirements of Federal Rule of Civil Procedure 23 are satisfied by purportedly ‘common’ questions that do not resolve the defendant’s liability as to any individual class member and would require hundreds of separate follow-up trials,” and, second, “Whether the court of appeals erred in holding that Rule 23 and the Due Process Clause permit class-wide resolution of a defendant’s liability through a class process that prevents the defendant from raising individualized defenses in the liability phase.”

For now, it appears as though in the Ninth Circuit individualized damages alone is not enough to defeat class certification.

4. Second Circuit

While the early circuit court cases applying Comcast in the Rule 23(b)(3) context may be seen as a blow to the high hopes that many defense attorneys had when the decision was first published, there is a very recent decision from the Second Circuit that is encouraging for employers. In Johnson v. Nextel Communications, a group of clients brought putative class action claims of breach of fiduciary duty, legal malpractice, and breach of contract in state court against the law firm that had represented the clients in employment discrimination litigation against their employer and asserted claims against their employer, challenging an agreement that set up a dispute resolution process to resolve the clients’ claims without

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86 Id. at 1163-1164.
87 Id. at 1164.
88 Id.
89 Id.
litigation. In vacating the district court’s certification of the class, the panel found that, despite the fact that the employer’s role in negotiating and approving a dispute resolution agreement would be same for every class members’ claim, where each member of a potential subclass of clients would require a case-by-case inquiry into whether the subclass members waived conflict of interest protections, the interpretation of each client’s retainer agreement would be governed by law of each client’s home state, and each client’s damages would have to be calculated individually, common issues did not predominate. Therefore, “because liability for a significant bloc of the class members and damages for the entire class must be decided on an individual basis, common issues do not predominate over individual ones and a class action is not a superior method of litigating the case.”

Moreover, there are several interesting employment-related cases pending the Second Circuit that are worth closely watching. In the first case, Roach v. T.L. Cannon Corp., the district court denied certification of a wage-and-hour class under Rule 23(b)(3) when the plaintiffs failed to offer a class-wide damages model, rejecting the argument that damages need not be considered at the certification stage. The plaintiffs in Roach were employees at Applebee’s restaurants who were not paid wages to which they were entitled under state and federal law. In seeking to bring a class action, the plaintiffs presented evidence of the defendants’ uniform policies and practices that led to the wage law violations. Nonetheless, in stark contrast to the Ninth Circuit’s holding in Leyva, the district court denied class certification, citing Comcast for the proposition that a class action cannot be maintained whenever monetary relief must be calculated on an individual basis for each member of the class.

In Jacob v. Duane Reade, the plaintiffs, assistant store managers, allege that the defendant failed to compensate them for hours worked in excess of forty hours per week in violation of the FLSA and New York Labor Law (“NYLL”). Prior to the Comcast decision, the district court certified a class with respect to the NYLL claims - a ruling for which the defendant sought reconsideration following Comcast. In support of its motion for reconsideration the defendant argued that damage calculations for each of the 750 class members would be “inherently individualized” and plaintiffs offered no model to measure damages on a class-wide basis. The district court, like the Sixth and Seventh Circuit courts in the washing machine cases, opted to affirm certification with respect to liability, while “partially decertify[ing]” the class by requiring plaintiffs to proceed individually on their damages claims pursuant to Rule 23(c)(4) if liability is found.

The Second Circuit agreed to hear the appeal of these cases in tandem.

92 Id. at *14.
93 Id. at *15.
95 Id. at *4-5.
97 Id. at 589.
98 Id. at 595.
court’s holding will likely have a significant impact wage and hour cases throughout the country since those cases often involve the calculation of highly-individualized damages for each class member. Employers and employees should watch these cases closely to how the Second Circuit treats the existence of individualized damages in this post-Comcast era.

On July 1, 2014, in *Houser v. Pritzker*, the U.S. District Court for the Southern District of New York certified a liability class under Rule 23(a) in a Title VII suit brought against the United States Census Bureau while declining to certify the plaintiffs’ proposed damages subclasses under Rule 23(b)(3) based on Comcast.99 Applying Comcast, the court concluded that the plaintiffs’ proposed damages model was over-inclusive and “inevitably” included individuals not entitled to back pay because they would not have been hired absent the alleged discrimination.100 Because Title VII affords defendants the right to rebut a presumptive entitlement to back pay with fact-specific, individualized defenses, questions of individualized entitlement to damages would “overwhelm” the litigation.101 However, as the court did in *Jacob*, rather than reject certification entirely, the court, at the plaintiffs’ urging, exercised its discretion under Rule 23(c)(4) to bifurcate the liability and damages phase, and proceed to adjudication of the liability questions.102

One clear post-Dukes trend has emerged in the circuit courts. A review of various circuit court cases applying Dukes indicates that absent a company-wide policy or practice common across the class — or, put differently, where local managers exercise discretion or control — certification will be difficult for employees.103 Conversely, where a company-wide policy or practice common to all class members gives rise to the alleged injury or injuries, some post-Dukes certifications have been affirmed.104

100 Id. at *14.
101 Id.
102 Id. at *15.
103 See, e.g., Tabor v. Hilti, Inc., 703 F.3d 1206, 1229 (10th Cir. 2013) (holding that a class could not be certified where plaintiffs challenged a “highly discretionary policy for granting promotions” and failed to show that the employer “maintained a common mode of exercising discretion that pervaded[d] the entire company.” (quoting Dukes, 131 S. Ct. at 2554-2555)); Bolden v. Walsh Constr. Co., 688 F.3d 893, 894-896 (7th Cir. 2012) (holding that discrimination that allegedly took place across multiple sites of an employer could not be certified because the injury depended on all supervisors being motivated the same way, which would be nearly impossible to prove); Benet v. Nucor Corp., 656 F.3d 802, 813-816 (8th Cir. 2011) (holding that because of different supervision and policies as well as “stark inter-departmental variations in job titles, functions performed, and equipment used,” a class of about 100 African American employees lacked commonality); see also Marcia L. McCormick, Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases, 62 DePaul L. Rev. 711, 732 (2013).
104 See, e.g., Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 797 (8th Cir. 2014) (upholding certification where workers sought payment for donning and doffing protective gear and traveling to work stations despite the fact that the plaintiffs in the case had different items of required personal protective equipment and different routines, in part because the employees all worked at the same plant and the employer treated the employees in a similarly with a specific company policy regarding payment.); McReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc., 672 F.3d 482,
III. The Impact of Dukes on Employment-related Class Actions

Following Dukes, the Court has rendered several other opinions that significantly impact employment-related class action litigation, all of which employers can laud as victories. Since the pro-defendant/employer Dukes decision, the Court seems to be continuing its trend toward evening the playing field for defendant/employers by (1) enforcing class action waivers in arbitration agreements, (2) reigning in plaintiffs’ “forum shopping” in class action litigation, and (3) providing defendants greater access to federal courts. The impact of these post-Dukes opinions is analyzed in this section.

A. American Express v. Italian Colors Restaurant

I. The Holding

One of the most significant opinions that the Court issued was in American Express v. Italian Colors Restaurant, in which the Court enhanced the ability of employers to contract out of potential class action litigation. The issue in American Express was “whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act (‘FAA’) when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.” In a 5-3 decision, the Court held that the class action waiver in the parties’ contract was enforceable, even though the provision made it economically unfeasible to prosecute the antitrust claim. In other words, plaintiffs cannot use the “effective vindication” doctrine to invalidate class action waiver provisions in circumstances where the recovery sought is exceeded by the costs of individual arbitration.

The plaintiffs in American Express were merchants and business owners who accepted payments from customers through American Express credit cards and entered into standardized agreements with American Express regarding the terms of participation in their payment system. In each of these agreements, there was a provision requiring that the parties arbitrate any disputes that arose out of the agreement. The provision also contained a waiver of the right for multiple merchants or business owners to pursue class arbitration against American Express. The effect of the provision was that each individual claim had to be arbitrated independently, even if the amount in controversy was small.

Normally, when a group of individuals are aggrieved by a single entity, but only a small amount of damages result, they can

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105 133 S. Ct. 2304 (2013).
106 Id. at 2307.
107 Id. at 2310.
unite and bring a single lawsuit so that the legal fees and costs associated with the case will not engulf the anticipated recovery. This argument was integral to the plaintiff’s case in American Express. The holding in American Express (coupled with the holding in Stolt-Nielsen S.A. v. Animal-Feeds Int’l Corp.108) frustrates such an effort when individuals enter into arbitration agreements that do not expressly allow arbitration of class claims.

2. Exceptions To The Enforcement Of Arbitration Agreements

The Supreme Court has instructed lower courts to “rigorously enforce’ arbitration agreements according to their terms,”109 but acknowledged the following two exceptions to this directive: (1) where the FAA’s mandate is “overridden by a contrary congressional command” and (2) where the parties’ agreement includes a prospective waiver of a federal statutory right, the court-crafted “effective vindication” exception to the FAA. The Court in American Express found that the first exception did not apply because there was no contrary congressional command in the federal antitrust laws.110

The Court then analyzed the “effective vindication” exception and determined that it did not apply to the facts of the case. The “effective vindication” exception to the FAA originated as dictum in the Court’s decision in Mitsubishi Motors v. Soler Chrysler-Plymouth,111 where the Court expressed a willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party’s right to pursue statutory remedies. In American Express, the plaintiffs argued that the Court should invalidate the arbitration agreement because its terms effectively foreclosed vindication of their federal (antitrust) rights. Plaintiffs argued that they could not pursue their antitrust claims because the experts required to prove the claim would cost hundreds of thousands of dollars, while the individual recovery would not exceed $40,000.112 The Court rejected that argument and held that “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”113

American Express and its progeny pave the way for employers to incorporate class action waiver provisions in their employment agreements. However, employers should be mindful that these waivers should typically be incorporated in arbitration clauses within employment agreements. Otherwise, the holding in American Express would not benefit employers. American Express does not address the

109 133 S. Ct. at 2312.
110 In the employment context, employers can rest easy that the FAA is not overridden by a contrary congressional command in the FLSA. Every Court of Appeal that has considered this issue has concluded that the FLSA does not preclude the waiver of collective action claims. See, e.g., Sutherland v. Ernst & Young, 726 F.3d 250, 296 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002).
112 133 S. Ct. at 2310.
113 Id. at 2311.
validity of class or collective action waivers outside of the arbitration context. And, the federal policy in the FAA would not be implicated or serve to outweigh the policy set forth in federal statutes, like the FLSA.114

3. The Impact of American Express

The opinion in American Express has already impeded class actions in favor of arbitrations in several federal courts, despite some of the courts’ express discontent with enforcing the arbitration provisions.115 The opinion also reversed the

114 See, e.g., Killion v. Kehe Distributors, LLC, 761 F.3d 574, 592 (6th Cir. 2014) (refusing to enforce a collective action waiver and finding that the holding in American Express did not apply because the waiver was not in an arbitration agreement).

115 See, e.g., Raniere v. CitiGroup Inc., 553 Fed. App’x. 11, 14 (2nd Cir. 2013) (relying on the holding in American Express to overturn a district court opinion and holding that the “effective vindication” doctrine does not apply simply because it is not “economically feasible” for a plaintiff to enforce his statutory rights individually); Sutherland, 726 F.3d at 297 (“Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context”’’’); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 600 (6th Cir. 2013) (enforcing the arbitration agreement, but expressing that - “The idea that the arbitration agreement in this case reflects the intent of anyone but [the defendant] is the purest legal fiction. But all of these things—the one-sided nature of the arbitration clause, and its adhesive nature—were also present in American Express”); Shetiwy v. Midland Credit Mgmt., 959 F. Supp.2d 469, 475 (S.D.N.Y. 2013); Porreca v. The Rose Group, No. 13-1674, 2013 U.S. Dist. LEXIS 173587, *42 (E.D. Pa. Dec. 11, 2013) (disagreeing with the current state of the law, but enforcing arbitration agreement with class and collective action waiver, and acknowledging that – “This Court, however, is not at liberty to ignore the decisions of the United States Supreme Court.”).

116 See, e.g., In re American Express Merchant’s Litigation, 634 F.3d 187, 196 (2nd Cir. 2011).

117 133 S. Ct. at 2310-2311.

118 733 F.3d 916, 927 (9th Cir. 2013).

119 See id.

120 718 F.3d 1052, 1058 (9th Cir. 2013).
plaintiffs’ argument that there were some putative class members who may not be able to afford the arbitration fees because, the court held, the mere risk that a plaintiff will face prohibitive costs is too speculative to justify invalidating an arbitration agreement.121

In Reed Elsevier, the Sixth Circuit Court of Appeals ruled differently from the Ninth Circuit in a matter that contained similar facts as those in Chavarria. In Reed Elsevier, the plaintiff argued that the arbitration clause prohibiting class-wide arbitration was economically unfeasible and thus unconscionable because it required the plaintiff to pay his own legal fees, even if the arbitrator concluded that the defendant violated the law, and it required the plaintiff to split the costs for the arbitrator’s fee.122 Pursuant to the holding in American Express, the court suppressed its serious concerns about the fairness of the arbitration agreement and enforced it.123 Notably, the court also noted that the plaintiff could have avoided the arguably unconscionable arbitration provision by contracting with another company to provide legal research services, other than the defendant, that did not have a similar arbitration clause.124 Unlike the Sixth Circuit in Reed Elsevier, the Ninth Circuit did not mention such a “marketplace” solution to an arguably oppressive arbitration clause before it deemed the clause unenforceable in Chavarria.

Other cases decided since American Express serve as cautionary tales for employers to carefully draft arbitration agreements so that there can be no argument not to enforce them. The Southern District of New York decided two cases in which the arbitration agreements included a provision that only claims or controversies required to be arbitrated by the Financial Industry Regulatory Authority (“FINRA”) rules would be resolved by individual (not class or collective) arbitration.125 The court noted that American Express did not “touch on whether arbitration should be compelled . . . where FINRA rules bind the parties” and found that the FINRA rules prohibit the enforcement of arbitration agreements against members of a putative class or collective action until class or collective certification has been denied or decertified.126

B. Standard Fire Insurance Co. v. Knowles

I. The Holding

In 2013, the Supreme Court also decided Standard Fire Insurance Co. v. Knowles,127 which rejected plaintiffs’ frequently used attempts to forum-shop their class action lawsuits. The issue in Standard Fire was whether a named plaintiff in a class action can avoid federal jurisdiction under the Class Action Fairness Act (“CAFA”) by stipulating, before the class

121 Id.
122 734 F.3d at 600.
123 Id.
124 Id.
127 133 S. Ct. 1345 (2013).
is certified, that he will not seek more than $5 million in damages. In a rare unanimous decision, the Court held that a named plaintiff’s stipulation not to seek damages in excess of the $5 million jurisdictional threshold does not bind the class and therefore does not preclude federal jurisdiction. The Court declared that – “A plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.” The reason for the Court’s decision is that, prior to class certification, the named plaintiff does not represent the class. A named plaintiff’s stipulation can only bind him as to his own damages, but he does not have the power to bind anyone else in the class as to their damages. As a result, such a stipulation does not limit the amount of potential damages that the class would be able to recover and so does not affect removability under CAFA.

While the Standard Fire opinion prohibits named plaintiffs from binding putative class members on a limitation of damages, a named plaintiff can still bind absent class members to decisions that govern the litigation proceedings. For instance, in Day v. Persels & Assocs., the Eleventh Circuit held that Standard Fire does not strip a named plaintiff’s authority to bind absent class members when the named plaintiff consents to the jurisdiction of the magistrate judge before the class has been certified.

2. Plaintiffs can Still Avoid CAFA Jurisdiction

Although the Supreme Court appeared to display little patience with efforts by the plaintiffs’ bar to evade CAFA’s removal provisions, Standard Fire should not be read to promulgate a broad rule that CAFA does not allow plaintiffs to structure their lawsuits to avoid CAFA jurisdiction. Since the Court’s opinion in Standard Fire was handed down, crafty plaintiffs have been able to circumvent CAFA’s “mass action” provision, which permits defendants to remove cases from state to federal court if there are more than 100 plaintiffs and certain other conditions are met. For instance, in Scimone v. Carnival Corp., the Eleventh Circuit held that the plaintiffs were able to successfully avoid CAFA jurisdiction by filing almost identical separate complaints, each naming less than 100 plaintiffs, and by not moving for or

128 The relevant statutory provision provided that “to determine whether the amount in controversy exceeds the sum or value of $5,000,000,” the “claims of the individual class members shall be aggregated.” See 28 U.S.C. § 1331(d)(6).

129 133 S. Ct. at 1349.

130 The Court’s opinion provided another small nugget for employers. It reinforced the primary purpose of CAFA, which is to ensure “[f]ederal court consideration of interstate cases of national importance.” In 2005, Congress enacted CAFA as a piece of tort reform legislation. It was enacted against the backdrop of several state jurisdictions where a large proportion of class actions were filed and huge verdicts against corporate defendants were rendered. CAFA prevents this type of state court forum-shopping by granting jurisdiction to federal district courts over class actions involving more than 100 class members and more than $5 million in controversy, among other requirements. CAFA also provides that, when determining whether a matter exceeds the jurisdictional amount, the “claims of the individual class members must be aggregated.” See 28 U.S.C. §1332(d)(6).

131 729 F.3d 1309 (11th Cir. 2013).

132 See id. at 1324–1325.

133 720 F.3d 876 (11th Cir. 2013).
otherwise proposing joint trial in the state court. The Ninth Circuit reached the same decision in *Romo v. Teva Pharmaceuticals.*

3. Named Plaintiffs have a Fiduciary Duty to Putative Class Members

The Court’s opinion in *Standard Fire* focused on a named plaintiff’s fiduciary duty to the putative class that he aspires to represent. The Court recognized that a named plaintiff’s fiduciary duty prohibits him from throwing away what could be a major component of the class’s recovery. Since this opinion, lower courts have expounded upon a named plaintiff’s fiduciary duty and further explained when the named plaintiff can bind the class or collective. In *Gawarecki v. ATM Network,* a district court in Minnesota cited *Standard Fire* to support its holding that the plaintiffs could not abandon the actual damages claims of the putative class members, prior to class certification, in an effort to avoid federal jurisdiction. Likewise, in *Addison Automatics v. Hartford Casualty Insurance,* the Seventh Circuit held that a class representative’s fiduciary duty to class members carriers over to separate litigation affecting the class. The court joined the Eighth Circuit and held that where representatives

of a class in a federal case under federal law pursued individual relief in a separate but parallel action in state court under state law, the class representative still owed fiduciary duties to the members of the federal class when pursuing the state court action.

C. *Genesis Healthcare Corp. v. Symczyk*

I. The Holding

The circuit courts are split on whether an unaccepted offer of judgment that fully satisfies a plaintiff’s claim is sufficient to render the claim moot and thus beyond the judicial power of Article III of the United States Constitution. While the Supreme Court granted certiorari in *Genesis Healthcare Corp. v. Symczyk* seemingly to resolve this split, the Court ultimately decided the case on narrower grounds and did not reach the question or resolve the split because the plaintiff conceded that the offer of judgment mooted her individual claim and did not raise the issue on appeal.

*Genesis Healthcare* was a putative collective action in which the plaintiff alleged that Genesis violated the Fair Labor Standards Act. Before any other plaintiffs joined the action, Genesis made an offer of judgment for full relief of the plaintiff’s claims. The plaintiff did not

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134 731 F.3d 918, 922–923 (9th Cir. 2013); see also *Corber v. Xanodyne Pharmas., Inc.*, 771 F.3d 1218, 1223 (9th Cir. 2014).
135 133 S. Ct. at 1349.
137 731 F.3d 740 (7th Cir. 2013).
138 731 F.3d at 743.
139 *Id.*; see also *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 938-939 (8th Cir. 1995); *CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 181 F. Supp.2d 914, 922 (N.D. Ill. 2002) (affirmed in *CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849 (7th Cir. 2002)).
140 133 S. Ct. 1523 (2013).
141 See *id.* at 1525.
accept the offer, but the district court dismissed the case because the offer of judgment left the plaintiff without a personal stake in the litigation. Although the plaintiff conceded that the offer of judgment mooted her individual claim, she argued that Genesis was simply trying to “pick off” her claim by satisfying it so that Genesis could avoid facing the collective action suit on behalf of the other employees. The district court found that, because no other employees had joined the collective action and because the plaintiff had been offered full relief, her claim was moot. The Supreme Court agreed with the district court. However, courts have limited the analysis in Genesis to collective actions and concluded that the Genesis discussion does not apply to class actions.142

Because the Supreme Court did not reach this issue, the circuits remain divided on two issues – (1) whether an offer of judgment for the full amount of damages moots a plaintiff’s individual claims, and (2) whether an offer of judgment before class certification or before individuals join a collective action effectively “picks off” a putative class representative.

2. Circuit Court Split

The circuits are split on whether an unaccepted Rule 68 offer moots the plaintiff’s case. The majority of circuits have held that an offer of complete relief moots a plaintiff’s individual claim. The Third Circuit has held that “[a]n offer of complete relief will generally moot the plaintiff’s claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.”143 The Fourth and Tenth Circuits have adopted this same approach.144 The Seventh Circuit takes a more extreme approach and holds that “[o]nce the defendant offers to satisfy the plaintiff’s entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.”145 The Sixth Circuit agrees with the Seventh Circuit that “an offer of judgment that satisfies a plaintiff’s entire demand moots the case,” but disagrees with the Seventh Circuit’s view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand. Instead, the Sixth Circuit holds that “the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants’ Rule 68 offer of judgment.”146 Four justices dissented in Genesis Healthcare and sharply

142 See, e.g., Epstein v. JP Morgan Chase & Co., No. 13 Civ. 4744(KPF), 2014 U.S. Dist. LEXIS 38628, *30 (S.D.N.Y. Mar. 21, 2014) (“The court agrees with Plaintiff that these [prior class action] cases were not affected by the Supreme Court’s recent decision in Genesis . . . .”).

143 Weiss v. Regal Collections, 385 F.3d 337, 340 (3rd Cir. 2004).

144 See Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 371 (4th Cir. 2012); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1243 (10th Cir. 2011) (“As Rule 68 operates, if an offer is made for a plaintiff’s maximum recovery, his action may be rendered moot.”).

145 See Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991); see also Thorogood v. Sears, Roebuck & Co., 595 F.3d 750, 752 (7th Cir. 2010) (“The offer exceeded the amount in controversy and so the case was moot.”).

criticized the mootness-by-unaccepted-offer approach. The Second Circuit follows the Sixth Circuit’s approach that when an unaccepted offer has been made, the better approach is to enter judgment against the defendant. The Second Circuit addressed this issue in the context of an offer of settlement, as opposed to an offer of judgment, and held that an unaccepted offer of settlement for the full amount of damages owed does not moot a case such that the case should be dismissed for lack of jurisdiction if the plaintiff desires to continue the action. Rather, the proper disposition in such a situation is for the district court to enter judgment against the defendant for the proffered amount and to direct payment to the plaintiff consistent with the offer.

The Ninth, Eleventh, and Fifth Circuits are at complete odds with the other circuits that have decided this issue and have explicitly adopted the position set out in the Genesis Healthcare dissent. The Ninth Circuit holds that “an unaccepted Rule 68 offer that would fully satisfy a plaintiff’s claim is insufficient to render the claim moot.” Similarly, the Eleventh Circuit holds that “a plaintiff’s individual claim is not mooted by an unaccepted Rule 68 offer of judgment.” The Fifth Circuit follows the same approach.

3. The Offer of Judgment

While several circuits allow a defendant to moot a plaintiff’s individual claim with an offer of judgment, the offer must be for the full amount of the plaintiff’s requested relief. In several cases, defendants have made unsuccessful attempts at mooting a plaintiff’s claim because the defendant did not offer the plaintiff everything the plaintiff demanded. In

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147 Genesis Healthcare, 133 S. Ct. at 1533-1534 (“An unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect. . . . So a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don’t try this at home.”).


150 See id.


152 Stein v. Buccaneers Limited Partnership, 772 F.3d 698, 709 (11th Cir. 2014).

153 Mabary v. Home Town Bank, N.A., 771 F.3d 820, 824 (5th Cir. 2014) (“Although an offer of complete relief (even an unaccepted one) will generally moot a plaintiff’s claim, we agree with the district court that these circumstances fit within the ‘relation back’ exception. That doctrine prevents a defendant from ‘picking off’ a named plaintiff by mooting her individual claim before the court has an opportunity to rule on the question of class certification, if the plaintiff has timely and diligently pursued a motion for class certification that actually results in a class being certified.”).

154 See Scott v. Westlake Serv. LLC, 740 F.3d 1124, 1126 (7th Cir. 2014) (“[I]f the defendant offers to pay only what it thinks might be due, the offer does not render the plaintiff’s case moot.”); Payne, 748 F.3d at 607 (“An incomplete offer of judgment – that is, one that does not offer to meet the plaintiff’s full demand for relief – does not render the plaintiff’s claims moot”); Hrivnak v. NCO Portfolio Management, Inc., 719 F.3d 564, 567 (6th Cir. 2013) (“An offer limited to the relief the defendant believes is appropriate does not suffice. The question is whether the defendant is willing to meet the plaintiff on his terms.”); Boyle v. International Brotherhood of Teamsters Local 863 Welfare Fund, 579 Fed. App’x. 72, 75 (3rd
this situation, the plaintiff still has a stake in the action because he may obtain additional relief if he prevails. To hold otherwise would suggest that any reasonable offer of judgment moots a plaintiff’s case or that long-shot claims are moot rather than unlikely to succeed. A plaintiff’s prospects of success are not pertinent to the mootness inquiry. Courts have held that, even if a plaintiff demands more than he is entitled to under the law, the court cannot determine the merits of the plaintiff’s demand and, at the same time, dismiss the case on the grounds of lack of jurisdiction because of mootness.

4. “Picking Off” a Putative Class Representative

The circuits remain split on whether a defendant can “pick off” a putative class representative by offering the full amount of his individual damages. The timing of class certification motions is critical to this debate. The Seventh Circuit holds that a defendant can render moot a possible class action by offering to settle for the full amount of the plaintiff’s demands before the plaintiff files a motion for class certification.

Most of the other circuits that have addressed this issue have reached a different result. In the Third, Fifth, Ninth, Tenth, and Eleventh Circuits, a Rule 68 offer of full relief to the named plaintiff does not moot a class action, even if the offer precedes a class-certification motion, so long as the named plaintiff has not failed to diligently pursue class certification. For instance, the Ninth Circuit holds that an unaccepted Rule 68 offer of judgment – for the full amount of the named plaintiff’s individual claim and made before the named plaintiff files a motion for class certification – does not moot a class action. If the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class certification issue. Then, if the district court certifies the class, certification relates back to the filing of the complaint. Once the class has been certified, the case may continue despite full satisfaction of the named plaintiff’s individual claim because an offer

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155 See Smith v. Greystone Alliance, LLC, 772 F.3d 448, 450 (7th Cir. 2014) (holding that a defendant cannot propose that the judge decide a part of the merits, whittle down the amount in dispute, and then dismiss the suit on the ground that a larger offer had been made); but see Scott, 740 F.3d at 1126 (implying that if a defendant can establish that it would be impossible for the plaintiff to recover more than what the defendant offered, the offer may render the case moot.).

156 See Smith, 772 F.3d at 450 (“If the plaintiff asks for the moon, only the moon extinguishes the controversy.”).

157 See Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011).

158 See Lucero, 639 F.3d at 1249–1250; Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 920–921 (5th Cir. 2008): Weiss, 385 F.3d at 348; Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091-1092 (9th Cir. 2011); Stein v. Buccaneers Ltd. Partnership, 772 F.3d 698, 707 (11th Cir. 2014). See also Church v. Accretive Health, Inc., 299 F.R.D. 676, 679 (S.D. Ala. 2014) (“The premise that a Rule 68 offer of judgment moots a class action in the absence of a prior Rule 23 motion is a decidedly minority view. The Eleventh Circuit has not accepted it.”).

159 Pitts, 653 F.3d at 1091-1092.

160 Id. at 1092.
of judgment to the named plaintiff fails to satisfy the demands of the class. Conversely, if the district court denies class certification, the plaintiff may still pursue a limited appeal of the class certification decision. Only when the denial of class certification is final does the defendant’s offer moot the case.

D. Dart Cherokee Basin Operating Co. v. Owens

Another recent Supreme Court decision that hands a victory to employers is Dart Cherokee Basin Operating Co. v. Owens. The holding in this case increases employer access to federal courts by clarifying that the burden of proof for removing cases to federal court on the grounds of diversity jurisdiction or the Class Action Fairness Act is a “preponderance of the evidence.” The Court also supports the argument that a defendant employer’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions unless the allegation is contested by the plaintiff or questioned by the Court. Now, it is clear that an employer’s notice of removal need not meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint, which is merely “a short and plain statement.” The Court explained that an employer’s amount-in-controversy allegation seeking federal court jurisdiction should be accepted when not contested by the plaintiff or questioned by the court. If the plaintiff contests the employer’s allegations, both sides must submit proof and the court will decide, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.

By embracing the “preponderance of the evidence” standard, the Court expressly rejected the burden of proof of “legal certainty” that some courts imposed on defendant employers seeking to establish the jurisdictional amount to obtain federal court jurisdiction. The other nugget that the Court handed employers is its proclamation that there is no anti-removal presumption that attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.

E. Brown v. Nucor Corporation

A recent Fourth Circuit decision could signal post-Dukes commonality pendulum swinging back to center, with a focus on the Dukes commonality “glue.” In Nucor, African American steel workers brought a class action against employer under § 1981 and Title VII alleging that they were subjected to discriminatory job promotion practices and a racially hostile work environment under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §

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161 See id.
162 See id.
164 Id.
165 See, e.g., Morgan v. Gay, 471 F.3d 469, 474 (3rd Cir. 2006) (“[A] defendant will be able to remove the case to federal court by showing to a legal certainty that the amount in controversy exceeds the statutory minimum.”).
1981. The plaintiffs based their promotions claim on allegations of a pattern or practice of racially disparate treatment in promotions decisions, and facially neutral promotions policies and procedures that had a racially disparate impact. The United States District Court for the District of South Carolina decertified promotions class in the wake of *Dukes*, and the commonality requirement set out in Federal Rule of Civil Procedure 23(a)(2). 167 Under that standard, the district court concluded that decertification of the promotions class was required because:

(1) the Court’s examination of the workers’ statistical analysis in the original certification decision was not sufficiently “rigorous” to assess whether it raised questions common to the class under Rule 23(a)(2);
(2) the workers’ statistical and anecdotal evidence failed to establish such commonality because it did not provide “significant proof” that there existed both a “general policy of discrimination” and a “common injury”;
(3) the delegation of subjective decision-making to Nucor supervisors was not, without more, a sufficiently uniform policy to present “‘common’ issues appropriate for resolution on a class-wide basis”; and
(4) even if the workers had identified a common question of law or fact satisfying Rule 23(a)(2), they failed to independently satisfy Rule 23(b)(3)’s requirements that common issues predominate and that the class action is a superior litigation device.

The workers appealed, and the Circuit Court reversed decertification. In doing so, it held that the workers had advanced enough glue of commonality to support a post-*Dukes* certification. Noting the significant statistical and broad-sweeping anecdotal evidence of hostile environment and racial animus, the Court held:

Here, for a liability determination in a disparate treatment claim, the workers’ statistical and anecdotal evidence, especially when combined, thus provide precisely the ‘glue’ of commonality that *Wal–Mart* demands. Such a claim requires proof of a “systemwide pattern or practice” of discrimination such that the discrimination is “the regular rather than the unusual practice. The required discriminatory intent may be inferred upon such a showing.168

The Circuit Court also acknowledged significant differences from *Dukes*, including the class size. Whereas Wal-Mart’s female workers consisted of millions of employees, working across thousands of stores, Nucor workers concerned approximately 100 putative class members in a single facility. In *Dukes*, the Supreme Court found it unlikely that thousands of managers across different regions would exercise their discretion in a common way without evidence of common direction. The Fourth Circuit found that here the workers provided evidence supporting their allegation of a common, racially-based exercise of discretion throughout the plant.

In a strongly worded dissent, Judge Agee noted that a plaintiff who brings a

167 Id.
168 Id, at *15 (citations omitted).
class-wide charge of discrimination must traverse a “wide gap” between his claim of individual mistreatment and a class-wide harm. The plaintiff could do so by offering “significant proof” that an employer “operated under a general policy of discrimination ... [that] manifested itself in hiring and promotion practices in the same general fashion.” 169 Where the majority found that a discriminatory intent may be inferred from statistical showings, the dissent urged that the Court must scrutinize and test relevant statistical evidence at the certification stage and should not merely “defer to the plaintiff’s expert. 170

*Nucor* demonstrates that, particularly with manageable, single-site employment classes, the landscape of commonality glue, and how much evidence satisfies that necessary element, remains shifting.

IV. Conclusion

Only time will reveal the true impact of the Supreme Court’s decisions affecting employment-related class action litigation, as the lower courts continue to digest and grapple with *Dukes* and its progeny. Most defendants would agree that over the past several years the Supreme Court has changed the landscape of class action litigation in an encouraging direction. The Court has reacted to plaintiffs’ overreaching attempts to certify classes seeking primarily monetary damages under the less burdensome Rule 23(b)(2) standard, their attempts to “forum shop” class action lawsuits, their attempts to disregard class action waivers, and their attempts to deny defendants access to federal courts. In the meantime, the typical employment class action is becoming smaller, more focused, and generally striking only a single overarching policy or practice. Defendants can only hope that the Supreme Court’s decisions over the next several years will be as enlightened as its *Dukes* and post-*Dukes* decisions in addressing these new, more tailored actions. But the employment class action is far from dead.

169 Id. at *34.
170 Id.