

## Saved From The Bell?

Law360, New York (June 29, 2011) -- Wal-Mart Stores Inc. v. Dukes appears to set standards that greatly expand a defendant's rights to individual determinations of each class member's liability and damages. Because the court's rulings on the issue of statistical sampling as a substitute for individual proof are tethered to the Due Process Clause, they should apply to actions brought under state class action rules as well.

In California, the case appears inconsistent with — and thus may effectively overrule — *Bell v. Farmers Insurance Exchange*, 115 Cal. App. 4th 715 (2004) ("Bell III"), a case that plaintiffs' lawyers regularly rely on to explain how a class action may manageably be tried using statistical extrapolation. If Bell III is no longer good law, the impact on class certification in wage and hour cases could be enormous.

Bell III involved a class of 2,500 insurance adjusters alleging they were misclassified as exempt and thus not paid premium pay for their overtime hours. Farmers argued that the adjusters were covered by the administrative exemption, but the trial court granted summary adjudication to the adjuster class on the exemption defense, holding that adjusters were "production workers" ineligible for the administrative exemption.

The issue remained, however, how to determine which class members worked overtime, and for those who worked overtime, what their individual recovery should be. The appellate court ultimately approved the trial methodology that the trial court had used by which a manageable sample of class members was deposed to obtain their testimony on the amount of overtime they worked. Experts for each side then presented to the jury on a proper resulting interpretation of the average number of overtime hours worked and the resulting calculation of classwide damages.

Notably, the court of appeal held that the defendant's only due process right in this procedure was to present a defense as to the total damages owed to the class. The court thus approved of a procedure by which the damages phase of the trial was only intended to calculate total liability to the class. In ruling that defendant's lacked a due process right to individualized determinations, the court relied primarily on federal precedent, finding that there was little state court precedent on point.

Dukes appears inconsistent with Bell III. The court in Dukes addressed several distinct issues, but Section III(C) of the opinion addressed the issue of using statistical sampling to establish aggregate back pay owed to a Rule 23(b)(2) class. The lower courts had allowed certification under Rule 23(b)(2), which allows a class to be certified where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

The Supreme Court noted that Rule 23(b)(2) certification is appropriate only when a single, indivisible remedy would provide relief to each class member. To comply with this requirement of an indivisible remedy, class counsel had sought an award of classwide backpay to be determined through a process, as in Bell III, that generated a single backpay figure through statistical sampling.

More specifically, the proposed procedure, which the Supreme Court derisively dubbed "Trial by Formula," entailed taking a sample of the class and having both liability and damages determined as to that sample based on deposition testimony.

Total damages for the class were to be extrapolated by taking the average backpay owed to the sample, multiplied by the percentage of the sample found to have experienced discrimination, and that figure was to be multiplied by the number of class members to calculate total damages. Just as in Bell III, the methodology was entirely focused on determining the "total damages" owed to the class without any concern as to whether individuals within the class who lacked a right to recover nonetheless recovered damages.

The Supreme Court held that the "Trial by Formula" procedure ran afoul of the Due Process Clause of the United States Constitution. The court explained that such a procedure was impermissible "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right."

From this premise, the court concluded that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." Because this conclusion rested on the Due Process clause, it should apply in cases arising either in state court or federal court.

This pronouncement from the Supreme Court casts serious doubt on the continued validity of Bell III. Even though the court was addressing certification under Rule 23(b)(2) and a claim under Title VII rather than a wage/hour claim, there is no apparent reason why that distinction should be meaningful. The prohibition on Rule 23 "abridging, enlarging or modifying any substantive right," applies just as well to claims asserted under Rule 23(b)(3) — where wage and hour class actions are routinely certified.

Moreover, just as an employer is permitted to defend itself against a claim that it discriminated against a particular employee, it is entitled to defend itself against a claim that it wrongly failed to pay overtime to an employee, that it deprived the employee of a meal period, or that it forced an employee to work off the clock.

Furthermore, as mentioned above, Bell III derived its holding from citation to federal cases. Indeed, much of California's class action rules are derived from federal precedent interpreting Rule 23. The federal cases Bell III cites are now apparently bad law, having been rejected by the highest federal court in the land. Furthermore, many class actions are now removed to federal court under the Class Action Fairness Act. To the extent there is a divergence in federal and state class action jurisprudence, Dukes will control in any case that makes its way into federal court.

Dukes thus has the potential to drastically reduce the number of viable wage/hour class actions. If a defendant is entitled to insist on individualized determinations to ensure that each class member is entitled to damages, then this would be a factor that would weigh against finding the class action vehicle to be a superior vehicle for litigating a case rather than individualized actions.

Without access to the procedural tool of resolving the claims of a large class through sampling a small subset of the claims, many class actions will simply become unmanageable. As such, although Dukes was directed at an unusually unwieldy Title VII class, it very well could snuff out many run-of-the-mill wage/hour class actions.

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