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Class Action ADVISORY ■

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California Supreme Court Issues Its Own *Dukes* Opinion

By David Venderbush

The California Supreme Court recently issued a broad class action decision that sounds a lot like the United States Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*. Both decisions reverse certification of employment classes, both turn on the rights of defendants to present affirmative defenses, highlight the importance of managing individualized issues, and warn about the limitations of trials using flawed statistical sampling models. The California decision goes even farther, explicitly directing courts and parties to address all of those issues with specific trial plans at the class certification stage.

Duran v. U.S. Bank National Association (USB)

The new California Supreme Court opinion is *Duran v. U.S. Bank Nat. Assn.*, __ P.3d __, 2014 WL 2219042 (Cal. May 29, 2014). *Duran* reversed "an exceedingly rare beast: a wage and hour class action that proceeded through trial to verdict." The *Duran* court criticized the trial court's statistical trial plan model that:

- limited liability testimony to a sample of 21 employees;
- precluded defendant USB from introducing relevant work habit evidence from any other class member; and
- extrapolated the liability finding to the entire class of 260 members.

The court's rejection of that plan appears to harmonize California state practice with federal principles, particularly those articulated in *Dukes*.

The Right to Litigate Affirmative Defenses in Class Actions

In tone and language, *Duran* appears to be the *Dukes* of California, attempting to rein in runaway class certifications in the "Golden State." The California Supreme Court explicitly equated state and federal law and directly quoted *Dukes* for the principle that "'a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" The trial court's statistical trial plan was flawed, because it violated the rule that "any trial must allow for the litigation of affirmative defenses." In language that will be familiar to *Dukes* readers, the *Duran* court said, "The class

action procedural device may not be used to abridge a party's substantive rights." *Compare Dukes*, 131 S.Ct. at 2561 (cannot interpret Rule 23 to "abridge … any substantive right"). The court held that the trial court "significantly impaired USB's ability to present a defense" by extrapolating liability findings from a small, skewed sample group to the entire class and by refusing to admit relevant evidence relating to class members outside the sample group. The court rejected the trial court's liability finding because "[t]he injustice of this result is manifest."

Limitations on Statistical Proof Methods

Also like *Dukes*, the *Duran* court dialed back on the use of statistical procedures in class action. *Duran* cited *Dukes* as a decision that questioned the use of statistical sampling, and plaintiffs in both cases used the same statistical expert, Dr. Richard Drogin. Both courts rejected sampling plans that were "innovative" (*Duran*) or "novel" (*Dukes*) because of their negative effect on "substantive rights," and both rejected specific attempts to use statistics as "common proof" (*Duran*) or "proof of commonality" (*Dukes*). The *Duran* court allowed that "it may be possible to manage individual issues through the use of surveys and statistical sampling," but that "[s]tatistical methods cannot entirely substitute for common proof." The court cautioned, "[i]f statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate." The court identified the trial court's plan as "seriously flawed," and explained in detail how the sample size was too small, the sample was not random, and the method resulted in an intolerably large margin of error. But the court was equally concerned that reliance on statistical proof failed to "satisfy concerns of fundamental fairness" because it undermined the defendant's right to present relevant individualized evidence.

Manageable Trial Plans at the Class Certification Stage

But *Duran* is also a development on *Dukes*. *Duran* elevated manageability to equal status with predominance as a class certification criterion. "While common issues among class members may have been sufficient to satisfy the predominance prong for certification, the trial court also had to determine that these individual issues could be effectively managed in the ensuing litigation." Manageability of individual issues is such an important consideration that, in the *Duran* court's view, the certification of a class is "necessarily *provisional*" to "development of a trial plan that would manage the individual issues" presented in the case. The court reversed the judgment below because the trial court "did not manage individual issues. It ignored them."

Duran directed "[c]lass certification is appropriate only if … individual questions can be managed with an appropriate trial plan." In cases involving statistical evidence, "the [trial] court should consider *at the certification stage* whether a trial plan has been developed to address its use." A trial court should not accept "assurances that a statistical plan will eventually be developed," but should "obtain such a plan before deciding to certify a class action." Although *Dukes* did not address trial plans, the new importance of a detailed trial plan under California state law is consistent with Ninth Circuit law. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (affirming denial of class certification where "there was no manageable trial plan adequate to deal with individualized issues").

The Need for "Glue"

Perhaps the most obvious clue of the *Duran-Dukes* connection is the *Duran* court's adoption of the *Dukes* class action commonality metaphor of "glue that binds class action members together." *Compare Dukes*, 131 S.Ct. at 2552 (requiring "some glue holding the alleged *reasons* for all those [employment] decisions together"). Like *Dukes*, the new California decision expands the defendants' toolkit for opposing class actions and places greater burdens on plaintiffs to articulate why class action treatment is justified. The decision points California state class action practices toward the same, more conservative path that the U.S. Supreme Court signaled three years ago in *Wal-Mart Stores, Inc. v. Dukes*. Whether it will have that affect—and whether state trial judges will be as resistant to change as some federal district courts have been after *Dukes*—only time will tell.

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