The Future of ERISA Class Actions

Panelists:
Ian H. Morrison, Seyfarth Shaw LLP
Theresa S. Gee, O’Melveny & Myers LLP
R. Joseph Barton, Cohen Milstein Sellers & Toll, PLLC
Catha Worthman, Lewis, Feinberg, Lee, Renaker & Jackson, PC

Wal-Mart Stores, Inc. v. Dukes – Background

• Pay and Promotion Allegations
  ➢ Company systematically pays women less than their male counterparts
  ➢ Promotes men to higher positions at faster rates than women

• Class Action Allegations
  ➢ Suit filed on behalf of 1.6 million “past, present, and future” female employees of Wal-Mart’s retail stores in the United States (3,400 stores)
  ➢ Class allegations not tested until after class discovery ended
  ➢ Class claimed that the system of local discretion allowed discrimination to take place and supported that allegation with expert testimony
**Wal-Mart v. Dukes: Holdings**

- **The majority decision:**
  - Plaintiffs failed to satisfy the “commonality” requirement of Rule 23(a)(2) because the issue of discrimination could not be decided on a nationwide basis with a single answer
  - Commonality overlaps with the merits and an inquiry into the merits in this respect is permissible if needed to resolve Rule 23 questions

- **Unanimous Supreme Court also ruled:**
  - Class action should not have been certified as a non-opt out class under Rule 23(b)(2) because plaintiffs sought non-incidental monetary relief

**Differing Views**

- **Plaintiffs: Dukes Should Not Affect Most ERISA Class Certifications**
  - *Dukes* involved unique facts, & denied certification in an employment discrimination case alleging a large nationwide class where the “common” policy was described as supervisorial discretion, with literally millions of subjective decisions at issue; not applicable to many of our cases.

- **Defendants: Dukes Has and Will Continue to Result in More Frequent Denials**
  - *Dukes* mandated a stricter, genuinely rigorous analysis for commonality that will be difficult to meet in many ERISA cases; it will also prevent certification under (b)(2) seeking monetary relief payable to individuals; increased court skepticism of non-opt out classes seeking individual monetary relief.
Scorecard: Post-Dukes Results So Far

**Upholding Certification**


**Denying Certification**

- *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 654 F.3d 618 (6th Cir. 2011)

Impact of Dukes’ Rule 23(a) Holding?

  - No showing that class members suffered the same injury; class members suffered different damages in a different manner
  - No showing that key common issues of fact or law are capable of resolution in a class action
  - Assessment of damages will become “a massive series of individualized analyses”

  - Finding Dukes inapposite in case challenging CIGNA’s national policy as to coverage of autism spectrum disorder
Dukes’ Rule 23(b) Analysis

• Ordinarily, claims for individual monetary relief should be certified under Rule 23(b)(3)
  ➢ But Court’s holding only applied to Rule 23(b)(2) and to claims for compensatory and punitive damages.
  ➢ Can the following constitute individual monetary relief in ERISA cases?
    ▪ Section 502(a)(2) relief for “the plan”
    ▪ Section 502(a)(1)(B) benefits, or are these merely “incidental” to declaratory relief
    ▪ Certain forms of “equitable relief” under Section 502(a)(3)

• Rule 23(b)(3) predominance and superiority are generally harder to meet than the Rule 23(a) requirements
  ➢ ERISA plaintiffs (and defendants) have typically been reluctant to seek certification under (b)(3), seeking certification under (b)(1) instead

Impact of Dukes’ 23(b) Holding?

• Groussman v. Motorola, supra: Rule 23(b) certification inappropriate because no risk of varying or inconsistent decisions; Rule 23(b)(3) certification inappropriate because common questions of law or fact do not predominate.

• Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan, 654 F.3d 618 (6th Cir. 2011) (class certification reversed because district court did not conduct “rigorous analysis” as to Rule 23(a) and that a Rule 23(b)(3) class action was not superior because entering judgment and allowing the case to be a “bell weather” would have been more efficient).

• Bacon v. Stiefel Laboratories, Inc., 2011 U.S. Dist. LEXIS 79599 (S.D. Fla. July 21, 2011) (claims turned on questions of reliance, investment strategy and damages, all issues which necessitated individual inquiries and defeated certification under Rule 23(b)(3)).

Alternative Class Treatment Approaches After *Dukes*

- Rule 23(c)(4): “When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”
- Certification followed by decertification when individual issues predominate, such as when determining causation and harm
- Renewed focus on declaratory and truly injunctive relief
  - Orders to force plan fiduciaries to recalculate benefits
  - Rule 23(b)(2) requires “final injunctive relief” and an order to recalculate may not be final; but, calculation of benefits may be purely formulaic
  - Certain creatively fashioned “equitable” remedies under Section 502(a)(3) may be highly individualized

Do You Need A Class Action?

- Actions on Behalf of the Plan
  - **Pre-Dukes**
    - *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006): Good faith effort to join other participants determined on case-by-case basis
    - *Tullis v. UMB*, 515 F3d 673 (6th Cir. 2008): No *de facto* requirement to bring actions on behalf of the plan as class actions
  - **Post-Dukes**
Do You Need a Class Action?

• Claims for Benefits or Violations of ERISA or the Plan
  ➢ Seeking a declaratory judgment which leads to monetary relief
    ▪ *Barnes v. AT&T Pension Benefit Plan*, 270 F.R.D. 488 (N.D. Cal. 2010)

Do You Need a Class Action?

• Does the lack of “need” undermine the appropriateness of a class action?

• Does an assessment that an action would be better brought by the DOL prevent certification?
Do You Need A Class Action?

- How Do Plaintiffs’ Attorneys Get Paid Without a Class?
  - Option #1: Paid by Defendant(s) Under ERISA
    § 502(g)(1) – Common Factor (except 7th Cir.): The party requesting fees confers a common benefit on all participants and beneficiaries of an ERISA plan (and sometimes) or resolves significant legal questions regarding ERISA.

- Option #2: Common Benefit Doctrine
  “Nothing in ERISA indicates that Congress intended to preempt the common benefit doctrine.”
  *Florin v. Nationsbank*, 34 F.3d 560 (7th Cir. 1994) (quoting Attorney’s Fees Under ERISA: When is an Award Appropriate? 71 Cornell L. Rev. 1037 (1986)).

AT&T v. Concepcion
Supreme Court Holdings

• FAA preempts California’s Discovery Bank rule
• Class action arbitration waivers thus enforceable in consumer class actions
  ➢ Not unconscionable or against public policy.
• Note: One of many pro-arbitration rulings by Supreme Court

Concepcion: Implications

• ERISA not intended to preclude arbitration. Kramer v. Smith Barney, 80 F.3d 1080 (5th Cir. 1996); but see Amaro v. Cont’l Can Co., 724 F.2d 747, 750 (9th Cir. 1984) (ERISA claims not arbitrable)
  ➢ If arbitration applies to ERISA claim, agreements can exclude class claims
  ➢ DOL regulation limits arbitration of benefits claims. 5 F.R. 70246, 70253 (Nov. 21, 2000)
    ▪ But arbitration explicitly permitted if pursuant to collective bargaining. (29 C.F.R. 2560.503-1(b)(6))
    ▪ And as one level of claims process, if voluntary. (29 C.F.R. 2560.503-1(c)(3))
Concepcion: Implications

- **Fiduciary claims issues:**
  - If claim is brought on behalf of plan under ERISA § 502(a)(2), do participants’ agreements control? *(See release cases)*
  - Participants may not be bound by plan’s agreement to arbitrate. *Comer v. Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006)
  - Do participants’ employment agreements survive retirement?
  - Precluding class or collective arbitration may violate NLRA concerted activity protections. *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012)

Certification of Claims Seeking Relief in *Cigna Corp. v. Amara*

**Dukes**
- Rule 23(a)(2): Common Questions & Common Answers
- Rule 23(b)(2): Cannot Be Used To Certify Claims for *Individualized* Relief

**Amara**
- **Pros:** *Amara* was a class action & either trust or beneficiary should be made whole
- **Cons:** Participants must show harm and causation
- **Pros:** Relief such as reformation & surcharge are equitable
- **Cons:** Must show actual harm, which could include detrimental reliance