

The Impact Of Dukes On Antitrust Class Actions

Law360, New York (June 24, 2011) -- Litigators waited with baited breath for the U.S. Supreme Court's decision in *Dukes v. Wal-Mart Stores*, which they hoped would be a watershed opinion on Rule 23's requirements for class certification. It appears, however, that *Dukes* did not quite live up to that hope or hype for antitrust cases, although the opinion does offer a few points worthy of consideration by those seeking or opposing class certification in antitrust class actions and may offer some guidance in this area of the law.

Dukes was a gender discrimination class action brought against Wal-Mart, on behalf of 1.5 million current and former female employees, for backpay and injunctive and declaratory relief. The class plaintiffs' theory of the case was that Wal-Mart's policy of allowing individual store managers to determine promotions and raises, within limits and subjectively in their individual discretion, disparately impacted all female employees across all of Wal-Mart's 3,400 stores in the U.S. Slip op., at 1-2, 4. The district court certified the class (not entirely as the plaintiffs wished), and the Ninth Circuit affirmed (for the most part).

In a 5-4 decision, the Supreme Court reversed, holding that class certification was not appropriate, primarily because no common questions of law or fact existed. A crucial issue is that the court reversed for the plaintiffs' failure to satisfy Rule 23(a)'s requirement of commonality, not Rule 23(b)(3)'s requirement that common questions of law or fact predominate questions affecting individual members of the class and that the class action device is "superior to other available methods for fairly and efficiently adjudicating the controversy." Slip op., at 8.

The court expressly disclaimed that it was speaking to Rule 23(b)(3)'s predominance and superiority inquiry. *Id.* at 5 n.2. This disclaimer is critical because of the low threshold for

provision's predominance and superiority rubric