ERISA Class Certification: Strategies to Defeat or Certify the Class After Dukes and Comcast
Navigating Issues in Class-Wide Proof of Damages, Commonality, Adequacy and Class Conflicts

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ERISA Class Certification Strategies to Defeat or Certify the Class After Dukes and Comcast

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Overview of Class Certification Rules
It Takes a Village

- Class actions likely originated from “group litigation” in medieval England, dating back to the year 1200. At that time, groups of people were either being sued or suing based on societal structures such as villages, towns, parishes or guilds. The English courts did not question the right of plaintiffs to sue on behalf of a group.
The Modern Day Arrives in 1966

- Rule 23 Created in 1966

- Although class actions as we know them have only been around for about 50 years, they account for a significant percentage of civil filings

- During the last year alone, there were roughly 5,000 class action decisions published in federal courts
Rule 23(a)

(1) **numerosity**: “the class is so numerous that joinder of all members is impracticable;”

(2) **commonality**: “there are questions of law or fact common to the class;”

(3) **typicality**: “the claims or defenses of the representative parties are typical of the claims or defenses of the class; and”

(4) **adequacy**: “the representative parties will fairly and adequately protect the interests of the class.”
Rule 23(b)

(1) Individual cases would risk incompatible standards of conduct, or adjudication as to one class member would be dispositive as to others

(2) Seeks final injunctive relief

(3) Common issues predominate; class action is superior mechanism

› Heightened commonality test

› Allows opt-outs
Select Rule 23 Provisions

- FRCP 23(c)(4): particular issue classes

- FRCP 23(e)(2): settlement must be “fair, reasonable, and adequate” if it binds class members

- FRCP 23(f): allows discretionary interlocutory appeal
Pre-Wal-Mart v. Dukes: From “Merits Avoidance” to “Rigorous Analysis”

  - “[N]othing 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.”

  - The Court stated that District Courts must conduct “a rigorous analysis” to determine whether the requirements of Rule 23 are satisfied.
  - “[C]lass determinations generally involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of actions.”
Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)
Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)

- **Background:**
  - Putative class of 1.5 million female employees
  - Claimed Title VII violation:
    - Local managers’ pay and promotion decisions disproportionately favored men, having a disparate impact on women; and
    - Wal-Mart's refusal to cabin its managers' authority amounted to disparate treatment
  - The District Court certified the class, finding that respondents satisfied Rule 23(a) and Rule 23(b)(2)
  - The Ninth Circuit substantially affirmed
Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)

- 5-4 decision authored by Scalia, J. reversed as to both 23(a) commonality & 23(b)(2).

- “Rule 23 does not set forth a mere pleading standard. A party seeking class certification . . . must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.” (emphasis in original)

- Cited Falcon for the “rigorous analysis” standard:
  - “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”

- Specifically rejects contention that Eisen precludes a court from considering, on class certification, factual issues that overlap with the merits.
As to Rule 23(a) commonality:

- “Common Question”
  - Must be provable with common evidence
  - Must have the same answer for all class members
  - Must be central to the validity of the claim
- “What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” (emphasis in original)
Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)

- As to Rule 23(a) commonality:
  - Court is skeptical of “promises” of common proof; instead, Court is interested in the evidence that would be offered at trial
  - Court considered the merits of the expert testimony offered by plaintiff
    - “The District Court concluded that Daubert [v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)] did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . .”
As to Rule 23(b)(2):

- Certification for injunctive relief class is inappropriate where “the monetary relief is not incidental to the injunctive or declaratory relief”
  - Claims for individual back pay are not incidental to injunctive relief
- “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them’”
  - By contrast, Rule 23(b)(3) contains additional procedural safeguards necessary under Due Process Clause
- Ginsburg, J. concurrence and dissent agrees with this part of the holding
ERISA Class Certification:
Strategies to Defeat or Certify the Class
After *Dukes* and *Comcast*

Sarah A. Zumwalt, Principal
Comcast Corp. v. Behrend

- Antitrust suit by 2 million Comcast subscribers
- Plaintiffs alleged 4 theories of antitrust violation
- District court held that one theory – overbuilder impact – could be measured on a class-wide basis
Comcast Corp. v. Behrend

- Class certified under Rule 23(b)(3) – common issues predominate
  - But court relied on expert damages analysis that did not separate out effects from 4 theories

- Court of appeals affirmed
  - Said attack on merits of methodology had no place in class cert analysis
Comcast Corp. v. Behrend

- Supreme Court
  - Rule 23 is not merely a pleading standard
    - Overlap with merits analysis is fine
  - Rule 23(b)(3)’s predominance requirement is even more demanding than 23(a)’s commonality requirement
  - Damages model must be consistent with theory of liability
Class-Wide Proof of Damages

- Plaintiffs fail to satisfy *Comcast*

  - *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).
    - Vacates grant of class cert and remands
    - A “hard look at the soundness of statistical models that purport to show predominance” is required.

    - Class cert denied – plaintiff provided no model for calculating actual damages on a class-wide basis.
Class-Wide Proof of Damages

- Plaintiffs satisfy *Comcast*
On the other hand:

- **Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013).**
  - Reads *Comcast* narrowly – focuses on disconnect between theory of liability and proof of damages
  - Suggests issue certification

- **Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 580 (S.D.N.Y. 2013).**
Class-Wide Proof of Damages

ERISA issues:

Stock drop cases:
- Pin plaintiffs down to artificial inflation rather than alternative investment theory early on

Winners and losers
- Standing issue

Absent class members have right not to have named plaintiffs make arguments that hurt them.

Experts become more crucial
Commonality and Claims Challenging ERISA Disclosures


  - Applied *Wal-Mart* to conclude there was no commonality for a proposed class of plans challenging how Medicare offsets were calculated; plans had different language on the issue and different standards of review.
Commonality and Claims Challenging ERISA Disclosures

- Cert may be denied even when there has been a single misrepresentation
  - Who read/heard it?
  - What did they understand?
  - Who relied?
  - Outside advice?
  - What actions taken in reliance?
  - How harmed and how to calculate harm?

  - Denied ERISA disclosure class due to differences regarding what class members relied on.
Commonality and Claims
Challenging ERISA Disclosures


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Adequacy and Class Conflicts
Court explained that commonality (and typicality) “tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.”
Spano v. Boeing Co., Beesley v. Intl. Paper Co., 633 F.3d 574 (7th Cir. 2011)

- Claims included:
  - Causing plans to pay allegedly excessive fees, including revenue sharing payments;
  - Maintaining allegedly imprudent investment options; and
  - Concealing material information from participants about the investments

- Proposed class defined as, in court’s words: “Anyone, in the history of Time, who was ever a participant in the Boeing Plan, or who in the future may become a participant in the Boeing Plan”
Seventh Circuit reversed

“The question whether to certify a class asserting section 502(a)(2) claims is, however, a complex one if the underlying plan takes the defined-contribution form.”

In pre-\textit{Dukes} decision, relies on \textit{Falcone} for proposition that, to meet typicality, “there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group.”
Seventh Circuit reversed, cont.

- Typicality: “[A] class representative in a defined-contribution case would at a minimum need to have invested in the same funds as the class members”
  - Therefore, if the class is focused on the holdings in two funds, it is irrelevant to plan participants who did not invest in those funds

- Adequacy: “absentee members of a class will not be bound by the final result if they were represented by someone who had a conflict of interest with them or who was otherwise inadequate”
  - Classes must not be “defined so broadly that some members will actually be harmed” by the relief sought

- District court on remand has certified a narrower class, with multiple sub-classes

- Class for “administrative fee claim” = “All participants or beneficiaries . . . who had an account balance at any time between September 28, 2000 and December 31, 2006, as all participants during that time paid recordkeeping fees.”

- Sub-classes – all limited to six or seven year period:
  - Mutual fund sub-class = those who invested in funds
  - Small-cap Fund sub-class = those who invested in the Small Cap Fund
  - Technology Fund sub-class = those who invested in Technology Fund and whose fund performance underperformed S&P 500 Index Fund by more than 5 bps for investments management
  - Company Stock Fund subclass = those who invested in company stock fund and whose investment underperformed the company stock
Abbott v. Lockheed Martin Corp., 725 F.3d 803 (7th Cir. 2013)

- District court had previously certified class, in a decision that was remanded by the Seventh Circuit in 2011 (at 412 Fed. Appx. 892) based on Spano v. Boeing, 633 F.3d 574 (7th Cir. 2011).

- On remand, district court denied certification as to certain sub-classes.

- The Seventh Circuit reversed, holding that certification was appropriate
  - The revised class definition was narrowly tailored to avoid conflicts—plaintiffs had modified the proposed class definition to be limited only to plan participants “whose accounts held units of the [SVF] from September 11, 2000 through September 30, 2006 and whose SVF units underperformed relative to the Hueler FirstSource Index.”
In re Schering Plough Corp. ERISA Litig., 589 F.3d 585 (3d Cir. 2009)

- Lawsuit by plan participant for decline in value of company stock fund
- Third Circuit reverses grant of class certification due to typicality and adequacy concerns arising from named plaintiff having signed a release of claims
  - Would make named plaintiff subject to unique defenses
  - Might result in named plaintiff having different incentives than absent class members in pursuing certain claims that she might otherwise have released, such as individualized augmented benefits
Best Practices to Defeat Class Certification
Fiduciary Safe Harbor - Overview

- § 404(c) provides plan fiduciaries a safe harbor from liability for investment losses incurred by plan participants.

- Where a participant “exercises control over the assets in his account,” a fiduciary “shall not be liable . . . for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control . . . .”
Uncertainty as to Scope of 404(c) Protection

- Question re: scope of 404(c) safe harbor protection:
  - What constitutes losses resulting from a participant’s exercise of control?
  - Does the safe harbor protect a fiduciary from breaches in connection with initial investment selection?

- DOL view:
  - Even when the conditions of 404(c) are satisfied, the safe harbor does not protect a plan fiduciary from liability for imprudently selected options.
  - Heavily litigated question – decisions go both ways.
  - DOL position memorialized in recent regulations.
404(c) caselaw

- *Howell v. Motorola, Inc., & Lingis v. Dorazil*, 633 F.3d 552 (7th Cir. 2011)
  - ERISA § 404(c) does not apply to “core decisions” as to which investments would be presented to participants

- *Compare with Langbecker v. EDS*, 476 F.3d 299 (5th Cir. 2007)
  - Reverses certification of a class of participants allegedly harmed by the inclusion of an imprudent investment option where the district court failed to consider the effect of § 404(c)
  - Rejects DOL view that 404(c) does not apply to fiduciary investment decisions as inconsistent with a plain reading of the statute
Class action on behalf of all participants in all plans invested in an account holding primarily commercial real estate

Complaint alleges that the account lacked sufficient liquidity resulting in a “withdrawal freeze” in 2008, and a decline in value from 2008-2009

Court denied certification:

- Commonality not established as to liability: Many class members had notice of restrictions; some “may have contributed to their alleged damages by placing assets into the” account
- Commonality not established as to loss:
  - Expert testimony was that one would need to look at the preferred investment alternative of each plaintiff
  - Court relies on *Wal-Mart v. Dukes*: the key problematic question is “what effect did this alleged breach have on each class member”
In re Principal U.S. Property Account Litig., No. 10-198
(Sept. 30, 2013 S.D. Iowa)

- Court denied certification, cont.:
  - For same reasons that commonality was not established, the court also finds that the claims of the named plaintiffs were not typical and that they were not adequate representatives
  - Rule 23(b)(3) also not satisfied:
    - Recognized that predominance criteria is more demanding than commonality; relies on Comcast: “Questions of individual damage calculations will inevitably overwhelm questions common to the class.”
    - Class is not superior because, even though individual trials would be unwieldy, individualized nature of damages give individuals a strong interest in prosecuting separate claims.

- Eighth Circuit denied petition for interlocutory appeal
Rule 23(b)(1) classes

- Plaintiffs argue that ERISA claims are “paradigmatic” example of 23(b)(1) class. *E.g.*, *Tussey v. ABB*.

- But 23(b)(1) focuses on types of harm to a trust that are remedied differently than most ERISA fiduciary breach cases:
  - As the Supreme Court explained in *Amchem Products, Inc. v. Windsor*, 251 U.S. 591 (1997), and reiterated in *Dukes*, 23(b)(1) applies in cases such as “limited fund” cases, where a number of persons make a claim to one fund that may be insufficient to satisfy all claims.
  - By contrast, current fiduciary litigation seeks recovery personally from the fiduciary, as allowed under ERISA § 409(a)—claims are not against a common fund or trust.
Rule 23(b)(2) classes

- Given broad remedies under ERISA’s equitable relief provision, like reformation, this section is viewed as available under ERISA. *E.g., Cigna v. Amara*
  
  › Calendared for oral argument in Second Circuit Feb. 10, 2014

- But after Wal-Mart, the Second Circuit Court of Appeals reversed the certification under 23(b)(2) of *Haddock v. Nationwide*, 460 Fed. App’x 26 (2d Cir. 2012):
  
  › “[I]f plaintiffs are ultimately successful in establishing Nationwide's liability on the disgorgement issue, the district court would then need to determine the separate monetary recoveries to which individual plaintiffs are entitled from the funds disgorged. This process would require the type of non-incidental, individualized proceedings for monetary awards that *Wal–Mart* rejected under Rule 23(b)(2).”
Courts have certified a number of ERISA classes under Rule 23(b)(3)

  - Differences among plans irrelevant; insurer acted uniformly with respect to administration of its retained asset account program
  - Existence of affirmative defense not sufficient to defeat superiority as court can modify its order if discovery shows sufficient notification to plan fiduciaries of the complained of practice to accelerate statute of limitations; sub-classes available

  - Claim for disgorgement not appropriate under 23(b)(1), but available under 23(b)(3)

- Trustees sued for alleged breach of ERISA fiduciary duties in assessing and not disclosing a “cost transfer subsidy fee”
  - Suit brought on behalf of all other plans charged the same fee
- Magistrate recommended denying class certification, district court granted class certification
- Sixth Circuit reversed, given the failure of a class to achieve superiority under FRCP 23(b):
  - Determining fiduciary status would require individualized inquiry of every contract term with each plan
  - It would be more efficient to have an individual action proceed to allow defendant to appeal, especially where the fund’s damages were in excess of $280,000
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