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## *Class Actions – Mass Torts, Aggregated Claims, New Threats*

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Professor Linda S. Mullenix  
University of Texas School of Law

## *Class Actions – Mass Torts, Aggregated Claims, New Threats*

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- Continuing issues in class certification:
  - Use of expert witness testimony and the *Eisen, Daubert* rules
  - Appropriate use of the (b)(2)/(b)(3) class categories
  - Punitive damage classes
  - Classwide arbitrations

## *Class Actions – Mass Torts, Aggregated Claims, New Threats*

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- *Dukes v. Wal-Mart, Inc.*, U.S. Dist. Ct. N.D. Cal., No. C 01-02252, 2004 U.S. LEXIS 11365 (June 21, 2004)
- Judge Martin J. Jenkins

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

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- Putative class of 1.5 million women employees
- 3,400 Wal-Mart, Sam's stores across country
- Class period: past five years
- Allegations of corporate culture of gender stereotyping that fostered workplace discrimination

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

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- Class definition:

*“All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.”*

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

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- Class wide allegations:
  - Class claims under Title VII 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, as amended 1991, 42 U.S.C. § 1981a(b)(1)
  - Women paid less than men in comparable positions, despite higher performance ratings and greater seniority
  - Women received fewer promotions to in-store management positions than men
  - Women who are promoted must wait longer than male counterparts to advance

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

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- Relief sought:
  - Classwide injunctive and declaratory relief
  - Lost pay
  - Punitive damages
  
- Relief not sought:
  - Compensatory damages on behalf of class
  - Ps severed racial discrimination claims by two named Ps



## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

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- Class certification hearing:
  - September 24, 2003
  - Oral argument over seven hours
  - Extensive briefing and volumes of documentary and testimonial evidence
  - Anecdotal evidence from class members re discriminatory attitudes held & tolerated by management
  - Competing expert witness testimony on:
    - issues relating existence of company-wide policies and practices (sociologist)
    - statistical evidence of classwide gender disparities attributable to discrimination (labor economist)

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

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- District court's decision:
  - Emphasis on two threshold points:
    - “resolution of this motion for class certification should not be construed in any manner as a ruling on the merits or the probable outcome of the case” (invocation of the *Eisen* rule)
    - “while the size of the proposed class is unique, the issues are not novel, and Plaintiffs claims are relatively narrow in scope.”

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision*

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- Motion for class certification granted in part, denied in part: (84 page decision)
  - with respect to Ps' claims for *equal pay*, Ps' motion granted and class certified for liability and all forms of requested relief
  - With respect to *promotion* claim, Ps' motion granted in part, denied in part:
    - Class certified with respect to liability issues for injunctive, declaratory relief & punitive damages
    - With respect to remedy of lost pay, class manageable only for challenged promotions where objective data available to document class members' interest in challenged promotion

*Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*  
*District court decision*

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- Court denied certification:
  - Ps' promotion claims for lost pay & punitive damages as to class members for whom no objective data available;
  - Finding: such Ps' claims unmanageable

*Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*  
*District court decision*

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- Standards for class certification:
  - Rigorous analysis standard (*Falcon*)
  - Broad discretion; certification decision may be revisited throughout
  - Review of merits should be limited to those aspects relevant to making certification decision on informed basis

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision*

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- Court's understanding of *Eisen* rule as applied to expert witness testimony at class certification:
- “The restriction on conducting a merits inquiry applies equally to the Court’s review of the expert testimony presented by the parties. Rather than resolving the ‘battle of the expert,’ and without conclusively ruling on admissibility, the Court’s role at the class certification stage is to determine whether the expert witness evidence adds probative value to the plaintiffs’ claims. See *Thomas & Thomas Rodmakers, Inc., v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162-63 (C.D. Cal. 2002).”

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision*

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- Findings (on Rule 23(a) requirements):
  - Ps satisfied all Rule 23(a) threshold requirements (numerosity, commonality, typicality, adequacy)
  - Numerosity uncontested
  - *Commonality & typicality* findings highly dependent on court's assessment of evidence relating to corporate culture and gender stereotyping:
    - Ps' experts: Dr. William Bielby, sociologist; Dr. Bendick, labor economics expert
    - D challenged Bielby's facts & opinions as unfounded and imprecise

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision*

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- **Court's response to Wal-Mart's challenge to Ps' experts:**
  - “Defendant also challenges Dr. Bielby’s opinions as unfounded and imprecise. It is true that Dr. Bielby’s opinions have a built-in degree of conjecture. He does not present quantifiable analysis; rather, he combines the understanding of the scientific community with evidence of Defendant’s policies and practices, and concludes that Wal-Mart is “vulnerable” to gender bias. Defendant rightly points out that Dr. Bielby cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. However, this is the nature of this particular field of science. See Fed. R. Evid. 702 (allowing “scientific, technical, or *other specialized knowledge* [that] will assist the trier of fact to understand the evidence”)(emphasis added).”



# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision*

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- Successful Daubert challenges at class certification:
  - *Corley v. Entergy*, 220 F.R.D. 478 (E.D. Tex.2004)(ct. grants D's motion to strike expert opinions of P's 2 experts on classwide damages)
  - *Yapp v. Union Pacific*, 301 F. Supp. 2d 1030 (E.D. Mo. 2004)(ct. grants P's motion to strike D's experts; methodology employed by D's experts in conducting survey regarding its hiring practices was not scientific and inherently unreliable)

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision: the (b)(2) certification*

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- **The Rule 23(b)(2) certification:**
  - **1991 amendment of Title VII:** permits plaintiffs in employment discrimination cases to recover punitive damages if defendant's alleged discrimination was intentional and P proves that the employer "engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to federally protected rights of an aggrieved individual."
  - ***Allison v. Citgo*, 151 F.3d 402 (5<sup>th</sup> Cir. 1998):**
    - P may recover monetary damages in a 23(b)(2) action only if those damages are "incidental" to the predominant form of declaratory or injunctive relief
    - Conversely, if monetary damages are predominant form of relief, class may not be certified as mandatory class

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision: the (b)(2) certification*

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- Further *Allison* standards:
  - “incidental monetary relief flows directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief”
  - In order for damages to be incidental to a Rule 23(b)(2) class claim, the damages should be at least capable of computation by means of objective standards; and
  - Damages should not be dependant in any significant way on the intangible, subjective differences of each class member’s circumstances

*Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*  
*District court decision: the (b)(2) certification*

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- Federal courts adopting *Allison* approach:
  - *Murray v. Auslander*, 244 F.3d 807, 812-13 (11<sup>th</sup> Cir. 2001)
  - *Miller v. Hygrade Foods Prods. Corp.*, 198 F.R.D. 638, 641-42 (E.D. Pa. 2001)
  - *Hoffman v. Honda of America Manufacturing, Inc.*, 191 F.R.D. 530 (S.D. Ohio 1999)

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)* *District court decision: the (b)(2) certification*

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- Seventh Circuit approach: *Jefferson v. Ingersoll, Inc.*, 195 F.3d 894 (7<sup>th</sup> Cir. 1999):
  - Eschewed *Allison*'s bright-line rules
  - Three possible options for handling Title VII claims under 23(b)(2) and (b)(3)
  - Approved possibility of divided or “hybrid” classes combining (b)(2) and (b)(3) provisions

## *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)* *District court decision: the (b)(2) certification*

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- Split among the Circuits: *Allison courts v. Ingersoll courts*:
  - *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 165 (2d Cir. 2001)
  - *Molski v. Gleich*, 307 F.3d 1155, 1164-67 (9<sup>th</sup> Cir. 2002)
  - *Taylor v. District of Columbia Water & Sewer Authority*, 205 F.R.D. 43, 48-51 (D.D.C. 2002)
  - *Reeb v. Ohio Dept. of Rehabilitation*, 203 F.R.D. 315, 323 (S.D. Ohio 2001)(rejecting Allison principles)
  - *Robertson v. Sikorsky Aircraft Corp.*, 200 WL 33381019, \*8 (D. Conn)

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision: the (b)(2) certification*

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- Other post-*Allison* developments:
  - *Allison* principles extended to non-Title VII (b)(2) damage class actions: see *Coleman v. GMAC*, 296 F.3d 443 (6<sup>th</sup> Cir. 2002)(extending *Allison* principles to Equal Credit Opportunity Act case)
  - *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5<sup>th</sup> Cir. 2004)(reaffirming core *Allison* concepts, but holding due process requires class notice when (b)(2) class seeks monetary damages, while opt-out provision is optional with the court)

# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision: the (b)(2) certification*

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- **Jenkins opinion in *Wal-mart* class certification on (b)(2) class:**
  - Aligns Northern District of Cal. with anti-*Allison* courts, citing *Robinson v. Metro-North; In re Monumental Life*
  - Relies on *Molksi v. Gleich* (9<sup>th</sup> Cir.)
  - Read *Molski* to require judge to ascertain the “intent of the plaintiffs in bringing the suit” – requires evaluation of the specific facts & circumstances of each case:
    - “This court has little difficulty concluding that here the equitable relief sought predominates over the claim for punitive damages,” and the plaintiffs’ claims for punitive damages “appears secondary in nature.”



# *Dukes v. Wal-mart, Inc. (N.D. Cal. June 2004)*

## *District court decision: the (b)(2) certification*

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- **Jenkins opinion in *Wal-mart* class certification on (b)(2) class:**
  - Ps' claim for punitive damages did not detract from the homogeneity or cohesiveness of the class
  - Lack of cohesiveness or homogeneity would defeat class certification
  - Courts may certify mandatory Rule 23(b)(2) punitive damage class with provision for notice and opt-out of class members (citing *Molksi, Ingersoll, Robinson, Monumental Life*)
  - Certification of the (b)(2) punitive damage class did not violate constitutional limits on punitive damage recovery as per S. Ct.'s 2003 *State Farm* decision

*Bazzle v. Green Tree Financial Corp.*: Arbitration Agreements and Class Actions

# Arbitration Agreements and Class Actions

- What Impact Does the Presence of an Arbitration Agreement Have on a Proposed Class Action Proceeding?
  - Impact on Possibility of Class Certification
  - Impact on Possibility of Classwide Arbitration
  - *Bazzle v. Green Tree*: Implications
  - Classwide Arbitrations? How and Where?

# Arbitration Agreements and Class Actions

- Traditional Litigation Postures:
- Defendants invoke arbitration clause to avoid class certification and class proceedings; seek stays pending arbitration
- Plaintiffs challenge validity and enforceability of arbitration clauses, to avoid stay of class proceedings in deference to arbitration

# Arbitration Agreements and Class Actions

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# Arbitration Agreements and Class Actions

- Changed Scenario Post-*Bazzle*:
- Defendants still invoke arbitration clauses
- Defendants still seek stays to avoid class certification
- Plaintiffs still seek to invalidate arbitration clauses
- New element: arbitrator may order class-wide arbitration, depending on clause
  - Focus now on drafting techniques to avoid or permit classwide arbitration

# Arbitration Agreements and Class Certification Issues

## Arbitration Agreements and Class Certification

- Three Different Possibilities:
- Clause invoked prior to class certification
- Clause cited during class certification
- Clause used as rationale for modifying (or possibly defeating) class certification



## Arbitration Agreements and Class Certification

- Prior to Class Certification:
  - Defendant invokes arbitration provision prior to motion for class certification
  - Defendant seeks stay to enforce arbitration provision of individual claim
  - Plaintiff challenges provision as unenforceable
  - Court may or may not act

## Arbitration Agreements and Class Certification

### During Class Certification Proceedings:

- *Threshold Rule 23(a) requirements:*
  - Typicality
  - Adequacy
  - Unique affirmative defense

## Arbitration Agreements and Class Certification

### Arbitration Clause as Rationale to Modify (or defeat) Class Certification:

- May create need for subclassing
- Presence of claimants with and without arbitration clauses: need subclasses to represent different interests

*Bazzle v. Green Tree Financial:*  
Are Classwide Arbitrations Possible?

*Green Tree Financial Corp. v. Bazzle et al.*, No.  
02-634

- From Supreme Court of South Carolina
- Reported at 123 S. Ct. 2402 (2003)
- Issue: In a contracts clause where the arbitration provision is silent concerning whether classwide arbitration may occur, may the arbitrator decide whether the arbitration may take the form of class arbitration?
- Disposition: vacated and remanded

## Green Tree Financial Corp. v. Bazzle et al. Decision:

- No majority decision
- Plurality by Breyer, joined by Scalia, Souter & Ginsburg
- Concurring and dissenting in part: Stevens
- Dissenting: C.J. Rehnquist, joined by O'Connor & Kennedy
- Dissenting: Thomas

*Green Tree Financial Corp. v. Bazzle et al.*  
Plurality Decision (Breyer):

- Question whether contract agreement forbids classwide arbitration is for arbitrator to decide
- Parties had agreed to submit “all disputes, claims, or controversies arising from or relating to the contract” to the arbitrator
- Dispute about that the arbitration contract means (whether it forbids classwide arbitration) is a dispute “relating to the contract”

## Consequences of the Green Tree Financial Corp. v. Bazzle et al Decision:

- To avoid possible classwide arbitration, contract drafters need clearly state that arbitration provisions are not intended to embrace classwide arbitration, *e.g.*:
- “neither party shall pursue class claims and/or consolidate the arbitration with any other proceedings . . . .”



## Consequences of the Green Tree Financial Corp. v. Bazzle et al Decision:

- Further Drafting Consequences:
- To avoid class treatment, clause should specify:
  - Each dispute to be decided as individual case
  - Parties agree no class or mass action treatment allowed

## *Consequences of the Green Tree Financial Corp. v. Bazzle et al Decision:*

- Drafting alternatives (for permitting classwide arbitration) — clause should specify:
  - Dispute may be decided on classwide basis
  - Arbitrator has exclusive power to decide how dispute is to proceed, procedurally and substantively
  - Arbitrator has exclusive power to decide how dispute is to proceed, including class issues
  - Arbitrator has exclusive power and jurisdiction to decide whether “case” should proceed as “class” or “mass” action

## *Consequences of the Green Tree Financial Corp. v. Bazzle et al Decision:*

- Other Drafting Considerations:
  - Contracts with the same class or person or entity should have the same arbitration language
  - Arbitration provisions should comply with latest judicial, legislative, or regulatory rulings on unconscionability
  - Provision should indicate whether FAA or specified state arbitration statute will govern the arbitration

# American Arbitration Association and Class Action Rules

# AAA & Class Action Arbitrations

- Supplementary Rules for Class Arbitrations
- Effective October 8, 2003 (post-*Bazzle*)
- Arbitrator shall determine as a threshold matter whether applicable arbitration clause permits arbitration to proceed on behalf of or against the class (“clause construction award”)
- 30-day stay to permit court of competent jurisdiction to confirm or vacate the clause construction award

# AAA & Class Action Arbitrations

- Prerequisites to class arbitration:
- Mimic requirements for Rule 23(a)(1)-(4)
- Additional requirement: determination that “each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members”

# AAA & Class Action Arbitrations

- Class Arbitrations Maintainable:
- Conditions in subdivision (a) are satisfied
- Arbitrator finds common questions predominate
- Arbitrator finds class arbitration is superior (same four factors as in Rule 23(b)(3))
- Arbitrator makes “class determination award”
- 30-day stay to permit party to move in court of competent jurisdiction to confirm or vacate class determination award

# AAA & Class Action Arbitrations

- Other Provisions:
- Notice of class determination
- Final award
- Settlement, voluntary dismissal, or compromise
- No presumption of privacy or confidentiality: all class arbitration hearings and filings may be made public