

# PRODUCT LIABILITY

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*Christopher Parkerson reviews the Dukes Supreme Court decision and its impact on defending class actions with respect to factual discrepancies, notice, requested relief and applicable law.*

## Put Up Your Dukes: Using Recent Supreme Court Decision to Defend Against Class Actions in a Products Case

### ABOUT THE AUTHORS



**Christopher B. Parkerson** is a trial attorney at Campbell, Campbell, Edwards & Conroy, P.C., whose practice is concentrated in product liability defense and business litigation. He has tried jury and non-jury cases in state and federal court, and has represented clients in everything from arbitrations to mediations. He has also defended class actions in both state and federal courts across the country. He is a member of the IADC. He lives in Boston, MA with his wife Kimberly and three daughters. Mr. Parkerson can be reached at [cparkerson@campbell-trial-lawyers.com](mailto:cparkerson@campbell-trial-lawyers.com).

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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_\_ (2011), the United States Supreme Court confirmed the strict requirements of Fed. R. Civ. P. 23(a)(2), and held that in order for a class to be properly certified there must be common questions of law or fact. The Court explained in its decision that satisfying the criteria of the rule requires more than just skillful pleading or an allegation that all plaintiffs have suffered a violation of the same law. Rather, a plaintiff requesting class certification must demonstrate a common contention that is capable of classwide resolution, “which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” 564 U.S. at 9. In *Dukes*, the Court reviewed the record for some type of “significant proof” that Wal-Mart “operated under a general policy of discrimination,” but failed to find such evidence. 564 U.S. at 12-14.

The *Dukes* case involved 1.5 million female employees claiming that Wal-Mart had sexually discriminated against them. In reversing the Circuit court’s decision on class certification, Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito, wrote that the class of persons who work or previously worked in some 3,400 stores “wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial questions ‘*why was I disfavored.*’” *Id.* at 11-12. The assertion that a class existed of persons who suffered the same injury as others was not enough for the Court to allow the certification of a class.

The *Dukes* case cites earlier Supreme Court decisions as support for its reversal, most notably *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982) which holds that a class action may only be certified if the Court has conducted “rigorous analysis” of the Rule 23 criteria. When making a motion for class certification related to a breach of express warranty, plaintiffs must *identify* common issues, not just claim they exist without saying what they are. The issues must be supported by some type of evidence. If the Court believes a purported class representative’s individual claim is typical of absent class members’ claims – that he “possess[es] the same interest and suffer[ed] the same injury” that they did, then it can be properly certify a class. 457 U.S. at 157 (quoting *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403).

In defense of such a motion for class certification, defense counsel should request that the Court identify what it understands the individual issues to be and explain why it thinks whatever common issues it identifies predominate over them. The defendant has the right, pursuant to *Dukes* and *Falcon*, to compel the plaintiff’s production of proof that common questions can be answered with a single stroke. This is a valuable tool for defendants in that it not only provides an opportunity to defeat a request for class certification, but also at the very least allows for discovery of proposed class-wide issues, expert discovery, or even discovery of absent class members if such discovery demonstrates that validity of each one of the claims cannot be determined in “one stroke.”

For example, in a breach of warranty case, interrogatories asking whether each and every class member utilized the product under the same conditions, or whether each putative class member received the same express

warranty. Other appropriate categories of discovery given the requirements set out in *Dukes* include whether every class member made the product available for the warranty's remedy within the warranty period. Interrogatories or admissions setting out how and when the alleged defect manifested itself, how the breach was communicated and whether some of the owners of the product escaped damage also allow defendant to gather evidence that can be used to defeat the notion that a common "glue" holds the class together. Admissions that reflect the fact that not every member of the class experienced a defect, or that some had the alleged defect corrected by a dealer or manufacturer, assist in framing the issue for the Court and can prove valuable for defeating a motion for class certification. Where a defendant can produce records of customers who have had warranty issues addressed or who are happy with their product, this can serve as the basis for additional discovery to refute plaintiff's contention and prevent plaintiff from getting over the threshold set out in *Dukes*.

### **Factual Discrepancies**

In a case alleging a breach of express warranty, with standard warranty language stating that the product is free from defects at the time of sale and that the manufacturer will repair or replace the product if a defect is found during the standard warranty period, the plaintiff must demonstrate at the certification stage that *all* of the products referenced in the complaint were defective within the meaning of the manufacturer's warranty. Further, the plaintiff will need to demonstrate that all the alleged defects manifested themselves during the warranty period, and that proper notice was provided to the manufacturer. If during the certification stage the defendant is able to demonstrate variances in product performance, timing or notice, then the court should find that

common questions do not predominate. Without common questions as the "glue" holding claims together, an appeal for class certification fails under the *Dukes* standard as questions of defect, timing or notice cannot be answered in "one stroke."

### **Notice**

Many warranties, consistent with provisions of the UCC, require consumers to provide notice of an alleged product defect "within a reasonable time." U.C.C. § 2-607(3)(a). Because notice is an essential element of a plaintiff's case, a plaintiff typically bears the burden of proving that notice was given to the manufacturer. *Hays v. General Elec. Co.*, 151 F.Supp.2d 1001, 1010 (N.D. Ill. 2001). This notice requirement is not relaxed even if a manufacturer is aware of a problem with a particular product or product line. If a plaintiff cannot demonstrate that all members of the class gave proper notice within the warranty period, then a strong argument could be made that class certification would be improper because the Court would need to look at individual cases rather than the class as a whole to determine if proper notice was given.

### **Requested Relief**

If a putative class includes both former and current owners of a certain product, the type of relief requested can dictate the court's ability to meet the criteria set out in *Dukes*. If a current owner acts as a class representative, and the principal relief being sought is replacement (presumably meaning payment of the cost of replacing), what relief do *former* owners stand to receive from such litigation? It would be difficult to imagine a situation wherein a current owner's defect claim was in any way "common" to that of a former owner who sold the product before any such defect manifested itself.

### Applicable Law

In multi-state claims of breach of express warranty, counsel defending against a motion for class certification should always analyze the substantive law governing putative class members' claims. The lack of commonality of law alone may dictate denial of class certification. *In re Bridgestone/ Firestone, Inc.*, 288 F.3d 1012, 1015 (7<sup>th</sup> Cir. 2002); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5<sup>th</sup> Cir. 1996); *In re American Medical Systems*, 75 F.3d at 1085; *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1987), *cert. denied*, 482 U.S. 915 (1987). In such instances, it is the plaintiff's burden to demonstrate commonality of the applicable law.

For example, many states' warranty laws distinguish between consumers and others. In Massachusetts law, Mass. Gen. Laws c. 106, §2-316A(3), restrict the extent to which a seller of *consumer* goods can limit or modify a consumer's remedies for breach of express warranty while it imposes no such restriction with respect to commercial or government purchasers. Mass. Gen. Laws c. 106, §2-316(4). Maine law eliminates outright the seller's ability to limit or modify remedies

available for breach of an express warranty with respect to consumer goods, while expressly permitting limitations and modifications in the case of non-consumers. 11 M.R.S.A. §2-316(4) and (5). The same is true of the law of Connecticut. C.G.S.A. 42a-2-316(5).

Also, what constitutes a "defect" differs depending how applicable law defines that term. Some jurisdictions define "defect" by reference only to the product itself; others define it by reference to what the manufacturer knew or should have known; still others define it in terms of whether there has been a material effect on the ability of the product to perform its intended purpose.

### Conclusion

The *Dukes* case gives counsel defending a putative class action the ability to demand proof of common questions, and provides precedent to defeat a class certification motion where no common questions unite the prospective class members. It also presents the opportunity for discovery of proposed class issues so that the court can perform the analysis required by earlier Supreme Court precedent.



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