The "Hazards" of *Dukes*: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court's Decision

BY ELLEN MERIWETHER

WHENEVER THE SUPREME COURT reviews a class action—an infrequent occurrence indeed—there is always the potential that it will address the requirements of Rule 23 in a manner that extends to all types of cases and not just the specific type of case at issue. So when the Supreme Court decided to review the massive Title VII employment discrimination class action against the largest company in the world, it wasn't just employment lawyers who took notice. Lawyers for plaintiffs in antitrust class actions (as well as securities, consumer, and public interest class actions) anxiously followed the case as it made its way through briefing, argument and, finally, decision.

On June 20, 2011, the Supreme Court announced its decision in *Wal-Mart Stores, Inc. v. Dukes*,[1] reversing the certification under Rule 23(b)(2) of a class of 1.5 million female employees seeking an injunction and back pay for violations of Title VII of the Civil Rights Act. While the Court had been largely silent on significant issues of class certification jurisprudence since its *Amchem*[2] and *Ortiz*[3] decisions in the late 1990s, the courts of appeals had been busy during this same period, and it is recognized that many courts have ratcheted up the requirements for obtaining class certification.[4] For this and other reasons related to the facts of *Dukes* itself, few expected the decision to go the plaintiffs' way, and it did not.

Dukes was rendered in a factual and legal context well removed from that of a federal antitrust claim and concerned the certification of a class under Rule 23(b)(2), a type of class rarely sought in private actions under the Clayton Act. Nevertheless, some commentators, writing mainly writing from a defense perspective, have suggested that *Dukes* may add additional arrows to the quiver of those seeking to defeat motions for class certification of antitrust cases.[5] Certainly, defendants now may cite *Dukes*, instead of *Falcon*,[6] for the proposition that courts must conduct a "rigorous analysis" and may be required to "probe behind the pleadings" to determine whether the prerequisites of Rule 23 have been met. But beyond this surface effect, is there any reason for a court to accept the proposition that *Dukes* wrought real change in the substantive or procedural requirements to achieve class certification of antitrust cases under Rule 23(b)(3)? In other words, has *Dukes* made antitrust cases more difficult to certify?

In my view, as a litigator approaching these issues from the plaintiffs' perspective, the answer is no—the potential hazards of a far-reaching *Dukes* decision are not there. As discussed below, the decision significantly changes the substantive law governing Title VII actions and greatly restricts (though does not eliminate) the situations under which Rule 23(b)(2) may be used to certify a class where monetary damages are sought. But beyond these parameters (and at least with respect to antitrust damages actions), *Dukes* should have little significance.

First, with respect to its discussion of the commonality requirement, the admittedly stricter approach it mandates should have virtually no effect on outcomes of class certification decisions in antitrust class actions brought under Rule 23(b)(3) because the central proposition—that the class members' claims must depend on a common contention, the resolution of which is central to the validity of each claim—is almost never an issue in these cases. Second, the Court's discussion of the "rigorous analysis" requirement and the evidentiary burden on plaintiffs merely restates existing standards in virtually every circuit and neither clarifies nor expands the plaintiff's burden or the court's role. Third, the Court's discussion of Wal-Mart's right to litigate its statutory defenses, which arose in the context of determining whether the back pay claim was "incidental" to the claim for injunction, did not address or disturb the substantial body of case law concerning the issue of whether the litigation of individualized defenses affects the predominance determination under Rule 23(b)(3).

In fact, as explained below, antitrust plaintiffs may find it a useful strategy to embrace *Dukes* and to affirmatively employ its articulation of the commonality standard in their motions for class certification. Certainly, given the size and shape of the *Dukes* class, the idiosyncratic nature of employment decisions, and the nuances of Title VII jurisprudence at issue there, *Dukes* can be convincingly distinguished.

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Factual and Legal Background of *Dukes*

In what the Supreme Court characterized as "one of the most expansive class actions ever," the plaintiffs sought certification of a class of approximately 1.5 million female employees of Wal-Mart alleging violations of Title VII.[7] The plaintiffs alleged that the discretion that Wal-Mart gives to local managing supervisors over pay and promotion decisions, coupled with a strong and uniform corporate culture permitting bias, amounted to unlawful discrimination in violation of Title VII. As the Supreme Court characterized the plaintiffs' theory: "[T]he discretionary decisionmaking of each one of Wal-Mart's thousands of managers [makes] every woman at the company the victim of one common discriminatory practice."[8] The plaintiffs sought certification of the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure and requested injunctive and declaratory relief, punitive damages, and back pay.[9]

In seeking to establish the "commonality" element of Rule 23(b)(2), i.e., "that there are questions of law or fact common to the class," the plaintiffs relied on the following evidence: (1) statistical evidence about pay and promotion; (2) anecdotal reports from 121 employees; (3) and the testimony of the plaintiffs' expert sociologist, Dr. Bielby, who concluded that the company was "vulnerable" to gender discrimination.[10]

The district court certified the proposed class, and a divided panel of the Ninth Circuit sitting en banc affirmed, concluding that the proffered evidence of commonality was sufficient to raise the question of whether the female employees of Wal-Mart were subjected to a single set of corporate policies that may have worked to unlawfully discriminate against them.[11] The Ninth Circuit also held that the back pay claims of a narrowed class of female employees could be manageably tried using an approach the Ninth Circuit approved in *Hilao v. Estate of Marcus*.[12] Under that approach, the back pay claims of a random selection of plaintiffs would be tried before a special master. This process would allow Wal-Mart to present its individualized defenses in the randomly selected cases, thus revealing the approximate percentage of class members whose unequal pay or promotion was due to causes other than discrimination.[13]

The Supreme Court reversed the certification of both the injunction and back pay claims. Its rejection of the certification of the claims for an injunction under Rule 23(b)(2) rested on its rejection of a key merits contention central to the plaintiffs' claims: that a policy of "allowing discretion" is a uniform employment practice. Citing to its own decision in *Falcon*, the Court identified the plaintiffs' burden in establishing commonality under Rule 23(a)(2) in a Title VII "pattern or practice" case as proffering "significant proof that [Wal-Mart] operated under a general policy of discrimination."[14] Yet "[t]he only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's policy of *allowing discretion* by local supervisors." According to the Court, that proffer was legally insufficient:

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> [A] "policy" of *allowing discretion* . . . is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices . . . and one that we have said "should itself raise no inference of discriminatory conduct."[15]

As Professor Richard Nagareda put it: "*Dukes v. Wal-Mart* is at bottom a debate over an implicit reconceptualization of discrimination under Title VII."[16] In the Supreme Court, the plaintiffs lost that debate.

Against the backdrop of its resolution of this legal issue, the Court considered the sufficiency of the plaintiffs' evidence, finding it wholly lacking in the necessary '"significant proof' that Wal-Mart operated under a '"general policy of discrimination."' Dr. Bielby testified that Wal-Mart has a strong corporate culture that makes it vulnerable to gender discrimination, but could not say whether that discrimination manifested itself in .5% or 95% of employment decisions at Wal-Mart. Because that is the "essential question" on which the plaintiffs' theory of commonality depends, the Court found, Bielby's testimony could be "safely disregard[ed]."[17]

The plaintiffs' statistical and anecdotal evidence fell short as well. Although the deficiencies in each were discussed in some detail,[18] the underlying problem was that the evidence did nothing to establish a "specific employment practice"—much less one that ties the claims of the 1.5 million female employees of Wal-Mart together . . . ." Regardless of whether the statistical and other evidence was persuasive, it was irrelevant because it "would not demonstrate that the entire company 'operates under a general policy of discrimination, which is what respondents must show to certify a company-wide class.'"[19]

In sum, the plaintiffs' failure was a failure of law, not of evidence. To obtain class certification, the plaintiffs had to show that the company operated under a general policy of discrimination and that this policy manifested itself in the hiring decisions of all employees. Against this backdrop, the evidence proffered by the plaintiffs, i.e., that Wal-Mart "allowed discretion," was necessarily insufficient. As Professor Nagareda put it, "[T]he notion of Title VII liability for enabling discrimination—not battles over dueling expert submissions—forms the crux of the class certification dispute in *Dukes*."[20]

The Supreme Court also concluded that the plaintiffs' back pay claims were improperly certified under Rule 23(b)(2). While declining to reach the issue of whether the mandatory class certification provisions of Rule 23(b)(2) apply only to requests for injunctive or declaratory relief, the Court held that "at a minimum, claims for *individualized* relief (like the pay back at issue here) do not satisfy the Rule."[21]

As an additional basis for its decision that the back pay claims were not properly certified under Rule 23(b)(2), the Court held that these claims could not be characterized as "incidental" to the plaintiffs' request for a class-wide injunction. Citing the Rules Enabling Act and Title VII's detailed statutory scheme, the Court held that Wal-Mart is entitled to an individualized determination of each employee's eligibility for back pay.[22] "The necessity of that litigation will prevent backpay from being 'incidental' to the classwide injunction."[23]

Dukes*'s Focus on the Significance of the Common Question Should Not Affect Certification of Antitrust Cases.* One aspect of the *Dukes* decision with potentially wider ramifications is the Court's discussion of the commonality requirement of Rule 23(a)(2). Any decision that changes the way courts are required to look at "commonality" could have a significant impact on all class certification decisions because "commonality" must be demonstrated whether plaintiffs are seeking certification under Rule 23(b)(2) or 23(b)(3). But even as defined by the Supreme Court, the *Dukes* commonality standard should not pose any additional barriers in a typical antitrust case.

Because plaintiffs sought certification under Rule 23(b)(2), the "crux" of the case was "commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'"[24] Courts have long held that a single common question of law or fact suffices to satisfy the standard, and the Supreme Court did not reject that proposition.[25] But, in *Dukes*, the Supreme Court focused on the significance of that single common question. Thus, the claims "must depend on a common contention . . . that it 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."[26] Quoting Professor Nagareda, the Court stated: "[W]hat matters to class certification . . . is not the raising of common questions even in droves, but rather the capacity of the classwide proceeding to generate common answers apt to drive the resolution of the litigation."[27] In other words, while a single common question will satisfy the standard, the answer to that question, whether that answer is yes or no, must materially advance the litigation, i.e., resolve an issue central to the validity of the class members' claims.

In addition, in a statement particularly apropos in the Title VII context, the Court said "commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[28] Citing to its own decision in *Falcon*, the Court noted that Title VII can be violated in a number of different ways—for example, by intentional discrimination or by practices that result in disparate impact.[29] The mere claim that all employees have suffered a Title VII injury does not mean that "all their claims can productively be litigated at once."[30]

In reversing the certification decision, the Supreme Court rejected out of the box the legal significance of the single common question posed by the plaintiffs. Even if the plaintiffs had adduced sufficient evidence of Wal-Mart's policy of "allowing discretion," it was insufficient as a matter of law because allowing discretion is not a "specific employment practice."[31] "[B]ecause respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question."[32]

In contrast to *Dukes*, a typical antitrust case (and certainly a typical class action that asserts per se claims), by its nature, rests on a common contention; for example, whether the defendants conspired, or whether the defendant engaged in exclusionary conduct. Moreover, the resolution of this common contention, one way or another, will materially advance (or if answered in the negative, completely undermine), the claims of every member of the class. Finally, that contention is usually susceptible to resolution on a classwide basis; it depends not on proof individual to each plaintiff, but on proof related to the conduct of the defendant.

Nor should the discussion of the requirement that all class members "suffered the same injury" change the analysis in an antitrust case. While, as illustrated in *Falcon*, different injuries can arise from violations of Title VII, establishing a violation in an antitrust case requires proof that class members suffered the same injury—antitrust injury. Whether common evidence predominates with respect to this showing is, and will continue to be, the focus of the class certification analysis in antitrust cases.[33]

In cases addressing antitrust class certification since the *Dukes* decision, *Dukes* appears to have played little, if any, role. For example, in *Behrend v. Comcast Corp.*,[34] the Third Circuit affirmed the certification of a damages class in a case arising under Section 2 of the Sherman Act. There, as is often true in antitrust cases, the element of "commonality" had been conceded by the defendants, and the dispute involved the plaintiffs' showing that the preponderance element of Rule 23(b)(3) was met.[35] As to *Dukes*, the Third Circuit stated: "[T]he factual and legal underpinnings of *Wal-Mart*, which involved a massive discrimination class action under different sections of Rule 23—are totally distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us."[36]

Similarly, in *In re Wellbutrin XL Antitrust Litigation*,[37] the district court, citing *Dukes*, found the commonality element satisfied, as well as the remainder of the Rule 23 requirements, and certified both direct and indirect purchaser classes in separate opinions. In both opinions the court stated:

> Rule 23(a)(2) requires that there must be questions of law or fact common to the class. To satisfy the commonality requirement, the classes' claims must depend on a common contention. The common contention must be capable of class-wide resolution. A contention is capable of class-wide resolution if determination of its truth or falsity will resolve an issue that is central to the verity of the claim "in one stroke." A single common question is sufficient.[38]

There, the court found that the commonality requirement was met through the plaintiffs' allegation that "the defendants engaged in a scheme to delay the entry of less expensive versions of Wellbutrin XL into the market." The court further held that "each class member's claims depend on whether or not the defendants unlawfully engaged in anti-competitive behavior to limit the entry of generic competitors in violation of federal antitrust law."[39]

In other cases seeking certification under Rule 23(b)(3) outside of the antitrust context, courts have found that *Dukes* had no effect on the certification questions before the court. For example, in *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co.*,[40] the court stated:

> [T]he Supreme Court's clarifying language in *Wal-Mart* has no effect on the commonality determination in this case. The common questions presented by this case—essentially, whether the Offering Documents were false or misleading in one or more respects—are clearly susceptible to common answers. Moreover, as explained in detail below, not only do common questions exist in this case, but they in fact predominate over any questions affecting only individual members. *See Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (the predominance inquiry is a more demanding criterion than the commonality inquiry). Furthermore, the facts in *Wal-Mart*, a case in which three named plaintiffs sought to represent a class of 1.5 million women in an employment discrimination suit, are entirely distinguishable from the facts of the instant securities class action. Accordingly, the Court finds that Wal-Mart has little to no bearing on the issues before the Court . . . .[41]

Similarly, the defendant's effort to decertify a class of employees in light of the *Dukes* decision was rejected in *Bouaphakeo v. Tyson Foods, Inc.*[42] There, the plaintiffs challenged the defendant's practice of failing to pay employees for certain activities that were allegedly necessary for job performance. Holding that the class had been properly certified, the court stated: "[U]nlike *Dukes*, there is a common answer available to this question because, unlike *Dukes*, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility."[43] In addition, the court did not disturb its prior decision certifying the back pay claims pursuant to Rule 23(b)(3). Citing *Dukes*, the court stated: "We think it clear that individualized monetary claims belong in Rule 23(b)(3).[44]

In *Churchill v. Cigna Corp.*,[45] the court also found the *Dukes* decision inapplicable:

> In *Dukes*, the Supreme Court reversed certification of a class of female employees who asserted Wal-Mart engaged in a discriminatory pattern of conduct, reasoning that Wal-Mart's decision to give local supervisors discretion over employment matters "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action." Here, in contrast, Cigna indisputably has a national policy of denying coverage for ABA to treat ASD. Pursuant to that policy, all Subclass A members were denied coverage for ABA.[46]

In each of these cases, the certification analysis under Rule 23(a)(3) appears to be undisturbed by the gloss *Dukes* places on the commonality inquiry.[47] In fact, in situations where class certification is sought under Rule 23(b)(3)—where the existence of single common question is not enough, but rather a predominance of common questions is required—it is hard to imagine a factual scenario where class certification would have been granted under Rule 23(b)(3) prior to *Dukes*, but now, following *Dukes*, would be denied. Indeed, commonality is often conceded in antitrust actions, and the war is waged on the issue of whether the predominance requirement of Rule 23(b)(3) has been satisfied.[48]

The Supreme Court Did Not Change the Rigorous Analysis Requirement or Increase Plaintiffs' Evidentiary Burden

With respect to the discussion of the rigorous analysis requirement and plaintiffs' burden in establishing the requisite elements of Rule 23, the Court forged no new ground and instead relied almost exclusively on language from its *Falcon* decision issued almost thirty years ago.[49] Citing *Falcon*, the Court reiterated that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question" and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[50] As courts of appeals have done before it, the Supreme Court reconciled *Eisen v. Carlisle*[51] by affirming that only those merits issues that are necessary to the class certification requirement may be determined.[52] This language is wholly consistent with the paths taken in recent years by all of the courts of appeals to have ruled on this issue.[53]

The *Dukes* decision did not explain, at least in a way that is useful in an antitrust case, where a foray into the merits is appropriate and where it is not. While as noted above, a number of decisions have held that a "critical assessment"[54] of merits issues may be required, "[merits] disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class."[55] The example provided by *Dukes*—where plaintiffs must prove that its shares were traded on an efficient market in order to invoke the "fraud on the market" presumption, thus avoiding individual issues of reliance[56]—does not help explain how to draw those difficult lines in an antitrust case. *Hydrogen Peroxide* articulated the quandary in this way:

> Plaintiffs' burden at the class certification stage is not to prove the elements of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task of plaintiffs on class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class, rather than individual to its members.[57]

Dukes gives no help in differentiating between the permitted Rule 23 inquiry directed at whether "the element of antitrust impact is capable of proof at trial through evidence that is common to the class" from the impermissible merits inquiry—"whether plaintiffs have proven the element of antitrust impact." Courts will continue to grapple with this difficult issue.[58]

In addition, although the Court discussed the evidentiary record proffered by the plaintiffs in support of their motion for class certification, and specifically the testimony of the plaintiffs' expert sociologist, it did not address, as some had expected, whether *Daubert*[59] applies in class certification proceedings. While noting that the parties disputed this issue, and while suggesting that *Daubert* does apply,[60] the Court did not resolve the question, and instead concluded that even assuming the expert testimony was admissible, it was nevertheless insufficient to carry the plaintiffs' burden of persuasion on class certification.[61]

In an article Greg Wrobel and I co-authored for the Summer 2011 issue of ANTITRUST, we argued that "the question of what *Daubert* standard, if any, courts should apply to expert evidence submitted at the class certification stage has been eclipsed by rulings in an increasing number of courts that require lower courts to weigh the evidence of opposing experts in determining whether plaintiffs have satisfied the predominance standard."[62] The upshot is, whether it is admissible under *Daubert* or not, if expert testimony is not persuasive it will be insufficient to carry plaintiffs' evidentiary burden under Rule 23. *Dukes* changes nothing in this regard.

Litigation of Defenses and Impact on the Predominance Determination

At least one commentator has suggested that *Dukes* might be used to argue that under the Rules Enabling Act, defendants have a "right" to litigate individual defenses against each class member, thus possibly undermining "predominance" under Rule 23(b)(3).[63] The *Dukes* decision did not address this issue (i.e., the "right" to litigate defenses against individual class members) in the context of evaluating the predominance requirement of Rule 23(b)(3). Rather, it focused on whether the statutorily required "back-pay trials" in a Title VII action would be "incidental" to the class-wide injunction claim and thus permissible, at least in theory, in a Rule 23(b)(2) context.[64] The Court concluded that the need for these "trials" necessarily would render back pay claims not merely "incidental" to the injunction, but it did not address or disturb the extensive body of case law discussing the availability of individual defenses and its effect on a predominance finding.[65] Even commentary raising this possibility recognizes that "oppositions to class certification based on the Rules Enabling Act are arguably nothing new in antitrust cases [and] *Wal-Mart* be viewed as simply reaffirming the Supreme Court's earlier holdings that Rule 23 must be interpreted in conjunction with the [Act.]"[66]

In short, defendants often argue, and presumably will continue to do so, that individual defenses preclude a finding of predominance under Rule 23. *Dukes* makes this argument neither easier nor harder. Nevertheless, it is highly unlikely that any case that would otherwise satisfy the predominance standard under Rule 23 would founder on class certification because of defendants' "right" to assert defenses against some or all of the members of the class.

Life After *Dukes*

In motions for class certification, plaintiffs should embrace *Dukes* and be prepared to discuss how the proposed class satisfies the commonality requirement of Rule 23(a) with reference to the language in the decision. Thus, plaintiffs should be prepared to explain that, unlike in *Dukes*, all members of the class are alleged to have suffered the same injury—antitrust injury caused by defendants' actionable conduct. Plaintiffs should also be prepared to describe how the class's claims "depend upon a common contention" (for example, that defendants conspired to fix prices), and that this common contention "is capable of class-wide resolution [meaning] the 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."[67]

To the extent it is necessary to respond to defendants' argument that *Dukes* controls the outcome, or that, as in *Dukes*, the evidence presented is irrelevant or insufficient, it may be enough merely to distinguish *Dukes* on its facts. Plaintiffs should point to the fact that in *Dukes*, the plaintiffs had failed to allege a single common policy affecting all class members. Emphasis should also be placed on the size and diversity of the class in *Dukes* and the idiosyncratic nature of employment decisions.

The cases finding *Dukes* inapposite in antitrust and other Rule 23(b)(3) contexts are mounting. As the Third Circuit concluded in *Behrend*, "[T]he factual and legal underpinnings of *Wal-Mart*, which involved a massive discrimination class action under different sections of Rule 23—are totally distinct from those of this [antitrust] case. *Wal-Mart* therefore neither guides nor governs the dispute before us."[68] ■

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1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2531 (2011).

2 Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997).

3 Ortiz v. Fibreboard Corp, 527 U.S. 815 (1999).

4 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 n.17 (3d Cir. 2008) (collecting cases).

5 *See, e.g.*, David R. Garcia & Leo Caseria, *Wal-Mart v. Dukes*: Implications for Antitrust Class Actions, ANTITRUST L. BLOG (July 11, 2011), http://

www.antitrustlawblog.com/2011/07/articles/article/walmart-v-dukes-implications-for-antitrust-class-actions/ (arguing that Dukes's implications for antitrust cases are significant); Kevin M. McGinty, Daniel T. Pascucci, Ari N. Stern & Nathan R. Hamler, The Future of Private Class Actions After *Wal-Mart v. Dukes* (June 23, 2011), *available at* http://www.mintz.com/newsletter/2011/adversaries ("The Supreme Court's decision has far-reaching implications for class action practice that extend well beyond employment discrimination cases").

[6] General Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

[7] *Id.* at 2547.

[8] *Id.* at 2548.

[9] *Id.* at 2547–48.

[10] *Id.* at 2548–49.

[11] *Id.* at 2549.

[12] 103 F.3d 767, 782–87 (1996).

[13] 131 S. Ct. at 2550.

[14] *Id.* at 2553.

[15] *Id.* at 2254 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988)).

[16] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009). Professor Nagareda's article was quoted twice by the majority in *Dukes*.

[17] 131 S. Ct. at 2554.

[18] *Id.* at 2553–57.

[19] *Id.* at 2556.

[20] Nagareda, *supra* note 16, at 153.

[21] *Id.* at 2557.

[22] *Id.* at 2561.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 2556.

[26] *Id.* at 2551.

[27] *Id.* (quoting Nagareda, *supra* note 16).

[28] *Id.* (quoting *Falcon*, 457 U.S. at 157).

[29] *Id.* In *Falcon*, for example, the Court reversed certification because the evidence adduced at trial showed that named plaintiff Falcon suffered injury related to disparate treatment in promotion, while class members suffered a different injury relating to disparate impact in hiring practices. 457 U.S. at 152.

[30] 131 S. Ct. at 2551.

[31] *Id.* at 2555.

[32] *Id.* at 2556–57.

[33] No. 10-2865, 2011 WL 3678805, at * 6 (3d Cir. Aug. 23, 2011) ("Individual injury, also known as antitrust impact, 'is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement . . .'" (quoting *Hydrogen Peroxide*, 552 F.3d at 311)).

[34] *Id.* at *1.

[35] *Id.* at *6.

[36] *Id.* at *31 n.12.

[37] No. 08-2431, 2011 WL 3563385 (E.D. Pa. Aug. 11, 2011) (direct) and No. 08-2433, 2011 WL 3563835 (E.D. Pa. Aug. 15. 2011) (indirect), certifying direct and indirect purchaser classes under Rule 23(b)(3).

[38] 2011 WL 3563385 at *4 (direct purchaser opinion) (citations to *Dukes* omitted).

[39] *Id.*

[40] No. 08 Civ. 10841, 2011 WL 3652477 at *6–7(S.D.N.Y. Aug. 22, 2011).

[41] *Id.*

[42] No. 5:07-CV-04009, 2011 WL 3793962 (N.D. Iowa Aug. 25, 2011).

[43] *Id.* at *3.

[44] *Id.* at *4.

[45] Civil Action No. 10-6911, 2011 WL 3563489 (E.D. Pa. Aug. 12, 2011).

[46] *Id.* at *3–4.

[47] The Third Circuit affirmed a denial of class certification entered by the district court prior to the *Dukes* decision in *Gages v. Rohm and Haas Co.*, No. 10-2108, 2011 WL 3715817 (3d Cir. Aug. 25, 2011). There, in a CERCLA action, plaintiffs sought certification under either Rule 23(b)(2) or (b)(3) of a medical monitoring class, and under 23(b)(3) of a property damages class arising out of exposure to vinyl chloride. The Third Circuit held that the district court did not abuse its discretion in finding that the common evidence proposed for trial did not adequately demonstrate exposure levels for specific individuals in the class. *Id.* at *3. Noting that the district court denied certification for reasons unrelated to the nature of the relief sought, the Third Circuit also stated, in light of *Dukes*, "[W]e question whether the kind of medical monitoring sought here can be certified under Rule 23(b)(2) but we do not reach the issue." *Id.* at *5.

[48] *See, e.g.*, *Behrend*, 2011 WL 3678805, at *6; *see also* Hal J. Singer, *Economic Evidence of Common Impact for Class Certification in Antitrust Cases: A Two-Step Analysis*, Antitrust, Summer 2011, at 34.

[49] 457 U.S. 147 (1982).

[50] 131 S. Ct. at 2551.

[51] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[52] 131 S. Ct. at 2552 n.6; *see also In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 317 n.17 (3d Cir. 2009) (*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed) (collecting cases).

[53] I am unaware of any court of appeals that has taken a contrary position. *See, e.g.*, Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618 (6th Cir. 2011) ("In addition, both the Supreme Court and this Circuit require that a district court conduct a 'rigorous analysis' of the Rule 23(a) requirements before certifying a class"); *Hydrogen Peroxide*, 552 F.3d at 317 ("Because the decision whether to certify a class 'requires a thorough examination of the factual and legal allegations,' the court's rigorous analysis may include a 'preliminary inquiry into the merits . . .'") (quoting *Newton*, 259 F.3d 154, 166, 168); *In re* New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 17 (1st Cir. 2008) ("[A]s both we and other circuit courts have emphasized, weighing whether to certify a plaintiff class may inevitably overlap with some critical assessment regarding the merits of the case"); Regents of Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372, 395 (5th Cir. 2007) ([I]t is often necessary for the district court to go "beyond the pleadings" and "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues . . . .") (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

[54] *New Motor Vehicles*, 522 F.3d at 17.

[55] Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005) ("The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.").

[56] 131 S. Ct. at 2552 n.6.

[57] *Hydrogen Peroxide*, 552 F.3d at 311–12.

[58] In its recent decision in *Behrend*, the Third Circuit took aim at this problem. After quoting the language from *Hydrogen Peroxide* set forth in the text above, the court stated that "[m]any of Comcast's contentions ask us to reach into the record and determine whether plaintiffs actually have proven antitrust impact. This we will not do. Instead, we inquire whether the District Court exceeded its discretion by finding that Plaintiffs had demonstrated by a preponderance of the evidence that they *could* prove antitrust impact through common evidence at trial." 2011 WL 3678805, at *11.

[59] Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

[60] 131 S. Ct. at 2554.

[61] *Id.*

[62] Gregory G. Wrobel & Ellen Meriwether, *Economic Experts: The Challenges of Gatekeepers and Complexity*, Antitrust, Summer 2011, at 8.

[63] *See* Garcia & Caseria, *supra* note 5.

[64] 131 S. Ct. at 2561.

[65] *See, e.g.*, Dupler v. Costco Wholesale Corp., 249 F.R.D. 29, 46 (E.D.N.Y. 2008) ("[I]n the instant case, the Court concludes that common issues of law and fact predominate on the Section 349 claim, as well as the other claims, despite the existence of a potential defense against some plaintiffs under the voluntary payment doctrine or the potential individualized nature of potential damages."); Southern States Police Benev. Ass'n v. First Choice Armor & Equip., 241 F.R.D. 85, 89 (D. Mass. 2007) ("Because questions pertaining to liability are common to all members of the putative Class, the Court concludes that class certification is not precluded by the possibility of individual questions of fact which may arise in the context of affirmative defenses."); Noble v. 93 University Place Corp., 224 F.R.D. 330, 339 (S.D.N.Y. 2004) ("[T]he fact that a defense 'may arise and [ ] affect different class members differently does not compel a finding that individual issues predominate over common ones.'"); Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32, 39 (1st Cir. 2003) ("Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members. Instead, where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses."); *In re* Linerboard Antitrust Litig., 305 F.3d 145, 162 (3d Cir. 2002) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)."); Waste Mgmt. Holdings v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000) ("Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier. . . As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)."); Sparano v. Southland Corp., No. 94 C 2098, 1996 WL 681273, at *4 (N.D. Ill. Nov. 21, 1996) ("Any individual issues dealing with different states' statute of limitations and punitive damage laws can be handled by creating subclasses.").

[66] Garcia & Caseria, *supra* note 5.

[67] *Dukes*, 131 S. Ct. at 2551.

[68] *Behrend*, 2011 WL 3678805, at *31 n.12.