

WHAT EFFECT WILL *WAL-MART V. DUKES* HAVE ON SMALL BUSINESSES?

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I. INTRODUCTION

The class action has long been a devastating weapon in the hands of the plaintiffs' bar. While class actions are often a useful way to preserve judicial economy and achieve institutional reform, in the eyes of many businesses, class actions can open the door to frivolous litigation and unjustified settlements.¹ For large corporations with adequate resources set aside for settlement or litigation, class actions may be less of a concern. However, for small businesses with fewer resources, a class action lawsuit could potentially lead to their demise.² The Supreme Court's recent decision in *Wal-Mart v. Dukes* has assisted the defense bar by heightening the requirements that must be met for a group of plaintiffs to be certified as a class. However, although these requirements may be beneficial to large corporate defendants, the same cannot be said for smaller businesses.

The purpose of this note is to analyze the effects that *Dukes* will have on small businesses and how small businesses should respond. To do so, Part II provides an overview of the class action rules. Part III discusses how the Court interpreted those rules in *Dukes*. Part IV outlines how the Court's decision will serve as precedent for both federal and state jurisdictions. In Parts V and VI, the focus shifts to the impact that the decision will have on

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¹ STEPHEN C. YEAZELL, CIVIL PROCEDURE 878, 899 (8th ed. 2012).

² *Id.*; 151 CONG. REC. 1664 (2005) (statement of Sen. Grassley) [hereinafter Grassley] ("Unfortunately, the current class action rules are contributing to the cost of business all across America, and it particularly hits small business because it is the small business that gets caught up in the class action web without the resources to fight."). The damages provision under the Telephone Consumer Protection Act of 1999 (TCPA) prohibits the sending of unsolicited advertisements to fax machines and "has created a cottage industry of class action litigation spawning professional plaintiffs and causing the demise of several businesses . . . [U]sing the TCPA as a basis for class actions against small businesses most likely will and has led to devastating results." Med1Online, LLC's Reply Brief in Support of its Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) and in Opposition to the United States of America's Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act of 1991 at 1, 5, *Sadowski v. Med1Online*, 2007 WL 5025420 (N.D. Ill. 2007) (No. 07-CV-2973)

class litigation, particularly how it will benefit large corporations but not small businesses, and then Part VII discuss whether this disproportionate result will adversely affect the market for small businesses in the future. Finally, Part VIII of this note offers various recommendations designed to reduce the harm and the threat that class actions will pose under the current class action model.

II. CLASS ACTIONS: AN OVERVIEW

A class action is a way for one or more parties to sue or be sued as representative parties, on behalf of all those similarly situated.³ In other words, a class action is a way for several parties in the same situation as a result of a defendant's conduct to aggregate their claims against into one lawsuit, as opposed to each filing individually. The class of plaintiffs will often consist of employees, investors, customers or consumers. The defendants are often the businesses and employers whose alleged conduct harmed the class.

The usefulness of class litigation is subject to conflicting views. The plaintiff's bar and public interest groups believe class actions are a way to achieve institutional reform and ensure that businesses behave ethically and comply with the law.⁴ Businesses, on the other hand, often view class actions as "a dreadful scourge," forcing them to devote time and money to frivolous litigation or settle meritless claims.⁵ Many believe class actions are unfair, particularly in situations in which defendants are forced to settle regardless of the claim's merits to avoid the threat of bankruptcy, should a defendant lose in court.⁶ Furthermore, even if a business litigates and wins, class actions can be extremely damaging to the business's finances and reputation.⁷ Congress has not remained silent on this issue and has

³ FED. R. CIV. P. 23.

⁴ YEAZELL, *supra* note 1, at 878.

⁵ *Id.*; see also Grassley, *supra* note 2, at 1664 ("Out-of-control frivolous filings are a real drag on the economy. Many a good business is being hurt by this frivolous litigation cost. Unfortunately, the current class action rules are contributing to the cost of business all across America . . . Too many good companies and consumers are having to pay for this lawyer greed. Make no mistake about it, there is a real impact on the bottom line for many of these companies and, to some extent, on the economy as a whole. They have to eat this increased litigation cost or else it is farmed out to consumers, such as you and me, and this is all in the form of higher prices for goods and services we buy.").

⁶ YEAZELL, *supra* note 1, at 899.

⁷ Despite the fact that Wal-Mart prevailed in the *Dukes* case, its reputation was damaged as soon as the class action was filed. See Winnie Chau, Note, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for her Shoe: Dukes v. Wal-Mart & Sex Discrimination Class Actions*, 12 CARDOZO J. L. & GENDER 969, 993-95 (2006) (noting that when the class action

attempted to respond to these conflicting concerns with the passage of the Class Action Fairness Act of 2005.⁸ However, the rule governing class action procedures, Rule 23 of the Federal Rules of Civil Procedure, was unaffected.

Whatever the concerns may be, Rule 23 requires plaintiffs to overcome a few hurdles before a group can achieve class certification and go forward with class action litigation. First, plaintiffs must satisfy four prerequisites: numerosity, commonality, typicality and adequacy. Then, plaintiffs must prove that their prospective class falls within one of the categories codified in the Rule.

A. *Rule 23(a) Prerequisites*

In order to establish a case as a class action, the claims of the class members must be encompassed by the claims of the named plaintiff.⁹ To ensure this, Rule 23(a) of the Federal Rules of Civil Procedure provides four preliminary requirements that the plaintiffs must satisfy in order to go forward as a class: numerosity, commonality, typicality and adequacy or representativeness.¹⁰

The “numerosity” requirement focuses on the size of the class. The requirement is met if the class representative can show that the class is so large that joinder of all members is impracticable.¹¹ The “typicality” requirement is met if the claims of the representative parties are significantly similar to the claims of the class members.¹² The “adequacy” requirement is met if the representative parties will “fairly and adequately protect the interests of the class”¹³—that is, whether the named plaintiffs and their attorneys are sufficiently qualified to serve as representatives of the class. Finally, and perhaps most importantly, the “commonality” requirement mandates that the class members have “questions of law or fact common to the class.”¹⁴

The “commonality” requirement has been heavily litigated and is the crux of the debate in *Dukes*.¹⁵ This requirement “captures the idea that a class should consist of persons who share characteristics that matter in

was initially brought against Wal-Mart, its reputation and image quickly began to suffer).

⁸ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

⁹ YEAZELL, *supra* note 1, at 878.

¹⁰ *Id.* at 878–79.

¹¹ FED. R. CIV. P. 23(a)(1).

¹² FED. R. CIV. P. 23(a)(3).

¹³ FED. R. CIV. P. 23(a)(4).

¹⁴ FED. R. CIV. P. 23(a)(2).

¹⁵ YEAZELL, *supra* note 1, at 878.

terms of the substantive law involved.”¹⁶ However, what constitutes “enough” to satisfy the commonality requirement was a question subject to much debate until the Court reached its decision in *Dukes*, the focus of the discussion *infra* Part III.

B. Rule 23(b) Class Category Requirements

Once the potential class has overcome the prerequisites set forth in Rule 23(a), the party seeking class certification must then show that the class falls within one of the three class categories provided in Rule 23(b) of the Federal Rules of Civil Procedure.

A Rule 23(b)(1) class ((b)(1) class) is established if different adjudication with respect to individual class members would create “incompatible standards of conduct for the party opposing the class.”¹⁷ If a class is certified as a (b)(1) class, any potential class members need not receive notice or an opt-out right from the parties representing the class; rather, the court may provide notice of the potential members’ involvement.¹⁸

Plaintiffs may also seek certification under Rule 23(b)(2). A Rule 23(b)(2) class ((b)(2) class) primarily seeks injunctive or declaratory relief.¹⁹ To be a (b)(2) class, the party opposing the class must have acted or refused to act on grounds that apply generally to the class.²⁰ Civil rights actions in which each class member has suffered from the same injury as a result of the defendant’s conduct will usually fall within this category.²¹ Like a (b)(1) class, if a class is certified under (b)(2), the class representatives need not provide notice or an opt-out right to the class members.²²

Finally, if a group of plaintiffs cannot be certified as a (b)(1) or (b)(2) class, a judge may still certify the plaintiffs as a Rule 23(b)(3) class ((b)(3) class) if a class action is superior to other available methods of adjudication.²³ Rule 23(b)(3) acts as somewhat of a catchall provision to preserve judicial efficiency.²⁴ Rule 23(b)(3) will generally encompass claims seeking monetary damages.²⁵ Common actions brought under Rule

¹⁶ *Id.*

¹⁷ FED. R. CIV. P. 23(b)(1).

¹⁸ FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.”).

¹⁹ FED. R. CIV. P. 23(b)(2).

²⁰ *Id.*

²¹ YEAZELL, *supra* note 1, at 880.

²² FED. R. CIV. P. 23(c)(2)(A).

²³ FED. R. CIV. P. 23(b)(3).

²⁴ *Id.*

²⁵ YEAZELL, *supra* note 1, at 880.

23(b)(3) include mass torts and small claims cases.²⁶ The most noteworthy difference between a (b)(3) class and a (b)(1) or (b)(2) class is the notification requirement. Unlike (b)(1) and (b)(2) classes, plaintiffs seeking certification under Rule 23(b)(3) must provide individual notice to every prospective class member—including absentee class members—and such notice must contain an opt-out provision.²⁷ This requirement essentially gives a prospective class member the option of handling the matter individually, rather than allowing a collective group of plaintiffs to determine his or her fate.

To summarize, a properly executed class action requires a prospective class to first satisfy the numerosity, commonality, typicality and adequacy prerequisites under Rule 23(a). Once these requirements are satisfied, the class must become certified as one of three types of classes under Rule 23(b). If the prospective class seeks certification under Rule 23(b)(3), then it must provide individual notice accompanied with an opt-out provision to any prospective class member.²⁸ After a prospective class gets past these hurdles, it will generally be free to litigate as a class. Although the plain language of these rules seems clear, they have been subject to rigorous interpretation. In particular, the Court redefined the commonality requirement and the applicability of Rule 23(b) certification in *Dukes*,²⁹ which will be the main focus throughout the remainder of this note.

III. *WAL-MART V. DUKES*' INTERPRETATION OF RULE 23

In 2011, the Supreme Court gave new meaning to Rule 23 when confronted with the largest employment class action lawsuit in history. The case was *Wal-Mart v. Dukes*, and the Court's ruling heightens the "commonality" requirement under Rule 23(a) and bars prospective classes from certification under Rule 23(b)(2) if part of their complaint seeks individualized monetary relief.³⁰ The purpose of this section is to first provide a brief factual description of the *Dukes* case. Then, it will address

²⁶ *Id.*

²⁷ FED. R. CIV. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (vi) the binding effect of a class judgment on members under Rule 23(c)(3).").

²⁸ *Id.*

²⁹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–52 (2011).

³⁰ *See id.* at 2557–61.

the Court's decision to heighten the commonality requirement. Finally, this section will address the Court's decision to bar certification under Rule 23(b)(2) for actions seeking individualized monetary claims.

A. *Factual Background*

The case commenced when Betty Dukes and two others sought to represent approximately 1.5 million current and former female Wal-Mart employees in a class action against Wal-Mart.³¹ At the time of the case, Wal-Mart was the nation's largest private employer with over one million employees at approximately 3400 stores throughout the world.³² The group of plaintiffs claimed that Wal-Mart engaged in sex discrimination by denying female employees equal pay and promotions.³³ Although Wal-Mart did not have any discriminatory corporate policies in place, the plaintiffs alleged that various local managers with discretionary authority over pay and promotions engaged in discrimination against female employees.³⁴ The three named plaintiffs alleged that managers were exercising their discretionary authority to disproportionately disfavor female employees.³⁵ As a result, the prospective class of plaintiffs sued for injunctive and declaratory relief, punitive damages and back pay, and they moved to certify as a (b)(2) class.³⁶

B. *Commonality Prerequisite*

The main issue in *Dukes* was whether the plaintiffs satisfied the prerequisites to become certified as a class. In particular, the crux of the Court's inquiry involved whether the "commonality" prerequisite had been met. To show commonality, the plaintiffs alleged that Wal-Mart fostered a corporate culture that gave division managers discretionary decision-making authority, allowing them to act on gender biases—thus making every female employee a victim of a common discriminatory practice.³⁷ To prove this, the plaintiffs provided statistical and anecdotal evidence of sex

³¹ *Id.* at 2547–48.

³² *Id.* at 2547.

³³ *Id.*

³⁴ *Id.* at 2548.

³⁵ *Dukes*, 131 S. Ct. at 2548.

³⁶ *Id.* at 2547, 2549.

³⁷ *Id.* at 2548 (“The basic theory of [the plaintiffs’] case is that a strong and uniform ‘corporate culture’ permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice.”).

disparity among employees and testimony of a sociologist who conducted a “social framework analysis” of Wal-Mart’s corporate culture.³⁸

In determining whether the commonality requirement had been met, the Court noted that Rule 23(a) requires a “question[] of law or fact common to the class.”³⁹ But in his opinion for the Court, Justice Scalia heightened the commonality requirement to require not just *common questions* among class members but also the ability to provide *common answers* to issues central to each class member’s contention.⁴⁰ In other words, in addition to plaintiffs sharing the common question “why was I disfavored,” there must also be common answers to that question, such as an employment policy or other workplace practice.⁴¹

In applying this new standard to deny class certification for lack of commonality, Scalia wrote: “[T]he crux of [a Title VII] inquiry is ‘the reason for a particular employment decision,’ Without some glue holding the [plaintiffs’] alleged reasons for 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 question.”⁴² In other words, Scalia’s position states that to satisfy the common answer prong, there must be some sort of “glue,” such as an expressed corporate policy or practice in place, that explains the alleged reasons for each employment decision. Justice Scalia noted the fact that all Wal-Mart managers were afforded discretion in making pay and promotion decisions and stated: “[T]hat 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.”⁴³

The Court also rejected the statistical and anecdotal evidence about Wal-Mart’s female employees and held that even if such evidence was taken as “face value,” “that would not demonstrate that the entire company ‘operate[s] under a general policy of discrimination,’ Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.”⁴⁴ In short, the Court in *Dukes* heightened the

³⁸ *Id.* at 2549, 2553–54.

³⁹ *Id.* at 2550–51; *see also* FED. R. CIV. P. 23(a)(2).

⁴⁰ *Dukes*, 131 S. Ct. at 2550–52 (“[W]hat 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.” (quoting Richard A. Nagarerda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009))).

⁴¹ *See id.*

⁴² *Id.* at 2552 (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

⁴³ *Id.* at 2554.

⁴⁴ *Id.* at 2555–56 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 (1982) (alteration in original)).

commonality requirement by creating an additional prong. Although the plain language of Rule 23(a)(2) only requires plaintiffs to show that all members have common questions, as a result of *Dukes*, now plaintiffs must also show common answers in order to receive class certification.

C. Class Category Requirements

After finding that the prospective class failed to satisfy the Rule 23(a) prerequisites, the Court could have ended its inquiry. Nevertheless, the Court also considered the Rule 23(b) class certification requirements and concluded that the class was improperly seeking certification under Rule 23(b)(2).⁴⁵ The Court first noted that the plaintiffs' back pay claims were "individualized monetary claims," not "incidental" to the class-wide declaratory and injunctive claims.⁴⁶ The Court then held that classes seeking individualized monetary claims must proceed under the more stringent requirements of Rule 23(b)(3).⁴⁷ Unlike certification under Rule 23(b)(2), in order to be certified as a (b)(3) class, each class member must receive notice and an opt-out right.⁴⁸ The Court reasoned that an opportunity must exist for "plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have."⁴⁹ Because the plaintiffs were seeking back pay that was not incidental to any injunctive or declaratory relief, class certification under 23(b)(2) was improper.

Overall, the *Dukes* Court made two major pronouncements regarding class action litigation. First, and most notably, the plaintiffs must show not only that common questions exist, but also common answers to those questions at the requisite stage, in order to satisfy the commonality requirement under Rule 23(a)(2). Second, prospective class actions

⁴⁵ *Id.* at 2558, 2561 ("[R]espondents' class could not be certified even assuming, *arguendo*, that 'incidental' monetary relief can be awarded to a 23(b)(2) class.')

⁴⁶ *Dukes*, 131 S. Ct. at 2557–59 ("If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial.')

⁴⁷ *Id.* at 2557 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.')

⁴⁸ See FED. R. CIV. P. 23(c)(2)(B).

⁴⁹ *Dukes*, 131 S. Ct. at 2559.

containing individualized claims for monetary relief must be brought under the more stringent standards of Rule 23(b)(3).⁵⁰

IV. APPLICATION OF *WAL-MART V. DUKES* TO STATE COURTS

Dukes not only affects class actions at the federal level, but also at the state level. Although *Dukes* is a landmark decision for federal jurisdictions, many class action claims do not present federal questions or consist of diverse citizenship with the requisite amount in controversy. Consequently, such cases cannot properly be brought in federal court.⁵¹ Thus, a question remains as to the impact of *Dukes* to class actions brought in state jurisdictions. Recent trends suggest that states are beginning to follow suit.

Rule 23 of the Federal Rules of Civil Procedure serves as a model rule for states; the large majority of state class action statutes contain class certification requirements that are either identical to or closely mirror the requirements in Rule 23.⁵² In regard to the commonality requirement in particular, all but two states, North Carolina and Mississippi, have similar commonality language codified in their statutes.⁵³ As a result, the Court's interpretation of Rule 23 will likely have a strong influence on how state courts interpret their class action rules.⁵⁴ In fact, several state courts have begun applying *Dukes* when determining whether to grant class certification.⁵⁵ An Ohio Court of Appeals, in particular, recently applied the *Dukes* heightened commonality requirement when confronted with consumer class action lawsuits in *Cullen v. State Farm* and *Perme v. Union*

⁵⁰ *Id.* at 2557–61.

⁵¹ 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); *id.* § 1332(a) (requiring all class representatives to be citizens of different states than all defendants and at least one plaintiff to have over \$75,000 “in controversy”); *id.* § 1332(d)(2) (“The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . .”).

⁵² Thomson-Reuters/West, 50 State Statutory Surveys, Class Action Requirements, 0020 Surveys 2 (Mar. 2012) [hereinafter *50 State Surveys*]; *2011 Year-End Update on Class Actions*, GIBSON, DUNN & CRUTCHER LLP, Jan. 30, 2012, at 7.

⁵³ *50 State Surveys*, *supra* note 52.

⁵⁴ GIBSON, DUNN & CRUTCHER LLP, *supra* note 52 (“Because Federal Rule of Civil Procedure 23(a) often serves as a guide for analogous state class certification rules, *Dukes*’ should have a significant impact on state class certification decisions.”).

⁵⁵ *Id.* (“[S]everal state courts already have applied *Dukes* in assessing state-law class certification issues.”).

Escrow, and held that commonality existed.⁵⁶ The Supreme Court of Louisiana also grappled with the heightened commonality requirement from *Dukes* in *Price v. Martin* when it rejected certification for failure to provide common evidence.⁵⁷ In addition, a California Court of Appeals in *Duran v. U.S. Bank National Ass'n* applied *Dukes* to decertify a class consisting of employees alleging violations of wage and hour laws.⁵⁸ Similar to *Dukes*, in *Duran*, the court held that statistical data was not sufficient to establish commonality.⁵⁹

Therefore, because states are already beginning to follow suit, regardless of whether diversity or a federal question exists, the *Dukes* formula will likely filter its way to state courts.

V. THE IMPACT OF *WAL-MART V. DUKES*: A VICTORY FOR LARGE CORPORATIONS

The Court's decision to heighten the commonality requirement and to bar prospective classes seeking individualized monetary relief from certification under Rule 23(b)(2) was a victory for large corporate defendants, particularly in the context of employment class actions. It was a victory because it has heightened the hurdles for plaintiffs to proceed as a class. As a result, there will be fewer class action threats, and large corporations will likely spend substantially less time and money on litigation.

A. Fewer Class Action Threats

Dukes will inevitably reduce the number of class action threats against large corporations. In fact, within the six months after the Supreme Court rendered its decision, hundreds of courts across the nation began to apply

⁵⁶ *Cullen v. State Farm Mut. Auto. Ins. Co.*, 2011-Ohio-6621, 970 N.E.2d 1043, ¶ 56 (Ohio Ct. App. 2011); *Perme v. Union Escrow Co.*, 2012-Ohio-3448, Nos. 97368, 97381, 2012 WL 3133239, ¶¶ 12, 24 (Ohio Ct. App. Aug. 2, 2012).

⁵⁷ *Price v. Martin*, 2011-0853, pp. 10-14 (La. 12/6/11); 79 So. 3d 960, 969-71 (applying *Dukes* heightened commonality requirement to bar class certification because plaintiffs failed to come forward with common evidence of "a causal connection between specific emissions and damage to the class member's property").

⁵⁸ *Duran v. U.S. Bank Nat'l Ass'n*, 137 Cal. Rptr. 3d 391, 435-43 (Cal. Ct. App.), *rev'd*, 275 P.3d 1266 (Cal. 2012).

⁵⁹ *Id.* at 442-43 ("Here, the trial court attempted to manage the individual issues in the first phase of this trial by resorting to an unproven statistical sampling methodology that denied USB the right to properly defend the claims against it. As we have demonstrated, the plan fell short. Accordingly, we conclude the failure to grant USB's second motion to decertify was an abuse of discretion.").

the *Dukes* formula to deny class certification.⁶⁰ Because of the heightened commonality requirement and the inability to seek certification under Rule 23(b)(2) for monetary claims, class actions against large corporations will be less of a threat and less frequent.

The heightened commonality requirement in particular will result in fewer class action threats, more certification denials and smaller class sizes seeking certification.⁶¹ For one, the ability to provide common contentions against large corporations is already difficult. Prospective classes seeking to sue large corporations will often consist of a large number of members. The more prospective class members, the greater the likelihood that an inconsistency will exist among their contentions.

Furthermore, assuming that the plaintiffs do possess common contentions, *Dukes* requires plaintiffs to prove that common answers exist, such as an expressed corporate policy or practice.⁶² Because large corporations tend to operate across a large geographical scope with various regional managers, the ability to prove that every particular division and every particular regional manager is operating under the same objective corporate policy will be extremely difficult and require significant discovery.⁶³ Also, if large corporations take heed of *Dukes* and allocate independent discretionary authority to division managers—permitting each individual division to engage in its own subjective practices—then common answers will likely not exist. Without evidence of a common corporate practice or policy to “glue” their contentions together, plaintiffs will be unable to satisfy the common answer prong.⁶⁴ Also, even if evidence can be

⁶⁰ GIBSON, DUNN & CRUTCHER LLP, *supra* note 52, at 2 (“Courts nationwide have taken heed of *Dukes*, citing it widely both as a general guide for evaluating class certifications and, most significantly, as the basis for denying certification or decertifying in more than a hundred cases in the past six months alone.”); Melissa Lipman, *Plaintiffs Bar Reboots Class Strategy in Wake of Dukes*, LAW360 (Jan. 9, 2012), <http://www.law360.com/articles/298335/plaintiffs-bar-reboots-class-strategy-in-wake-of-dukes> (“From the time the much-watched decision came down in June until the end of 2011, courts have cited the ruling tightening the standards for class certification more than 260 times Judges have either denied certification or decertified previous classes in roughly two-thirds of those cases”); *see also* *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–61 (2011).

⁶¹ *See* Dr. Mary Dunn Baker, *Class Certification Statistical Analyses Post-Dukes*, 27 ABA J. LAB. & EMP. L. 471, 481 (2012).

⁶² *See Dukes*, 131 S. Ct. at 2550–52.

⁶³ John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53, 55 (2011) (“The *Dukes* decision’s likely effects on employers include fewer unmeritorious cases being filed, because plaintiffs’ attorneys now will have to invest significant resources in discovery before moving for certification.”).

⁶⁴ *See Dukes*, 131 S. Ct. at 2550–52.

uncovered through extensive discovery, the cost of discovery itself may be so impracticable that it deters plaintiffs from proceeding as a class.⁶⁵ Finally, given the difficulty in proving both common contentions and common answers among large classes, any remaining class actions against large corporations will likely be smaller and thus less of a threat.⁶⁶

In addition, the Court's decision in *Dukes* to bar certification under Rule 23(b)(2) for claims seeking individualized monetary relief will also serve as an advantage for large corporate defendants. Plaintiffs that wish to obtain individualized monetary relief now must either drop these individualized monetary claims or attempt to certify as a class under Rule 23(b)(3), which requires that individual notice and opt-out rights be given to all prospective class members.⁶⁷ Because class actions against large corporations include many prospective class members, several of whom will be absentees, plaintiffs suffer from the burden of identifying and individually notifying every potential member. This burden, coupled with the heightened commonality requirement, is likely to deter plaintiffs from proceeding as a class. Therefore, both the heightened commonality requirement and the preclusion of Rule 23(b)(2) certification for classes with individualized monetary claims will reduce the threat of class actions to large corporations and will result in fewer class actions against large corporations.

B. *Saving Large Corporations Money*

In addition to fewer class actions, the *Dukes* decision will allow large corporations to reduce their legal expenses. In fact, numerical data suggests that large corporations are already beginning to save money as a result of the *Dukes* decision.⁶⁸ This ability to save money likely stems from two sources: by devoting fewer resources to legal departments and engaging in subjective employment practices that reduce expenses associated with employee wages.

1. *Saving Money by Devoting Fewer Resources to Litigation*

Fewer class actions will allow large corporations to devote fewer resources to litigation. As previously noted, class action litigation can be

⁶⁵ See Husband & Williams, *supra* note 63.

⁶⁶ Baker, *supra* note 61, at 480–81 (noting that the *Dukes* decision should limit the size of class actions); see also Lipman, *supra* note 60.

⁶⁷ *Dukes*, 131 S. Ct. at 2557–61.

⁶⁸ 'Dramatic Halo Effect' of Wal-Mart Ruling Seen Spurring Change in Workplace Suits, BLOOMBERG (Jan. 18, 2013) ("The top 10 settlements [in employment discrimination litigation] in 2012 totaled \$48.65 million, a sharp decline from 2010, the year prior to *Dukes*, when the total was \$346.4 million.").

very expensive, particular in federal courts where the amount in controversy will exceed \$5,000,000.⁶⁹ With the heightened commonality requirement making it more difficult to bring class actions, plaintiffs will instead have to file lawsuits individually. The benefits of this are threefold. First, without the class action rules, many individuals will not receive notice that they possess a common claim and will fail to bring it. Second, even if individuals receive notice, they now will have to devote resources of their own to litigation. Finally, large corporations tend to be much more successful in suits against individuals where they can take advantage of economies of scale.

Without the class action rules in play, individuals may never receive notice that they possess a claim. As noted in Part II, Rule 23(c) requires the representative party in a (b)(3) class seeking monetary relief to provide prospective class members with notice that a class action is being filed and of the claims that are being asserted, among other things.⁷⁰ Conversely, for classes certified under (b)(1) or (b)(2), a *court* may give notice to prospective class members.⁷¹ When class actions are brought, prospective parties will likely be notified that they have a valid claim. However, with fewer class action filings as a result of *Dukes*, fewer individuals will receive notice of existing class action claims. Without such notice, many parties may never become aware that they individually have a valid claim and will fail to bring it without the proactive action of other class members.

In addition, class actions are a means for prospective class members to join in a lawsuit without having to devote their own personal resources to litigation. Because it is now more difficult to bring class actions against large corporations, plaintiffs will have to file suits individually and will have to devote resources of their own to do so. This will indefinitely deter some parties from filing suit, particularly the parties that lack the resources to initiate a lawsuit. Furthermore, even if an individual does file suit, he or she may not have the resources to conduct the necessary discovery and compile sufficient evidence to satisfy the burden of proof, whether at trial or to survive a later motion for summary judgment.

Finally, even if individual plaintiffs bring their claims in court, the likelihood of success is significantly less than if the plaintiffs joined together in a class action. According to one study, class actions brought for claims challenging the subjective practices of employers have a success rate of 27% to 29%.⁷² Meanwhile, when individuals bring claims challenging

⁶⁹ See 28 U.S.C. § 1332 (2006).

⁷⁰ See FED. R. CIV. P. 23(c)(2)(B).

⁷¹ See FED. R. CIV. P. 23(c)(2)(A).

⁷² Elizabeth Tippett, *Robbing A Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 457 (2012).

the subjective practices of employers, the success rate is only 2% to 5%.⁷³ According to Professors Hay and Rosenberg, by forcing plaintiffs to litigate their common claims individually, “a defendant facing a large number of plaintiffs generally has an enormous, and unwarranted, upper hand over the plaintiffs. The defendant firm, but not the plaintiffs, can take advantage of economies of scale in case preparation, enabling it to invest far more cost-effectively in the litigation.”⁷⁴ Therefore, even if an individual plaintiff believes that he or she may have a valid claim, but does not have the resources to adequately litigate that claim in court, the likelihood of the plaintiff succeeding on said claim is significantly less than it would have been had he or she joined a group of plaintiffs and been able to satisfy the class certification requirements.

Overall, making it more difficult to bring class actions may not only result in fewer class actions, but also in fewer individual actions, thus reducing the resources a business may need to devote to litigation. Furthermore, even if individuals bring actions, they are significantly less likely to succeed on their claims. All of these facts will inevitably permit corporations to devote fewer resources to their legal departments in favor of strengthening their infrastructure to better compete in the market.

2. *Saving Money Through Subjective Employment Practices*

In addition to reducing litigation expenses, as a result of the *Dukes* decision, large corporations can also save money by engaging in subjective employment practices to reduce expenses associated with employee wages.

Under the *Dukes* criteria, so long as large corporations do not have an expressed corporate policy of discrimination, they may be able to deny promotions and engage in certain employment practices to save money without fear of class action litigation.⁷⁵ As noted, to satisfy the heightened commonality requirement under the *Dukes* formula, resolution of the case must be able to provide “common answers” that will “glue” together the common questions, such as an expressed objective policy that results in discrimination.⁷⁶ In *Dukes*, the Court noted that giving regional and district managers discretion to use their own judgment is the exact opposite of an objective corporate policy that would suffice to satisfy the “common

⁷³ *Id.*

⁷⁴ Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1379 (2000).

⁷⁵ See discussion *supra* Part III.B. Companies could, however, still be subject to disparate impact litigation if the grant of discretionary authority resulted in the same “effects as a system pervaded by impermissible intentional discrimination.” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011).

⁷⁶ *Dukes*, 131 S. Ct. at 2553 (“The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.”).

answer” prong.⁷⁷ Thus, when claims are based on subjective employment practices alone, the ability to provide common answers will be difficult, if not impossible.

In its appellate brief for the plaintiffs in *Dukes*, the National Employment Lawyers Association noted that “[i]f claims involving objective criteria are easier to certify than those involving subjective criteria, the likely result is that employers will move further away from objective measures of job performance, skills, or qualifications.”⁷⁸ Thus, under this view, *Dukes* opens the door for corporations to subjectively discriminate against individuals, whether regarding wages or promotions, because of the difficulty in establishing the heightened commonality requirement for such claims. All corporations must do is remove objective policies, possibly by giving individual discretionary authority to regional managers as did Wal-Mart in *Dukes*.⁷⁹ Then, they are free to deny promotions and reduce employee wages without fear of class litigation.⁸⁰

Overall, *Dukes* was a substantial victory for large corporations. As a result of the Court’s decision, large corporations will face fewer class action threats and be able to save money by devoting fewer resources to legal departments and engaging in subjective business practices.

⁷⁷ *Id.* at 2547 (“Admission to Wal-Mart’s management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year’s tenure in the applicant’s current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee’s superiors after prescribed objective factors are satisfied.”). Justice Scalia noted the fact that all Wal-Mart managers were afforded discretion in making pay and promotion decisions and stated: “[T]hat 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.” *Id.* at 2554.

⁷⁸ Brief of Amici Curiae National Employment Lawyers Association et al. in Support of Respondents at 14–15, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

⁷⁹ *Dukes*, 131 S. Ct. at 2554.

⁸⁰ In addition, individual actions against large corporations that engage in subjective business practices will also be less of a threat given the low success rate of individuals when challenging the subjective practices of employers (only 2% to 5%). Tippett, *supra* note 72.

VI. IMPACT OF *WAL-MART V. DUKES*: A VICTORY FOR SMALL
BUSINESSES?

While *Dukes* may have been a victory for large corporations, the same cannot be said for small businesses. In particular, the heightened commonality requirement provides no assistance to small businesses for four reasons. First, most small businesses are not large enough to have various divisions with managers to whom discretionary authority can be allocated. Second, in small business class actions, class sizes are much smaller, making it easier to establish commonality. Third, with regard to employment class actions, many small businesses do not employ enough people to make up a class that will satisfy the “numerosity” requirement, thus making *Dukes* irrelevant.⁸¹ Fourth, small businesses have fewer resources to utilize when disproving commonality and may be forced to settle even before the class certification stage. In addition, the requirement that individualized monetary claims be brought under the more stringent standards of Rule 23(b)(3) is of little benefit because small business class actions consist of a relatively few number of members, thereby reducing the significance of the notification requirement.

A. Less Opportunity to Allocate Discretionary Authority

Unlike large corporations, such as Wal-Mart, small businesses do not have various divisions with local managers to whom they can allocate discretionary authority. This is significant because the *Dukes* Court’s reasoning was based in part on the conclusion that the allocation of discretionary authority to local managers was “just the opposite of a uniform employment practice that would provide the commonality needed for a class action.”⁸² The Court noted that given the size and geographic scope of Wal-Mart, many different managers across the globe could not each exercise their discretion in a common way without a uniform policy directing them to do so.⁸³ Small businesses also do not encompass a significantly large geographic scope. Thus, small businesses do not have the opportunity to use allocation of discretionary authority as a tool to defend themselves in class certification battles. Furthermore, without subjective practices of various managers to cloud a common answer, plaintiffs will need to invest very little in discovery. Consequently, businesses will also lose the deterrent power of costly discovery.

⁸¹ See FED. R. CIV. P. 23(a) (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable . . .”).

⁸² *Dukes*, 131 S. Ct. at 2554.

⁸³ *Id.* at 2555 (“In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”).

B. *Smaller Classes Make it Easier to Satisfy Commonality*

Unlike Wal-Mart and other large corporations, class actions against small businesses will consist of a substantially smaller number of class members. To recall, the prospective class of plaintiffs in *Dukes* consisted of roughly 1.5 million current and former employees.⁸⁴ Meanwhile, 99.7% of the rest of the employers in the United States employ fewer than 500 employees.⁸⁵ Thus, even if the largest company within that 99.7% is subject to a class action and every employee joins in the action, there will be fewer class members among which to show that common contentions exist than the 1.5 million plaintiffs in *Dukes*. With fewer class members, the likelihood that an inconsistency will exist among the prospective class members' contentions is reduced, making it easier for plaintiffs' attorneys to satisfy the commonality requirement.

C. *Employment Class Actions Exist Despite Fewer Employees*

In addition, because the "numerosity" prerequisite under Rule 23(a)(2) only permits class actions where the class is so large that a joinder would be "impracticable,"⁸⁶ smaller businesses that employ a relatively few number of employees will likely never be subject to an employment class action. Instead, the class may consist of consumers. Consumer class action claims pertain to mass torts, such as a product defect or misleading advertisement.⁸⁷ In these types of class actions, it will likely be significantly easier to satisfy the heightened commonality requirement because the common "product defect" or the "dangerous drug" will be expressed and physically identifiable, which will provide the common answer that was missing in *Dukes*.⁸⁸ Had the plaintiffs in *Dukes* been able to point to an "expressed" corporate policy to serve as a common answer, they would have been able to satisfy the commonality prerequisite under Rule 23(a).⁸⁹

⁸⁴ *Id.* at 2547.

⁸⁵ Tippett, *supra* note 72, at 474 ("Employers with less than 500 employees represent 99.7 percent of all employers in the United States, a class size much more likely to survive the more exacting standards set forth in *Wal-Mart*." (footnote omitted)).

⁸⁶ FED. R. CIV. P. 23(a)(2).

⁸⁷ *Common Types of Class Action Lawsuits*, LAW INFO (July 2010), <http://resources.lawinfo.com/en/articles/class-action/federal/common-types-of-class-action-lawsuits.html>.

⁸⁸ *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 418–21 (6th Cir. 2012) (applying *Dukes* in a product liability class action and holding that the commonality requirement was satisfied because the plaintiffs presented evidence of a common design flaw).

⁸⁹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011).

Where a defective product or misleading advertisement is the basis of the class action, for example, the common answer is much more clear.

D. *Small Businesses Have Fewer Resources*

In addition, because small businesses have significantly fewer financial resources than large corporations, many may be unable to conduct the necessary discovery to defend themselves against class certification. As a result of the *Dukes* heightened commonality requirement, lower courts, as gatekeepers, will have to conduct a more rigorous analysis during the class certification stage.⁹⁰ This may require both plaintiffs and defendants to devote more resources to attorneys, courts and discovery in order to prove or disprove commonality. Large corporations like Wal-Mart have the resources to devote to defend against class certification and disprove commonality. Small businesses, on the other hand, have fewer resources with which to do the same.⁹¹ Furthermore, even after the class certification stage, small businesses will still have fewer resources to defend against class action claims at trial. Therefore, if small businesses do chose to litigate, *Dukes* is of little assistance.

In a similar vein, oftentimes it may cost small businesses more to defend against class certification than it would cost to simply settle.⁹² Thus, even if a prospective class brings meritless claims, small businesses may still be forced to pay large settlements if they cannot afford to defend against class certification. Therefore, to avoid incurring additional costs associated with litigation and attorney fees, small businesses may decide to informally settle matters. In that case, *Dukes* is completely irrelevant.⁹³

E. *Fewer Absentee Members Make Rule 23(b)(3) Easier to Satisfy*

The Court's decision in *Dukes* to bar plaintiffs with individualized claims for monetary relief from seeking class certification under Rule 23(b)(2) will also have little benefit—if any—to small business defendants.

⁹⁰ *Hot Topic Labor & Employment Law News*: Wal-Mart Stores, Inc. v. Dukes, et al., AM. B. ASS'N, http://www.americanbar.org/newsletter/groups/labor_law/ll_hottopics/2011_aball_hottopics/11_aball_wal_mart_stores_incvdukesetal.html (last visited Mar. 30, 2013) (“The Wal-Mart decision . . . [S]tresses the importance of the lower courts’ gatekeeping function and the rigorous analysis required at the class certification stage. It is not enough to identify a general common question; rather, plaintiffs need to identify and advance ‘significant proof’ of ‘a specific employment practice’ that ‘ties’ their class together and for which there are ‘common answers apt to drive the resolution of the litigation.’”).

⁹¹ Grassley, *supra* note 2.

⁹² Cf. YEAZELL, *supra* note 1, at 880 (discussing mass tort claims).

⁹³ *Dukes* is irrelevant if small businesses choose to settle through other, informal means in which precedent and the Rules of Civil Procedure are inapplicable.

The Court in *Dukes* held that prospective classes seeking individualized monetary relief can only receive class certification under Rule 23(b)(3).⁹⁴ Moreover, classes seeking certification under Rule 23(b)(3) must satisfy the strict notice requirements under Rule 23(c)(2)(B).⁹⁵ As discussed *infra* Part V, this is beneficial to large corporations because the potential class actions they face consist of large classes with numerous absentee class members across a large geographical scope. Requiring plaintiffs to provide individual notice to each and every class member burdens the plaintiff's bar and discourages large class action lawsuits.⁹⁶ On the other hand, class actions against small businesses will consist of significantly fewer class members, particularly absentee class members. Thus, the burden of satisfying the strict notice requirements for classes with individualized monetary claims is not nearly as significant for class actions brought against small businesses.

Overall, *Dukes* was not a victory for small businesses. First, the heightened commonality requirement is of little benefit; it will have a minimal impact on the number of class actions and the manner in which class actions are brought against small businesses. Second, the heightened commonality requirement may adversely impact small businesses by forcing them to settle even unmeritorious claims as a result of inadequate resources to litigate. In addition, the Court's decision requiring plaintiffs with monetary claims to satisfy the strict notice standards does not meaningfully burden plaintiffs in class actions against small businesses. Therefore, although *Dukes* was a victory for large corporations, the same cannot be said for small businesses.

VII. WILL THE *WAL-MART V. DUKES* DECISION PUT SMALL BUSINESSES AT AN UNFAIR DISADVANTAGE IN THE MARKET?

Although *Dukes* may not adversely affect the number of class actions brought against small businesses, the decision may indirectly result in an unfair disadvantage for small businesses in the market. Though not a complete loss, *Dukes* was certainly not a victory for small businesses. It was, however, a victory for large corporations: whether benefiting large corporations and not small businesses will put small businesses at an unfair disadvantage is subject to debate. The purpose of this Part is to address potential arguments on both sides of the debate and permit readers to draw their own conclusions.

⁹⁴ *Dukes*, 131 S. Ct. at 2561.

⁹⁵ See FED. R. CIV. P. 23(c)(2)(B) (requiring that classes certified under Rule 23(b)(2)(3) to provide individualized notice to all prospective class members, including the opportunity to opt-out).

⁹⁶ See discussion *supra* Part V.

A. *Small Businesses Will Be Unfairly Disadvantaged*

One way to view the impact of *Dukes* may be to consider it as a form of “robbing from the poor and giving to the rich.” Prior to *Dukes*, large corporations already had the advantage of economies of scale and were better equipped to compete in the market. *Dukes* will only strengthen this advantage because it will likely provide access to additional capital for large corporations, while small businesses will be left in the same position as before.

Because *Dukes* significantly raised the bar for plaintiffs to successfully obtain class certification, large corporations will face fewer class actions and likely fewer individual actions.⁹⁷ As a result, large corporations now have the luxury of devoting fewer resources to their legal departments.⁹⁸ *Dukes* essentially opened the door for large corporations to cut employee wages and reduce employee promotions as long as the practice of doing so is subjective and not expressed.⁹⁹ With the ability to reduce legal expenses and possibly even the expenses associated with employees, large corporations will likely have additional capital on hand. With additional capital, large corporations may be able to afford to reduce the costs of their products or services and invest in marketing, technology or other market share growth opportunities.¹⁰⁰

Meanwhile, *Dukes* does not provide the same opportunities for small businesses. Unlike large corporations, small businesses will continue to face class action threats at the same rate and possibly even at a greater rate than before. If class action attorneys for plaintiffs are unsuccessful at pursuing large corporations, they may pursue instead the market for small businesses at higher rates.¹⁰¹ Therefore, unlike large corporations—which

⁹⁷ Fewer class actions will likely lead to more individual filings. Hay & Rosenberg, *supra* note 74.

⁹⁸ *See id.* at 1384.

⁹⁹ *See Dukes*, 131 S. Ct. at 2553 (“The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.”).

¹⁰⁰ *See Grassley, supra* note 2 (“Make no mistake about it, there is a real impact on the bottom line for many of these companies and, to some extent, on the economy as a whole. They have to eat this increased litigation cost or else it is farmed out to consumers, such as you and me, and this is all in the form of higher prices for goods and services we buy.”). Senator Grassley’s statements highlight the high costs to businesses and consumers alike from class action lawsuits, and “frivolous” class actions in particular. *Id.*

¹⁰¹ It will likely be easier to satisfy the *Dukes* standard when class actions are brought against small businesses because such class actions will consist of smaller class sizes. *See supra* note 85 and accompanying text. This may in some way encourage plaintiffs’ attorneys to bring class actions against small businesses at higher rates, given the difficulty in bringing class actions against large corporations as a result of *Dukes*.

already have economies of scale to their advantage—small businesses will not have access to additional capital and will be further disadvantaged in the market. In sum, because the *Dukes* decision will allow large corporations to devote fewer resources to legal departments and engage in subjective employment practices, it is plausible to suggest that because small businesses do not have these same advantages large corporations will be at an unfair advantage in the market.

B. *The Disadvantages May Be Minimal and Temporary*

Small businesses may not be entirely disadvantaged by *Dukes*, however. A contrary argument exists that the impact of *Dukes* on the market for small businesses will be minimal and only temporary. First, the impact of *Dukes* on the market for small businesses may be minimal; although the heightened commonality requirement from *Dukes* will likely have a significant impact on large employment class actions, the same may not be true when class actions are brought by consumers or investors. Employment class actions involve claims based on civil rights violations by employers, such as sexual harassment, discriminatory hiring, discriminatory pay, hostile work environments and retaliation.¹⁰² As illustrated in *Dukes*, it will be more difficult to satisfy the heightened commonality requirement when the class action is based on employment practices because it may be difficult to prove an apparent corporate policy to serve as a “common answer.” On the other hand, securities class actions consist of claims for security law violations and predatory lending, whereas consumer class actions claims pertain to mass torts such as product defects, dangerous drugs or misleading advertisements and warnings.¹⁰³ For claims of these types, large corporations may not be able to use subjectivity to cloud commonality. For example, plaintiffs need only present evidence of a common design flaw or misleading warning label in order to satisfy commonality in a products liability class action lawsuit.¹⁰⁴ Such evidence will likely be apparent and easily obtainable. Therefore, the heightened commonality requirement may have a significant impact only on employment class actions.

Furthermore, some evidence suggests that employment class actions have become less prevalent against large corporations.¹⁰⁵ Many

¹⁰² *Common Types of Class Action Lawsuits*, *supra* note 87.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 418–21 (6th Cir. 2012).

¹⁰⁵ See Brief of Amici Curiae, Law and Economics Professors in Support of Respondents at 8, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277). But see ‘Dramatic Halo Effect’ of Wal-Mart Ruling Seen Spurring Change in Workplace Suits, *supra* note 68 (“The report found that wage and hour litigation

employment class actions are based on civil rights violations; as in *Dukes*, and even prior to *Dukes*, civil rights class actions were on the decline in absolute numbers and constituted a relatively small percentage of total class action filings.¹⁰⁶ Specifically, the total number of class actions brought for civil rights violations in the first half of 2007 decreased 17% from the second half of 2001.¹⁰⁷ Also, by the first half of 2007, “[c]ivil rights class actions constituted only 6.9 percent of total class action filings and removals. . . .”¹⁰⁸ Thus, because civil rights class actions are primarily brought for employment discrimination, the decline in civil rights class actions prior to *Dukes* indicates a decline in employment class actions prior to *Dukes*.¹⁰⁹ Therefore, if the heightened commonality requirement only has a significant impact on employment class actions and if employment class actions are less prevalent than other types of class actions, then the advantages of the heightened commonality requirement for large corporations may be minimal overall.

In addition, one could argue that the disproportionate advantages that *Dukes* provides for large corporations will only be temporary. As more prospective classes are denied certification, attorneys will likely search for new strategies to overcome the *Dukes* standard. One strategy may be to cut back on nationwide class actions directed at an entire corporate practice and instead file smaller regional class actions confined to a single corporate division or facility.¹¹⁰ In doing so, there would likely be fewer class members; thus, like small business class actions, it would be easier for plaintiffs to show consistency among their claims. In addition, by focusing on one particular corporate facility or operation, there would likely be fewer managers with discretionary authority, which could in turn hinder a large

outpaced all other types of workplace class actions in 2012, with a total of 7,672 Fair Labor Standards Act suits filed last year. That represented an increase of 893 from the then-record 2011 levels.”).

¹⁰⁶ See, e.g., Brief of Amici Curiae, Law and Economics Professors in Support of Respondents, *supra* note 105; EMERY G. LEE III & THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS 5 (2008) (“[C]ivil rights class actions declined in absolute numbers, from 195 in July–December 2001 to 162 in January–June 2007, a decrease of 17 percent. Civil rights class actions constituted 6.9 percent of total class action filings and removals in January–June 2007, compared with 14.2 percent in July–December 2001.”).

¹⁰⁷ LEE & WILLGING, *supra* note 106.

¹⁰⁸ *Id.*

¹⁰⁹ Brief of Amici Curiae, Law and Economics Professors in Support of Respondents, *supra* note 105 (“Thus, the decline in civil rights cases represents not only a conservative estimate for the decline in civil rights class certifications but, more important, the waning of employment discrimination class action certifications, a subset of all civil rights certifications.”).

¹¹⁰ SEYFARTH SHAW LLC, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 9 (2012).

corporation's ability to cloud common answers. Therefore, even if *Dukes* does create a disadvantage for small businesses, the disadvantages that small businesses face may be only minimal and temporary.

VIII. RECOMMENDATIONS FOR SMALL BUSINESSES

Regardless of whether *Dukes* will put small businesses at an unfair disadvantage, a number of options are available that will protect small businesses from class action threats. This Part provides recommendations that will assist small businesses in avoiding class action litigation and the threats that class actions pose. These recommendations include the following: first, separating business finances and personal assets; second, incorporating arbitration clauses into contracts; third, obtaining appropriate liability insurance; and, finally, implementing subjective business practices by granting managers discretionary authority.

A. Incorporate to Separate Business and Personal Assets

One way for small business owners to minimize the impact of class action lawsuits is to formally incorporate their business and separate their personal assets from their business assets. Corporations and other statutorily recognized entities—e.g., limited partnerships (LPs), limited liability partnerships (LLPs), limited liability limited partnerships (LLLLPs) and limited liability companies (LLCs)—all offer owners some degree of protection from liabilities of the business, regardless of whether the business is insolvent.¹¹¹ On the other hand, informal associations, such as sole proprietorships and general partnerships, do not afford such protection; the owners of such entities are personally responsible for all debts, obligations and liabilities of the business.¹¹² In essence, formal incorporation creates a limited liability shield for the personal assets of shareholders. For small business owners, formal incorporation is an inexpensive and simple way to protect personal assets and finances when facing business litigation.¹¹³ This will ensure that any financial losses

¹¹¹ David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1309–10 nn.1–5 (2007) (citing various model codes offering limited liability).

¹¹² See, e.g., *Trs. of Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc.*, 862 F.2d 1020, 1024–25 (3d Cir. 1988) (“[T]he general rule [is] that a sole proprietor is personally liable for all debts of the business; the proprietor’s personal assets and the proprietorship’s business assets are legally a single financial estate.”). For liability of general partners, see UNIF. P’SHP ACT § 306 (1997) (“[A]ll partners [of a general partnership] are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”).

¹¹³ *How Small Businesses Owners Can Guard Against Class Action Lawsuits*, BOLT INS. AGENCY BLOG, <http://www.boltinsurance.com/news/small-business-tips/how->

associated with a potential lawsuit are less “astronomical” and, as such, the financial gains for a victorious class of plaintiffs less significant. Furthermore, the fewer assets a business possesses, the less attractive class action litigation will appear to a group of plaintiffs.

In addition to incorporation, small business owners must be sure to separate and avoid commingling their personal and business assets. Although incorporation limits the liability of small business owners, it does not shield them from the doctrine of “piercing the corporate veil.”¹¹⁴ Veil piercing is a creditor protection device that, under certain circumstances, courts deploy to “pierce” the limited liability “veil” and extend liability beyond the business to hold individual shareholders liable in tort or contract.¹¹⁵ Because of the nature of their businesses, private and undercapitalized small business owners face a particularly high risk of veil piercing.¹¹⁶ However, courts generally will employ the doctrine in these cases only if there appears to be a “lack of separateness” between the business owner and the business itself.¹¹⁷ By separating personal and business assets rather than commingling funds, small business owners can ensure separateness and avoid the threats of a potential class seeking to pierce the veil, which in turn, will reduce the potential harm associated with

small-businesses-owners-can-guard-against-class-action-lawsuits/ (last visited Mar. 30, 2013).

¹¹⁴ See Millon, *supra* note 111, at 1310–12.

¹¹⁵ WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 151 (Vicki Been et al. eds., 3rd ed. 2009) (“The most frequently invoked—and radical—form of shareholder liability in the cause of creditor protection is the equitable power of the court to set aside the entity status . . . (‘piercing the veil’) to hold its shareholders liable directly on contract and tort obligations.”); *see also* Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 569–70 (7th Cir. 1985) (“[A] corporate entity will be disregarded and the veil of limited liability pierced when two requirements are met: [F]irst, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.” (alteration in original) (quoting another source)); Millon, *supra* note 111, at 1310.

¹¹⁶ ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 115, at 152 (“A number of factors may play a role in veil-piercing decisions: A disregard of corporate formalities, thin capitalization, small numbers of shareholders, and active involvement by shareholders in management are but a few.”). Small business owners are at higher risk because they will likely play an active role in the business and because small businesses operate on less capital and with fewer owners.

¹¹⁷ *See* Van Dorn, 753 F.2d at 569–70 (“unity of interest and ownership that the separate personalities of the corporation and the individual . . . no longer exist”).

class litigation.¹¹⁸ Therefore, as a method of decreasing the potential detrimental impact of class actions against small businesses, small business owners should be sure to incorporate their business and separate all of their personal assets and finances from their business assets and finances.

B. *Incorporate Arbitration Agreements in Contracts*

Arbitration clauses in employment contracts, investor contracts and purchasing agreements may also help small businesses avoid class litigation and the disadvantages class actions pose. In addition to *Dukes*, the Supreme Court reached another landmark decision in 2011 when confronted with *AT&T Mobility LLC v. Concepcion*.¹¹⁹ The Court held that the Federal Arbitration Act preempts state rules that purport to invalidate arbitration agreements to waive class actions.¹²⁰ Thus, small businesses can contract to avoid litigating against classes and instead defend against classes in an arbitral forum.¹²¹ The ability to arbitrate class claims is particularly advantageous for undercapitalized small business defendants. When legal disputes arise, arbitration offers a way for small businesses to save time and money, and it can help protect the small business' reputation which could otherwise be damaged by class litigation.¹²²

Arbitration has several advantages over litigation. Arbitration is a dispute resolution forum that allows small businesses to save time and money.¹²³ Unlike litigation, the procedure of arbitration is less formal and parties need not go through the various pretrial steps involved in litigation, which can be costly and drawn out.¹²⁴ Also, the ability to draft a mandatory arbitration clause is essentially a way for small businesses to exercise a

¹¹⁸ Among the factors courts consider when determining whether separateness exists include the commingling of funds or assets. *See, e.g., id.* at 570.

¹¹⁹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹²⁰ *Id.* at 1748, 1753.

¹²¹ 9 U.S.C. § 2 (2006) ("A written provision in . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

¹²² *See* Chau, *supra* note 7, at 994.

¹²³ *See* Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 639–40 (2001).

¹²⁴ *Id.* ("There is no doubt that arbitration is faster on the whole than court With fewer depositions and with faster pre-trial procedures, a proceeding tried to judgment is much less costly in arbitration than in court.").

degree of control over contractual disputes.¹²⁵ One of the disadvantages that class litigation poses to small businesses is that small businesses often do not have the adequate financial resources to devote towards extensive discovery.¹²⁶ However, mandatory arbitration agreements can be drafted to limit the scope of discovery, which will save small businesses time and money and will protect them from the disadvantages of unequal bargaining power.¹²⁷ Furthermore, arbitration also offers parties the benefit of limited judicial review.¹²⁸ Arbitration decisions are generally final, thus avoiding the additional cost of an appeal.¹²⁹

Arbitration is also a way for small businesses to avoid harm to their reputation.¹³⁰ Unlike decisions in litigation, arbitration agreements can be designed so that proceedings and final decisions remain confidential.¹³¹ As discussed *supra* Part VI, the mere fact that a class action was filed can be detrimental to a business' reputation—whether a business prevails in a class

¹²⁵ So long as all parties sign, the drafters of arbitration agreements control how the arbitration will function; moreover, mandatory arbitration agreements are generally enforceable. *See* 9 U.S.C. § 2.

¹²⁶ *See* discussion *infra* Part VI.

¹²⁷ Edward Brunet & Walter E. Stern, *Drafting the Effective ADR Clause for Natural Resources and Energy Contracts*, NAT. RESOURCES & ENV'T, Summer 1996, at 7 (“The custom [arbitration] clause can describe whether any discovery is permissible and, if so, the extent of discovery available.”).

¹²⁸ Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 126 (2002). Both the Federal Arbitration Act and the Uniform Arbitration Act (which has been adopted by forty-nine states) contain provisions limiting judicial review. *Id.* at 131, 154 n.163.

¹²⁹ *Id.* at 133 (“Finality has been the functional cornerstone of arbitration, in that it has allowed arbitration to develop as a private, flexible, and self-contained process regarded as more efficient than litigation both in terms of time and expense.” (footnote omitted)).

¹³⁰ Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1224 (2006) (“[A]rbitration's private proceedings allow parties to resolve their disputes quietly without suffering public embarrassment of litigation.” (footnote omitted)).

¹³¹ Schmitz, *supra* note 130, at 1215 (“Arbitration's private process limits its transparency by precluding the public's observation of and participation in the process.” (footnote omitted)); *id.* at 1222 (“The press and the public may not freely attend and observe arbitration hearings, and some parties agree to various levels of secrecy. Furthermore, arbitration fosters a culture of secrecy that participants often observe even when they do not sign confidentiality agreements.”); *see also* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 452 (2010) (“[A]rbitration may better protect confidential information from disclosure.”); Lynne MacDonald, *What Are the Benefits of Employment Arbitration?*, HOUS. CHRON., <http://smallbusiness.chron.com/benefits-employment-arbitration-14693.html> (last visited Mar. 30, 2013) (“Unlike court actions, arbitration proceedings and arbitrators' decisions are not normally made public.”).

action suit. By incorporating an arbitration clause with a confidentiality provision, small businesses can protect their reputation from the damaging effects of litigation.¹³²

In short, the inclusion of an arbitration clause in business contracts provides a safety net for small businesses that would otherwise fall into the potentially devastating pit of class action litigation. Unlike litigation, arbitration offers small businesses the benefits of saving time and money, limiting discovery and avoiding permanent damages to their reputation.

C. *Invest in Appropriate Liability Insurance*

Small businesses can also protect themselves from class actions by investing in appropriate liability insurance, the requirements of which will vary by state.¹³³ Businesses—like individuals—often purchase some type of general or business basic liability insurance. This insurance protects small businesses against personal accidents, bodily injuries inflicted on third parties and property damages.¹³⁴ Business basic liability insurance is included in most businesses owner policy (BOP) packages.¹³⁵ However, although basic liability coverage may be economically feasible, BOP packages are designed for low-risk businesses and do not provide coverage for professional errors or negligence, workplace misconduct and other potential damages that could result in a class action law suit.¹³⁶ Depending on the type of business, general liability insurance alone may not adequately protect against class actions.

In regard to consumer class actions, the type of liability insurance that will provide adequate protection will depend on the type of business. Businesses that render professional services will not be afforded much protection under a general policy and should consider purchasing a professional liability insurance policy.¹³⁷ Unlike most traditional policies, a professional liability policy provides protection for malpractice and other

¹³² See Schmitz, *supra* note 130.

¹³³ *Business Insurance*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/business-insurance> (last visited Mar. 30, 2013) (“Most states require businesses with employees to pay for workers’ compensation insurance, unemployment insurance, and state disability insurance.”).

¹³⁴ SHEL PERKINS, TALENT IS NOT ENOUGH: BUSINESS SECRETS FOR DESIGNERS 188–89 (Michael J. Nolan et. al eds., 2d ed. 2010); *13 Types of Insurance a Small Business Owner Should Have*, FORBES (Jan. 19, 2012), <http://www.forbes.com/sites/thesba/2012/01/19/13-types-of-insurance-a-small-business-owner-should-have/> [hereinafter FORBES]; *Business Insurance*, *supra* note 133.

¹³⁵ PERKINS, *supra* note 134, at 188.

¹³⁶ *Id.*; see also L. Kathleen Chaney, *Employment Practices Liability Insurance*, 30 COLO. LAW. 125, 125 (2001); FORBES, *supra* note 134.

¹³⁷ FORBES, *supra* note 134.

damages for improper services.¹³⁸ On the other hand, businesses that operate in the chain of product distribution should consider product liability insurance, which will provide coverage in the event that the business is sued by consumers of defective products.¹³⁹

In addition, traditional insurance policies often do not provide coverage for employment rights violations.¹⁴⁰ Like the class action in *Dukes*, many employment actions are brought under the Americans with Disabilities Act or Age Discrimination in Employment Act.¹⁴¹ Unlike many traditional policies, employment practices liability insurance (EPLI) offers protection for businesses sued for wrongful employment practices, “such as wrongful termination, discrimination, and sexual harassment.”¹⁴² Thus, small business owners with a significant number of employees should consider investing in an EPLI policy so that their businesses are protected against potential employee class actions.

In sum, there are a number of insurance policies available that will afford protection against class actions and litigation in general. However, businesses must be sure to invest in the appropriate policy or combination of policies that best suit their operation in order to be adequately protected.

D. *Attempt to Engage in Subjective Practices*

Finally, a less feasible recommendation for small businesses to avoid class action litigation is to engage in completely subjective employment practices. By doing so, it will be more difficult for prospective class representatives to satisfy the commonality requirement, causing the class action to dissolve at the certification stage.¹⁴³ The heightened commonality requirement from *Dukes* will likely be of minimal assistance to small businesses. Unlike Wal-Mart and other large corporations, small businesses cover a relatively small geographical scope and employ only a few managers, if any. As a result, small businesses are likely unable to designate discretionary authority to managers and successfully challenge commonality.¹⁴⁴ However, if courts continue to narrow the gap for class

¹³⁸ *See id.*

¹³⁹ *Types of Business Insurance*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/types-business-insurance> (last visited Mar. 30, 2013).

¹⁴⁰ Chaney, *supra* note 136.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See* discussion *supra* Part II.B.2.

¹⁴⁴ In holding that commonality was lacking, the Court in *Dukes* stated that “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011). However, small businesses likely do not cover the same geographical scope and do

actions to squeeze through, the successful implementation of subjective practices and policies among the few managers and within the actual business premises may be just enough for small businesses to disprove commonality.

IX. CONCLUSION

The degree of harm that *Dukes* will have on small businesses remains uncertain. However, what appears certain is that *Dukes* was a victory for large corporations but not for small businesses. The new “common answer” prong of the commonality prerequisite has made it more difficult to show commonality in cases where the employer is large with local managerial discretionary authority and subjective employment practices. Also, the Court’s decision to require prospective classes with claims for monetary relief to obtain certification under Rule 23(b)(3) serves as an advantage for large corporations because of the significant burden that the Rule 23(b)(3) notice requirement places on large classes.

The same cannot be said for small businesses, however. First, the heightened commonality requirement will be easier to satisfy when class actions are brought against small businesses. Because smaller businesses do not cover a large geographical scope, do not have many local managers with discretionary authority and do not face giant class sizes in litigation, it will be more likely that prospective class members will have consistent common questions with common answers. Furthermore, the Court’s decision to bar Rule 23(b)(2) certification for classes seeking individualized monetary claims also provides no advantage to smaller businesses. The burden it places on plaintiffs in class actions against large corporations does not exist when class actions are brought against small businesses because prospective class sizes (and consequently the burden to notify) will be much smaller. Overall, small business owners must take it upon themselves to guard against class actions.

not employ a significant number of managers, making it more difficult to disprove commonality.

