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Doomsday Delayed: How the Court's Party-Neutral Clarification of Class Certification Standards in Wal-Mart v. Dukes Actually Helps Plaintiffs

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DOOMSDAY DELAYED: HOW THE COURT'S PARTY-NEUTRAL CLARIFICATION OF CLASS CERTIFICATION STANDARDS IN *WAL-MART V. DUKES* ACTUALLY HELPS PLAINTIFFS

*Anthony F. Fata**

INTRODUCTION

Wal-Mart Stores, Inc. v. Dukes[1] impacts all class certification decisions. Even though *Dukes* involved a Rule 23(b)(2) injunctive relief class and a gender discrimination claim, the courts have subsequently applied *Dukes* to Rule 23(b)(3) class actions in cases involving antitrust, breach of contract, wage and hour acts, product defect, product liability, Employee Retirement Income Security Act (ERISA), due process, and other statutory claims. While the *Dukes* Court focused primarily on Rule 23(a)(2)'s commonality requirement and Rule 23(b)(2)'s injunctive relief requirement, it also addressed principles that impact every requirement under Rule 23(a) and Rule 23(b), such as the "rigorous analysis" standard and the admissibility—and persuasiveness—of evidence offered in Rule 23 proceedings. *Dukes* and the cases interpreting it suggest four principles.

First, plaintiffs must prove, by a preponderance of the evidence, compliance with the Rule 23 requirements. Plaintiffs' evidence in support of these requirements, and defendants' evidence in rebuttal, must comply with the Federal Rules of Evidence (FRE).

Second, a court may, when necessary, conduct a "preliminary" inquiry into certain aspects of the merits to determine whether the Rule 23 requirements are satisfied, but it cannot rule on the merits or base the class certification decision on who it believes will prevail on the underlying substantive claim.

Third, "common questions" for purposes of Rule 23(a)(2) are limited to outcome-determinative questions, and "commonality" centers

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

on whether the defendant engaged in substantially uniform conduct that yielded a substantially similar impact on class members.

Finally, although *Dukes* narrowed the universe of "common" questions properly considered under Rule 23(a)(2), it did not alter Rule 23(b)(3)'s requirement that common questions "predominate" over questions affecting only individual members of the class. However, because *Dukes* discussed the Rules Enabling Act and defendants' right to assert affirmative defenses, such defenses may now play a more prominent role in the Rule 23(b)(3) analysis. On the other hand, the *Dukes* Court's rejection of the "Trial by Formula" method of ascertaining damages has had no impact on the well-settled rule that even complex individual damage determinations for class members will not defeat predominance.

II. "RIGOROUS ANALYSIS" FOCUSES ON ADMISSIBLE EVIDENCE

In reiterating the rigorous analysis standard originally set forth in *General Telephone Co. of the Southwest v. Falcon*[2] nearly thirty years earlier, the *Dukes* Court confirmed that a class certification proponent must "affirmatively demonstrate his compliance" with Rule 23, which means "he must be prepared to prove" with facts each of the applicable Rule 23 requirements.[3] Thus, "[a]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensible."[4] Accordingly, in the class action context, it is now clearer than ever that evidence is just as important as argument, if not more so.

While *Dukes* addressed this standard in the context of Rule 23(a)(2)'s "commonality" requirement, rigorous analysis will be applied to *every* applicable Rule 23 requirement.[5] Rigorous analysis, however, is constrained by the specific terms of Rule 23. As the Seventh Circuit has recognized, a court cannot impose new requirements on plaintiffs that are not found in the language of Rule 23(a) and (b):

> [A] district court's conclusion that it has a better idea does not justify disregarding the text of Rule 23. Policy about class actions has been made by the Supreme Court through the mechanism of the Rules Enabling Act. A district court is no more entitled to depart from Rule 23 than it would be to depart from one of the Supreme Court's decisions after deeming the Court's doctrine counter-

2. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

3. *Dukes*, 131 S. Ct. at 2551.

4. *Id.* (alteration in original) (quoting *Falcon*, 457 U.S. at 160).

5. *See, e.g.*, Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 917–18 (7th Cir. 2011) (holding that adequacy of counsel under Rule 23(a)(4) did not survive a rigorous analysis); George v. Kraft Foods Global, Inc., No. 08 C 3799, 2011 WL 5118815, at *8 (N.D. Ill. Oct. 25, 2011) (holding that the class definition did not survive a rigorous analysis).

> productive. Rule 23 establishes a national policy for the Judicial Branch; individual district judges are not free to prefer their own policies. The Court made this point twice in its most recent Term.[6]

A. The Federal Rules of Evidence Apply to Rule 23 Proceedings

The FRE are not limited to trials, but instead, under FRE 101, apply to all "proceedings," unless a specific exception applies.[7] The specific exceptions listed in the FRE do not include Rule 23 proceedings specifically or pretrial proceedings generally.[8] Moreover, in *Mars Steel Corp. v. Continental Bank N.A.*, the Seventh Circuit held, long before *Dukes*, that the FRE apply to Rule 23 proceedings.[9] More recently, in *American Honda Motor Co. v. Allen*, the Seventh Circuit held that Rule 702 and *Daubert* apply to expert opinions offered on class certification issues.[10]

Despite *Mars Steel*, some district courts in the Seventh Circuit have cited *Eisen v. Carisle & Jacquelin*[11] for the proposition that the FRE do not apply to Rule 23 proceedings because "a class action hearing of necessity is not accompanied by the traditional rules and procedures applicable to civil trials."[12] Thus, there appeared to be some confusion among the district courts in the Seventh Circuit.

Speculation as to whether *Eisen* permits a lesser evidentiary standard on class certification was seemingly put to rest in *Dukes*. The parties in *Dukes* disputed whether the opinions of the plaintiffs' expert regarding class certification had to satisfy FRE 702 and *Daubert*, and the district court held that neither applied to the issue of class certification. In response, the Supreme Court stated, "We doubt that is so."[13] While the Supreme Court did not hold that the FRE apply to Rule 23, its "doubt" clearly indicates that they do.

More recently, the Supreme Court granted certiorari in *Comcast Corp. v. Behrend* to address the following issue: "Whether a district

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6. *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 751–52 (7th Cir. 2011) (citation omitted). The court in *In re Aqua Dots Products Liability Litigation* held that the district court erred by determining, under Rule 23(b)(3), that defendant's voluntary product recall was "superior" to the class action device; while a voluntary recall may be a form of resolving the dispute, it is not a form of "adjudicating"—the term employed in Rule 23(b)(3)—the dispute. *Id.*

7. *See* FED. R. EVID. 101.

8. *See* FED R. EVID. 101, 1101.

9. *See* Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989); *see also* Reed v. Advocate Health Care, 268 F.R.D. 573, 594 n.20 (N.D. Ill. 2009).

10. Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010).

11. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

12. Lively v. Dynegy, Inc., No. 05-CV-63-MJR, 2007 WL 685861, at *12 (S.D. Ill. Mar. 2, 2007) (citing *Eisen*, 417 U.S. at 178).

13. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011).

court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a [classwide] basis."[14] The Supreme Court reversed class certification under Rule 23(b)(3), finding that the evidence was properly admitted (defendant waived its objection to admissibility), but holding that the evidence did not demonstrate that damages could be measured on a classwide basis.[15]

In *Messner v. Northshore University HealthSystem*, the Seventh Circuit cited *Dukes* and *American Honda*, explaining that, when expert evidence "is critical to class certification," the "district court must make a conclusive ruling on any challenge" to the evidence "before it may rule on a motion for class certification."[16] "Critical to class certification," means "expert testimony important to an issue decisive for the motion for class certification," and any doubts as to whether evidence is critical to class certification must be resolved by a conclusive evidentiary ruling.[17] "Failure to conduct an analysis when necessary . . . would mean that the unreliable testimony remains in the record, a result that could easily lead to a reversal on appeal."[18] Therefore, it is unacceptable for a trial court to admit potentially inadmissible evidence in a class certification proceeding.[19] Although this previous approach is "a time-honored and often acceptable approach toward many difficult evidentiary issues when the judge is the trier of fact[, it] does not suffice . . . when the expert testimony is in fact critical to class certification."[20] Rather, "[t]hose tough questions must be faced and squarely decided" before a class certification decision is reached.[21]

Following *Dukes*, courts have applied the FRE to Rule 23 proceedings. In *Hawkins v. Securitas Security Services USA, Inc.*, for example, the trial court noted that the defendant's evidence in support of its argument that a proposed class representative's prior bad acts rendered her "inadequate" under Rule 23(a)(4)'s "adequacy" requirement was likely inadmissible under FRE 403 and 608(b).[22] Similarly, in *Boyd v. Alutiiq Global Solutions, LLC*, a case involving the collec-

14. Comcast Corp. v. Behrend, No. 11-864, 2012 WL 113090, at *1 (U.S. June 25, 2012).

15. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1431–35 (2013).

16. Messner v. Northshore Univ. HealthSystem, 669 F.3d. 802, 812 (7th Cir. 2012) (internal quotation marks omitted).

17. *Id.*

18. *Id.*

19. *See id.* at 813.

20. *Id.*

21. *Id.*

22. *See* Hawkins v. Securitas Sec. Servs. USA, Inc., 280 F.R.D. 388, 395 (N.D. Ill. 2011).

tive action provision in the Fair Labor Standards Act that is analogous to Rule 23, the trial court rejected the plaintiffs' argument that "stringent application of the FRE is inappropriate at this stage in the litigation" and held that declarations addressing the issue of commonality were based on inadmissible hearsay and speculation.[23] Thus, after *Dukes*, litigants should assume that evidence offered in a Rule 23 proceeding must comply with the FRE.

B. Defendants' Evidence Must Also Comply with the FRE

The FRE apply equally to defendant's evidence against class certification. In *Messner*, the Seventh Circuit held that the trial court erred when it did not conclusively rule on the plaintiffs' request to bar defendant's evidence.[24] On appeal, the defendant argued that the FRE apply on class certification only to plaintiffs, but not to defendants, because "only plaintiffs bear the burden of satisfying Rule 23's requirements while defendants may present no evidence if they so choose."[25] The Seventh Circuit rejected this "asymmetric rule" because the FRE "appl[y] to plaintiffs and defendants alike, regardless of which side bears the burden of proof. The fact that a defendant is not required to present evidence to defeat class certification does not give that defendant license to offer irrelevant and unreliable evidence."[26]

More recently, in *Johnson v. Meriter Health Services Employee Retirement Plan*,[27] the Seventh Circuit rejected a defendant's argument that intraclass conflicts precluded a finding of "adequacy of representation" under Rule 23(a)(4). Although the defendant presented "some evidence" of intraclass conflicts, it failed to prove that those conflicts were real, as opposed to merely "hypothetical."[28] The court found that the defendant's contention that "some class members will be hurt by class treatment rings hollow" because the defendant failed to identify any class member who would be harmed by class treatment. The defendant "either didn't look for such a class member, which would be inexcusable, or it looked but didn't find one, which would probably mean that there isn't any such class member."[29] Accordingly, speculative and unsupported arguments offered by defend-

23. Boyd v. Alutiiq Global Solutions, LLC, No. 11-CV-753, 2011 WL 3511085, at *5 (N.D. Ill. Aug. 8, 2011).

24. *Messner*, 669 F.3d at 813.

25. *Id.*

26. *Id.* at 813–14.

27. Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012).

28. *Id.* at 372.

29. *Id.*

ants will not be accepted by the courts, even at the class certification stage.

C. *Rule 23 Evidence Need Not Be Admissible for the Trial on the Merits*

Although the FRE apply to class certification proceedings, the evidence need not be in a form that would be admissible at trial. In *In re Zurn Pex Plumbing Products Liability Litigation*, the Eighth Circuit, citing *Dukes*, rejected defendants' argument that the district court must "determine conclusively at an early [class certification] stage, not just whether or not expert evidence is sufficient to support class certification under Rule 23, but also whether that evidence will ultimately be admissible at trial."[30]

In the employment discrimination context, class certification decisions often rely on affidavits from either class members or the defendant's employees. "Affidavits are ordinarily inadmissible at trials but they are fully admissible in summary proceedings, including preliminary-injunction proceedings."[31] After *Dukes*, courts continue to rely on pretrial evidence that may be inadmissible at trial.[32]

D. *The "Preponderance of the Evidence" Burden Applies to Rule 23*

Dukes reiterated that plaintiffs bear the burden of proof on class certification, but did not specify the burden—whether plaintiffs must establish the Rule 23 requirements by "some evidence," a "preponderance" of the evidence, "clear and convincing" evidence, or "absolute certainty." The analysis in *Dukes*, however, suggests that a "preponderance" of the evidence standard applies. When addressing commonality, the *Dukes* Court weighed the plaintiffs' evidence of an unwritten company-wide policy of gender discrimination against Wal-Mart's evidence of written policies prohibiting gender discrimination and the delegation of employment decisions to the discretion of store managers.[33] The Court ultimately held that the plaintiffs' evidence did not outweigh Wal-Mart's evidence.[34] The plaintiffs' sociology ex-

30. *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611 (8th Cir. 2011) (affirming class certification premised in part on expert opinions that were based on preliminary, incomplete data made available during class certification discovery).

31. Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997).

32. *See, e.g.*, Ross v. RBS Citizens, N.A., 667 F.3d 900, 909 (7th Cir. 2012) (holding that the plaintiffs proved commonality through class member declarations, which indicated that the defendant engaged in uniform failure to pay overtime compensation).

33. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–57 (2011).

34. *Id.* at 2553.

pert could not confirm whether his findings of a corporate culture of "gender bias" impacted 99% of employment decisions, or less than 0.5%.[35] Similarly, the plaintiffs' other experts, a statistician and a labor economist, did not ascertain whether their conclusions that men received more favorable compensation and promotions was the product of company-wide gender bias or isolated region- and store-specific problems that weighed down the averages for women.[36] In addition, the plaintiffs' class member declarations were too few and geographically isolated to support the assertion of a nationwide policy.[37] Had "some" evidence of the commonality requirement been sufficient, the plaintiffs may have prevailed. If the Court had required "clear and convincing evidence" or some higher burden, its analysis most likely would have been more concise. Thus, it appeared that the standard fell somewhere between the two—a preponderance of the evidence.

Before *Dukes*, the Seventh Circuit had never stated what standard of proof applied to class certification. Some courts interpreted an earlier Seventh Circuit decision, *Szabo v. Bridgeport Machines, Inc.*,[38] as requiring something less than a preponderance of the evidence.[39] After *Dukes*, however, the Seventh Circuit made clear that the preponderance of the evidence standard applies to class certification: "Plaintiffs bear the burden of showing that a proposed class satisfies the Rule 23 requirements, but they *need not make that showing to a degree of absolute certainty*. It is sufficient if each disputed requirement has been proven by a *preponderance of the evidence*."[40] The Seventh Circuit also stated that, notwithstanding the discretion afforded district courts under Rule 23, a class certification decision will be reversed as an abuse when "the district court bases its discretionary decision on . . . a clearly erroneous assessment of the evidence."[41] In *Messner*, the Seventh Circuit reversed the denial of class certification, reasoning that the district court had erroneously assessed the competing expert opinions concerning whether defendant's conduct had a substantially similar impact on class members.[42]

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35. *Id.*

36. *Id.* at 2555.

37. *Id.* at 2556.

38. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001).

39. *See, e.g.*, CE Design Ltd. v. Cy's Crabhouse N., Inc., 259 F.R.D. 135, 140 (N.D. Ill. 2009) (rejecting the defendant's assertion that the "preponderance of the evidence" burden applies in the Seventh Circuit).

40. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) (emphasis added) (citation omitted).

41. *Id.*

42. *See id.* at 815–19.

E. "Persuasiveness" Is Just as Critical as "Admissibility"

Since *Dukes*, courts have made it clear that, in addition to establishing the admissibility of evidence, parties' evidence must meet a threshold level of *persuasiveness* on the particular Rule 23 requirement. In *Ellis v. Costco Wholesale Corp.*, for example, the Ninth Circuit held that the district court erred when it "limited its analysis of whether there was commonality to a determination of whether Plaintiff's evidence on the point was admissible," without subsequently "judging the *persuasiveness* of the evidence presented."[43]

More recently, in *Comcast*, an antitrust case, the Supreme Court held that plaintiffs' damages model was admissible because defendant did not object to it under the FRE.[44] Nonetheless, the Supreme Court held that the model failed to establish that damages could be measured on a classwide basis. The model assumed four theories of antitrust violations, but only one theory survived at the time of class certification, and plaintiffs failed to present a new damages model that isolated the one surviving theory.[45]

Similarly, in *George v. Kraft Foods Global, Inc.*, the district court denied class certification after finding the defendants' expert to be more persuasive than plaintiffs' expert concerning the propriety of the particular criteria used to define the class. The plaintiffs brought a class action under ERISA and defined the class as 401(k) plan participants whose investments in the subject securities performed worse than two purportedly "prudent alternative" comparator funds offered outside the plan. The court rejected the assertion by the plaintiffs' expert that the prudent alternatives were appropriate comparators because Kraft's expert asserted that appropriate comparators were funds already in the 401(k) plan.[46] The court found that "plaintiffs here have not yet established that the proper measure of loss in this case is an alternative passive investment or that the [funds proposed by plaintiffs' expert] are the appropriate specific alternatives."[47] Referencing *Dukes*, the court concluded that the plaintiffs bear the burden to "'affirmatively demonstrate' that the proposed class definition is appropriate" and concluded that the plaintiffs "cannot use class certification as a back-door way of resolving this contested issue in their favor."[48]

43. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) (emphasis added).

44. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1431 n.4 (2012).

45. *Id.* at 1434–35.

46. George v. Kraft Foods Global, Inc., No. 08 C 3799, 2011 WL 5118815, at *8 (N.D. Ill. Oct. 25, 2011).

47. *Id.*

48. *Id.*

Defendants too must demonstrate the persuasiveness of their evidence against class certification. In *Messner*, for example, the Seventh Circuit reversed the denial of class certification after rejecting the affidavit of a class member, which the defendant offered to show that the class member was not injured by the defendant's conduct.[49] The Seventh Circuit concluded that "the barebones affidavit on which [defendant] relies did not so thoroughly disprove [plaintiff's] claims as to render any further evidence to the contrary pointless."[50] The Seventh Circuit then cited the opinions of plaintiff's expert who demonstrated that the class member was injured by defendant's conduct and suggested that the class member retract its position and participate in the class action.[51]

F. Even "Undisputed" Rule 23 Criteria Must Be Backed by Evidence

Messner suggests that plaintiffs need only prove "disputed" Rule 23 requirements by a preponderance of the evidence.[52] Plaintiffs should not, however, rest on a mere lack of dispute or defendant's concession on a particular Rule 23 requirement. Even "undisputed" Rule 23 requirements are subject to rigorous analysis under the court's independent duty to assess the propriety of class certification. In *Dukes*, the Court based its rigorous analysis in part on how the class certification decision would adversely impact absent class members.[53] After *Dukes*, the Seventh Circuit reiterated the well-settled principle that the "rigorous analysis of a motion to certify a class is for the protection not of defendants alone *but of the class members as well.*"[54] Trial courts have thus demonstrated the necessity of analyzing even those Rule 23 requirements that the defendant has conceded.[55] Accordingly, plaintiffs should present evidence concerning every applicable Rule 23 requirement, even those that defendants do not dispute.

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49. *Messner*, 669 F.3d 802 at 824.

50. *Id.*

51. *Id.* at 824 n.13.

52. *See id.* at 814.

53. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011).

54. CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011) (emphasis added).

55. *See, e.g.*, Bailiff v. Vil. of Downers Grove, No. 11 C 3335, 2011 WL 6318953, at *2 (N.D. Ill. Dec. 16, 2011) ("The [defendant] does not dispute that Plaintiff has satisfied the requirements of Rule 23(a). Nevertheless, the court addresses each element pursuant to its independent obligation to decide whether an action brought on a class basis is to be so maintained." (internal quotation marks omitted)).

III. THE RULE 23 PROCEEDINGS ARE NOT A DRESS REHEARSAL FOR TRIAL

Dukes reiterates the rule, first announced in *Falcon*, that "[f]requently [the] rigorous analysis will entail some overlap with the merits of plaintiff's underlying claim" because the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[56] The commonality analysis in *Dukes* involved a weighing of the evidence to determine whether plaintiffs could prove that Wal-Mart had an unwritten, company-wide corporate policy of gender discrimination.[57] The unwritten policy was also an element of the class's substantive claim, thus the Supreme Court's analysis might suggest that the class certification procedure should involve predicting the outcome of the substantive claim.

Rigorous analysis, however, does not mean that the court may predict the outcome on the merits under Rule 23. Doing so in a preliminary proceeding would be highly unusual, especially in the absence of a jury, as required by the Seventh Amendment. As the *Dukes* Court explained, the limited merits inquiry on class certification is a very narrow one, focused exclusively on the procedural consideration at hand. "Nor is there anything unusual about that consequence: The necessity of *touching aspects of the merits* in order to resolve *preliminary matters*, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."[58] In a footnote, the Court cited *Eisen* to explain that, while touching aspects of the merits is appropriate in some cases to determine whether the Rule 23 requirements are satisfied, a merits inquiry "for any other pretrial purpose" is not.[59] The appellate courts have interpreted footnote six as narrowly prescribing the limits of the merits inquiry on class certification to that which is absolutely critical to determining whether the Rule 23 requirements are satisfied.[60] More recently, in *Amgen Inc. v. Connecticut Retirement Plans and Trust*

56. *Dukes*, 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 146, 160 (1982)).

57. *Id.* at 2553–57.

58. *Id.* at 2552 (emphasis added).

59. *Id.* at 2552 n.6.

60. *See, e.g.*, Behrend v. Comcast Corp., 655 F.3d 182, 190 (3d Cir. 2011) ("[A]t the class certification stage, we are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination."); Costco Wholesale Co. v. Ellis, 657 F.3d 970, 983 n.8 (9th Cir. 2011) ("[*Dukes*] clarif[ied] that Rule 23 does not authorize a preliminary inquiry into the merits of a suit for purposes other than determining whether certification was proper.").

Funds,[61] the Supreme Court reached the same conclusion: "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[62]

After *Dukes*, in *Messner*, the Seventh Circuit expressly cautioned that "the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits."[63] The Seventh Circuit's citation to its own pre-*Dukes* decisions indicates that *Dukes* does not alter the rule that the merits determination never precedes the class certification decision.[64] Rather, plaintiffs must only demonstrate that their claims are "capable of proof" on the basis of common evidence.[65]

Other appellate courts have likewise held that class certification proceedings should not be converted into mini-trials on the merits.[66] In *Behrend*, the Third Circuit addressed whether an expert's opinion was admissible under the FRE: "[A]lthough the Supreme Court recently hinted that *Daubert* may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial."[67] The Supreme Court's observations simply "require a district court to evaluate whether an expert is presenting a model that could evolve to become admissible evidence [at trial]," but does not require the "district court to determine if a model is perfect at the certification stage."[68] Rather, at the certification stage, evidence must be assessed "to determine whether the theory of proof is plausible"

61. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, No. 11-1085, 2013 WL 691001 (U.S. Feb. 27, 2013).

62. *Id.* at *7 (citing *Dukes*, 131 S. Ct. at 2552 n.6).

63. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) (citing Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010)); Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009); Payton v. Cnty. of Kane, 308 F.3d 673, 677 (7th Cir. 2002)).

64. *See, e.g.*, Schleicher v. Wendt, 618 F.3d 679, 686 (7th Cir. 2011) (rejecting the defendant's suggestion that "class certification is proper only after the representative plaintiffs establish by a preponderance of the evidence everything necessary to prevail" on the merits of their claim because it was contradicted by "the decision, made in 1966, to separate class certification from the decision on the merits" (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974))); Osada v. Experian Info. Solutions, Inc., No. 11 C 2856, 2012 WL 1050067, at *9 (N.D. Ill. Mar. 28, 2012) ("Although the certification inquiry may overlap somewhat with the merits of the case, the Seventh Circuit is clear that courts should not refuse to certify a class on the belief that it will lose." (citations omitted)).

65. *Messner*, 660 F.3d at 818.

66. *See, e.g.*, Behrend v. Comcast Corp., 655 F.3d 182, 204 (3d Cir. 2011).

67. *Id.* at 204 n.13 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011)).

68. *Id.*

and "susceptible to proof at trial through available evidence common to the class."[69] As a practical matter, however, litigants will continue to put their spin on the merits in class certification proceedings.

Policy considerations may also weigh on the court's decision. Some suggest that class certification can coerce a defendant into settling otherwise meritless claims.[70] Such suggestions do not address the fact that certified class actions have typically survived Rule 12 motions for dismissal before the certification. Moreover, even after certification defendants may invoke Rule 56 to avoid liability on substantive claims that are not backed by evidence. On the other hand, it is self-evident that the class action device is almost always the *only* way litigants can vindicate their rights and hold defendants accountable for misconduct in light of the high costs of litigation compared to individual recoveries.[71] In light of these competing policy considerations, litigants will likely continue to put their cases with the best merits forward when addressing class certification.

IV. "COMMONALITY" FOCUSES ON QUESTIONS THAT DRIVE THE CASE

All class actions must meet Rule 23(a)(2)'s "commonality" requirement, which requires "questions of law or fact common to the class."[72] *Dukes* is important because it recognized that "for purposes of Rule 23(a)(2) 'even a single common question' will do," but limited the universe of questions that may be considered.[73]

A "common question" is one that involves a "common contention" or "issue" that is "central to the validity" of each class member's claim, "capable of class-wide resolution" in "one stroke," and will provide a "common *answer*[ ] apt to drive the resolution of the litiga-

69. *Id.* (quoting *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 324 (3d Cir. 2008)) (internal quotation marks omitted).

70. *See, e.g.*, CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011).

71. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) ("[S]ome plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action."); Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 n.9 (1980) (noting that class actions allow claimants to vindicate rights when they would otherwise "be unlikely to obtain legal redress at an acceptable cost"); *CE Design Ltd.*, 637 F.3d at 723 ("Denial of class certification may be as heavy a blow to the class as grant of certification is to the defendant.").

72. FED. R. CIV. P. 23(a)(2).

73. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011).

tion."[74] In conducting the commonality analysis, subsequent cases in the Seventh Circuit have focused on whether the defendant engaged in uniform conduct that had a substantially similar impact on all class members.

Uniform conduct is established when a defendant's conduct, by its very nature, impacted the class, such as antitrust violations, misleading advertisements, or false statements concerning securities.[75] Uniform conduct may also be established through written policies, such as a company policy, or a law or ordinance.[76] Finally, uniform conduct may be established through unwritten policies, systemic practices, or centralized decision making, as long as plaintiffs present evidence that a common policy existed.[77] Of course, when proof of an unwritten policy is lacking, the courts will not find commonality.[78]

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74. *Id.* at 2551 (internal quotation marks omitted); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, No. 11-1085, 2013 WL 691001, at *8 (U.S. Feb. 27, 2013) (noting that a "common question" is one that involves "evidence common to the class")

75. *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 818–19 (7th Cir. 2012) (antitrust claim).

76. *See, e.g.*, Jacks v. DirectStat, USA, LLC, No. 10 CV 1707, 2012 WL 2374444, at *5 (N.D. Ill. June 19, 2012) (finding that, in wage and hour act litigation, "top-level corporate policies" were sufficient to establish commonality notwithstanding the fact that employees worked in different offices for different supervisors); Bailiff v. Vil. of Downers Grove, No. 11 C 3335, 2011 WL 6318953, at *3 (N.D. Ill. Dec. 16, 2011) (discussing a village ordinance that allegedly imposed an unconstitutional booking fee on arrestees).

77. *See, e.g.*, Ross v. RBS Citizens, N.A., 667 F.3d 900, 909 (7th Cir. 2012) (finding that, in a wage and hour act case, declarations from approximately 10% of class established that the employer had an unwritten policy of not paying overtime compensation to nonexempt employees); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (finding that, in an employment discrimination case, plaintiffs presented sufficient evidence of an unwritten policy of race discrimination to satisfy commonality); Galvan v. NCO Fin. Sys., Inc., Nos. 11 C 3918, 11 C 4651, 2012 WL 3987643, at *5 (N.D. Ill. Sept. 11, 2012) (finding that, in debt collection practices litigation, plaintiffs satisfied commonality by establishing that allegedly unfair practices were the product of centralized decision making that impacted the entire class); Williams-Green v. J. Alexander's Rests., Inc., 277 F.R.D. 374, 377 (N.D. Ill. 2011) (finding that, in a wage and hour act case, despite a restaurant chain's written policy of requiring all tips to be distributed to employees, the company's financial records, party admissions, and class representative testimony established that it had an unwritten policy of retaining a portion of the tip pool).

78. *See, e.g.*, *Dukes*, 131 S. Ct. at 2552–57 (finding that, in a Title VII gender discrimination case, expert opinions of a sociologist, labor economist, and statistician, coupled with class member declarations, failed to establish that Wal-Mart had an unwritten policy of gender discrimination); Bolden v. Walsh Constr. Co., 688 F.3d 893, 896–97 (7th Cir. 2012) (finding that, in a case alleging employment discrimination, plaintiffs' statistical evidence was insufficient to establish a common policy of race discrimination); Jamie S. v. Milwaukee Public Sch., 688 F.3d 481, 497–98 (7th Cir. 2012) (finding that, in a case alleging a school district's failure to properly educate students with disabilities, evidence of a policy or systematic failure to identify children with disabilities was entirely absent); Pa. Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n, No. 09 C 5619, 2011 WL 6819081, at *9 (N.D. Ill. Dec. 28, 2011) (finding commonality lacking in an ERISA case brought on behalf of medical providers because the multiple defendants had varying, dissimilar policies regarding claim denial appeal rights).

A substantially similar impact is proven through evidence that the defendant's conduct injured class members in the same basic way, such as antitrust violations that cause customers to pay more, misleading advertisements that cause consumers to pay more, and false statements in securities markets that cause investors to pay more.[79] Some variation on the impact will not defeat commonality.[80] Substantially similar impact is not established, however, when a great number of class members suffered no injury from defendant's conduct or when the nature of the injury varies significantly from one class member to another.[81]

In *Ross v. RBS Citizens, N.A.*, the Seventh Circuit addressed commonality and found that the facts were distinguishable from those in *Dukes*. The case involved an unwritten policy to deny Charter One bank employees overtime by instructing them to not record hours, changing their time sheets, giving paid time off instead of overtime pay, requiring them to work during unpaid breaks, or misclassifying them as exempt from the overtime requirements.[82] To prove commonality, the plaintiffs offered declarations from approximately 10% of the class to establish that the bank's uniform and unwritten policy led to a systematic denial of overtime compensation.[83] The bank argued that commonality was lacking because plaintiffs alleged that it denied overtime compensation in four distinct manners.[84] The Seventh Circuit disagreed: "Although there might be slight variations in how Charter One enforced its overtime policy, both classes maintain a common claim that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation. This unofficial policy is the common answer that potentially drives the resolution of this litigation."[85] The Seventh Circuit also concluded that the problematic circumstances in *Dukes* were not present.[86]

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79. *See, e.g.*, *Bailiff*, 2011 WL 6318953, at *3 (finding that plaintiffs established commonality in a due process case because all arrestees paid the allegedly unconstitutional booking fee).

80. *Ross*, 667 F.3d at 909 (finding that plaintiffs proved commonality in a wage and hour act case notwithstanding four different methods by which defendant denied overtime compensation).

81. *Jamie S.*, 668 F.3d at 498 (finding commonality lacking when class members suffered injury at different stages of a process that was established by a statutory scheme); Groussman v. Motorola, Inc., No. 10 C 911, 2011 WL 5554030, at *3–4 (N.D. Ill. Nov. 15, 2011) (finding commonality lacking in an ERISA case filed on behalf of 401(k) plan participants due to variations in the timing of and reasons for participants' investment decisions).

82. *See Ross*, 667 F.3d at 908–09.

83. *Id.* at 909.

84. *Id.*

85. *Id.* (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

86. *Id.* While the *Dukes* class had 1.5 million class members in a nationwide class, and the need to ascertain the discriminatory mental state of thousands of decision makers, the *Ross* class

While the facts in a particular case may be distinguishable from *Dukes*, the courts will still focus on the three-step commonality analysis espoused in *Dukes*.[87] At least one court has concluded that, in "*Dukes*, the Supreme Court indicated that a plaintiff must do more than simply point to some questions of fact or law relevant to potential class members or a common nucleus of operative fact,"[88] although the Seventh Circuit appears to have rejected this interpretation.[89] Therefore, litigants should focus their commonality arguments on the language employed by the Supreme Court in *Dukes*.

V. "PREDOMINANCE" HAS NOT BEEN ALTERED BY DUKES

Dukes narrows the universe of common questions appropriate under Rule 23(a)(2), but it does not alter the predominance analysis under Rule 23(b)(3). In *Messner*, for example, the Seventh Circuit set forth the standard for predominance without citing *Dukes* and, instead, cited earlier Supreme Court decisions. "Analysis of predominance under Rule 23(b)(3) 'begins, of course, with the elements of the underlying cause of action,'"[90] and "trains on the legal or factual questions that qualify each class member's case as a genuine controversy."[91] This standard is "readily met in cases alleging consumer or securities fraud or violations of the antitrust laws."[92] Common questions are those that can be answered with "the same evidence" for "each member" of the class; individual questions are those that require evidence that "varies from member to member."[93] Predominance exists "when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication."[94]

Dukes' commonality analysis focused on the central merits question of whether a uniform gender discrimination policy exists. This focus might create an expectation that more proof on the merits is now re-

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had 1,129 members in one state, and no need to ascertain the state of mind of decision makers. *Id.*

87. Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2591, 2550–51 (2011).

88. Groussman v. Motorola, Inc., No. 10 C 911, 2011 WL 5554030, at *3 (N.D. Ill. Nov. 15, 2011).

89. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012), ("[C]ommon questions can predominate if a common nucleus of operative facts and issues underlies the claims . . . ." (internal quotation marks omitted)).

90. *Id.* (quoting Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011)).

91. *Id.* at 814 (internal quotation marks omitted) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)).

92. *Id.* at 815 (quoting *Amchem*, 521 U.S. at 625) (internal quotation marks omitted)).

93. *Id.* (citing Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)).

94. *Id.* (alteration in original) (internal quotation marks omitted).

quired to establish predominance. In *Messner*, however, the Seventh Circuit rejected this expectation: "The district court misapplied Rule 23(b)(3)'s predominance standard when it made" proof of antitrust impact "a condition for class certification."[95] "Under the proper standard, plaintiff's 'burden at the class certification stage [was] not to prove the element of antitrust impact,' but only 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.'"[96]

A. Defenses May Play a More Prominent Role in Predominance

In *Dukes*, the Supreme Court rejected a class certification model in which the defendant would be precluded from asserting affirmative defenses.[97] The Court's discussion focused initially on Rule 23(b)(2) certification in Title VII cases that involved claims for monetary relief (backpay), but it evolved into a broader statement concerning the role of affirmative defenses in class certification.[98] The Court concluded that because the "Rules Enabling Act forbids interpreting Rule 23 'to abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[99] Courts have interpreted this analysis as supporting the proposition that affirmative defenses may defeat predominance when "[i]nvestigating and litigating each of [defendant's] potential defenses . . . as to each individual class member would require numerous mini-trials."[100] Accordingly, after *Dukes*, the courts may focus more attention on affirmative defenses when addressing predominance.

B. Complex Damage Determinations Still Do Not Defeat Predominance

Dukes disapproved the trial-by-formula approach adopted by the district court, in which a subset of the class claims would be tried, and the percentage of successful claimants would be multiplied by the av-

95. *Messner*, 669 F.3d at 818.

96. *Id.* (quoting Behrend v. Comcast Corp., 655 F.3d 182, 197 (3d Cir. 2011)); *see also id.* at 816 ("[P]laintiffs had to show that it was possible to use common evidence to prove that [defendant's conduct] injured members of the proposed class.").

97. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560–61 (2011).

98. *See id.* at 2561.

99. *Id.* (citations omitted) (quoting 28 U.S.C. § 2072(b) (2006)).

100. Witt v. Chesapeake Exploration, L.L.C., 276 F.R.D. 458, 469–70 (E.D. Tex. 2011) (denying class certification in a case involving affirmative defenses to breach of contract claims arising from highly individualized, nonstandardized mineral lease agreements).

erage recovery awarded to yield the entire class recovery.[101] The Court held that such an approach would enlarge or modify substantive rights in contravention of the Rules Enabling Act.[102] While the discussion was limited to the proposed Rule 23(b)(2) employment discrimination class, the discussion could be interpreted more broadly as defeating predominance in Rule 23(b)(3) damage classes in which complex individual damage determinations are required.

In *Messner*, the Seventh Circuit rejected this interpretation and concluded that "it is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)."[103] The Seventh Circuit rejected the trial court's conclusion that proof of highly individualized damages defeated predominance: "Under the district court's approach, Rule 23(b)(3) would require not only common evidence and methodology, but also common results for members of the class. That approach would come very close to requiring common proof of damages for class members, which is not required."[104] Accordingly, *Dukes* supports the well-settled principle that even highly individualized damage determinations do not defeat predominance, at least according to the Seventh Circuit.

In *Comcast*, the Supreme Court addressed damages issues in the context of a Rule 23(b)(3) class action. As noted above, the Supreme Court held that plaintiffs' damage model did not establish that damages could be measured on a classwide basis because it did not isolate the alleged misconduct at issue.[105] A "model purporting to serve as evidence of damages . . . must measure only those damages attributable to" the misconduct at issue.[106] "[A]t the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case."[107]

VI. CONCLUSION

Dukes impacts all class certification decisions. Even if *Dukes* is distinguishable on its facts, the principles set forth by the Supreme Court apply generally to the Rule 23 requirements. Defendants will no doubt cite *Dukes* because it is a Supreme Court decision that reversed

101. *See Dukes*, 131 S. Ct. at 2561.

102. *Id.*

103. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) (citing *Dukes*, 131 S. Ct. at 2558).

104. *Id.* at 819.

105. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1431–35 (2012).

106. *Id.* at 1433.

107. *Id.* (citations and internal quotations omitted).

class certification. Plaintiffs should rely on *Dukes* too, however, because it sets forth several principles that militate in favor of class certification.