Client Alert

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State Supreme Court Raises Bar for Class Actions Following U.S. Supreme Court's Decision in *Dukes*

On July 11, 2014, the Supreme Court of Georgia for the first time endorsed a landmark U.S. Supreme Court decision and applied it to class certification under O.C.G.A. § 9-11-23. The decision, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is well known for raising the bar for certifying a class action.

The U.S. Supreme Court's decision in *Dukes* emphasized that "Rule 23 does not set forth a mere pleading standard," but requires a "rigorous analysis" to verify that the "party seeking class certification [has] affirmatively demonstrate[d] his compliance" with Rule 23 by "prov[ing] that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. 2541, 2551. This analysis requires the resolution of any "merits question[s]" bearing on the class certification analysis, even if the plaintiffs will "have to prove [the same matters] again at trial in order to make out their case on the merits." *Id.* at 2552 n.6.

Citing *Dukes*, the Supreme Court of Georgia's decision in *Georgia-Pacific Consumer Products, LP v. Ratner*, No. S13G1723, 2014 WL 3396519 (July 11, 2014), relied on the federal commonality standard to reverse the trial court's certification of a class, as well as the Court of Appeals' affirmance of the class certification order. The proposed class alleged nuisance, trespass, and negligence theories against Georgia-Pacific for its purported environmental contamination of neighboring property. Specifically, plaintiffs claimed that hydrogen sulfide gas was released from decomposing sludge fields associated with a paper mill operated by Georgia-Pacific. Although the definition of the class was sufficient, the plaintiffs failed to provide actual evidence that the defined class satisfied the commonality requirement necessary for certification. *Ratner*, 2014 WL 3396519 at *1 n.1, *1-2. Specifically, there was no evidence that the "entire area by which the class was defined, in fact, was contaminated with hydrogen sulfide gas from the sludge fields." *Id.* at *3.

In finding that the trial court abused its discretion in certifying the class, the Supreme Court of Georgia applied several class action principles from *Dukes* that made "these points more clearly than [Georgia's] precedents" while being "entirely consistent with those precedents." *Id.* at *2. Relevant principles that now apply to class actions under O.C.G.A. § 9-11-23 are:

- It is "not enough" for class action plaintiffs merely to allege that the prerequisites for class certification have been met. Instead, plaintiffs must "come forward with evidence to prove their satisfaction of the statutory requirements." *Id.* at *1 (citing *Dukes*, 131 S. Ct. at 2550-52).

- Focusing on the commonality prong, the court observed that "any competently crafted class complaint literally raises common questions." *Id.* at *2 (quoting *Dukes*, 131 S. Ct. at 2551). This is not sufficient to certify a class under O.C.G.A. § 9-11-23, however. Following *Dukes*, commonality "depends on the presence of a particular sort of 'common' question, and simply reciting a list of questions that are 'common' in another sense contributes nothing to the commonality inquiry." *Id.* (citing *Dukes*, 131 S. Ct. at 2550-52). The Georgia Civil Practice Act requires class action plaintiffs first "to show that the class members have suffered the same injury." *Id.* (citing *Dukes*, 131 S. Ct. at 2551). In addition to showing the "same instance or course of wrongful conduct," plaintiffs also must demonstrate that the "common contention is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (citing *Dukes*, 131 S. Ct.

at 2550-52). In this manner, the inquiry controlling the determination of commonality "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." *Id.* (citing *Dukes*, 131 S. Ct. at 2550-52).

- As emphasized throughout the 5-2 majority opinion, the trial court's analysis must be "rigorous" and cannot rely on "anecdotal" evidence. *Id.* at *2, *3. In the context of this case, for example, such rigorous analysis depended upon "scientific evidence of the amount of gas released from the sludge fields," "evidence of the rate of release," "evidence of the extent to which the amounts released and rates of release varied over time," "evidence of exactly how the gas would be expected to move through air upon its release," "evidence of the rate at which the gas would be expected to dissipate following its release," and "evidence of air quality sampling across the class area at any time." *Id*. at *3. Conjecture, such as some plaintiffs' perceptions of the gas, or testimony by air-conditioning technicians concerning corrosion in some air-conditioning units, was not sufficient in Ratner to prove the commonality of the defined class.

- After underscoring the significant barriers to class certification, the court was careful to note that "[n]o one should misunderstand us to say that commonality can never be shown in the context of environmental mass torts" because "it is certainly conceivable that the plaintiffs might show the requisite commonality" for a class. *Id.* at *4. To do so, however, plaintiffs in Georgia now "have some more work to do" to satisfy the rigorous class certification analysis as explained in *Dukes*.

Although *Ratner* is a win for class action defendants in Georgia, there are two cautionary notes. First, while *Ratner* will make it more difficult for plaintiffs to certify a class in Georgia, certification under O.C.G.A. § 9-11-23 remains more likely than certification under the federal standards. For example, Georgia courts historically have not applied *Daubert* gatekeeping functions with the same rigor as their federal counterparts, and prefer that juries be permitted to consider the credibility of the experts' testimony. *See, e.g.*, Marc T. Treadwell, *Evidence*, 59 Mercer L. Rev. 157, 158 (2007) ("*Daubert* has come to Georgia, if not quite the same *Daubert* seen in federal court"); *Cartledge v. Montano*, 325 Ga. App. 322, 325, 328 (2013) (favoring jury review of expert testimony). In general, so long as a plaintiff proffers expert testimony that satisfies the plaintiffs' initial burden, Georgia courts tend to favor jury resolution, and are unlikely to scrutinize the expert's opinion, method and qualifications to the same degree as a federal court. *See, e.g.*, *Johnson v. Omondi*, 294 Ga. 74, 85 (2013) (disfavoring court determination of expert testimony that would remove the case from the jury).

Second, now that merits questions and damages theories may be controlling at the class certification stage, class action plaintiffs may have an easier time demonstrating "good cause" to proceed with merits discovery prior to issuance of the class certification order. *See* O.C.G.A. §9-11-23(f)(2) (staying merits discovery until issuance of the class certification order). This could drive up the discovery costs and potential nuisance settlement value in certain class actions.

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