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## Major Ninth Circuit Decision Sets Out Standards for Class Certification

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*On April 26, 2010, a closely divided Ninth Circuit issued its long-awaited en banc decision in *Dukes v. Wal-Mart Stores, Inc.*, an action on behalf of a nationwide class of female Wal-Mart employees alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1965. The court's decision affirming class certification has received widespread attention due partly to the size of the class—up to 1.5 million members—and the commensurately high potential damages. In the long run, however, by aligning the Ninth Circuit with a recent trend in the federal courts toward stricter scrutiny of class certification motions, *Dukes* should benefit defendants in many cases, especially cases outside the employment class action arena.*

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On the one hand, *Dukes* holds that district courts must consider and resolve factual disputes relating to whether the requirements for class certification under Federal Rule of Civil Procedure 23 have been met, even if those factual disputes also relate to (or “overlap” with) the merits of the case. While asserting that this had always been the rule under its own and Supreme Court precedent, the Ninth Circuit acknowledged that many district courts had misunderstood or failed to apply it. On the other hand, in affirming in large part the certification of a massive class, the Ninth Circuit said it would defer to class certification decisions of district courts that applied the governing standards properly. Five dissenting judges concluded that class certification was improper in *Dukes* because the plaintiffs had failed to present any significant proof that Wal-Mart had adopted a policy of discrimination applicable to all female employees nationwide, and because class certification would deny Wal-Mart its right to raise individual defenses to claims for back pay and punitive damages.

### Background

The suit was filed in 2001 by six former and current Wal-Mart employees, alleging that the company systematically denied women workers equal pay and opportunities for promotion. The proposed class

included all female Wal-Mart employees in some 3,400 stores. Only regional and national managers were excluded.

In June 2004, the district court granted class certification. After a three-member panel of the Ninth Circuit affirmed the district court's ruling, the court granted Wal-Mart's request for a rehearing before an 11-member en banc panel.

In a 6-5 decision, the en banc court affirmed the district court's certification of a class of current Wal-Mart employees with respect to their claims for injunctive relief, declaratory relief, and back pay. The en banc court sent the case back to the district court for further findings with respect to these class members' claims for punitive damages and claims of former Wal-Mart employees for back pay and punitive damages.

### Discussion of Rule 23 Standards

Prior to addressing the facts of the *Dukes*<sup>1</sup> case itself, the court found it necessary to clarify "the standards governing the district court in finding the Rule 23 requirements satisfied," and specifically the extent to which a district court may, or must, resolve factual disputes between the parties as to whether the Rule 23 prerequisites have been met.<sup>2</sup> *Dukes* at \*4. Recent cases from other circuits have tightened the standards for class certification,<sup>3</sup> and a key issue in *Dukes* was whether the Ninth Circuit would follow those cases.

Relying on a 1982 Supreme Court decision<sup>4</sup> that requires "a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied," the Ninth Circuit held that such an analysis "will often, though not always, require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims." *Dukes* at \*5. Although an earlier Supreme Court case<sup>5</sup> "prohibits a court from making determinations on the merits that do *not* overlap with the Rule 23 inquiry," this does not excuse district courts from the responsibility of "making determinations that each requirement of Rule 23 is actually met." *Id.* at \*13. Rather, "a district court's analysis will often, though not always, require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims." *Id.* at \* 5. The court reviewed the standards set out in recent cases from other Circuits, including the First,<sup>6</sup> Second,<sup>7</sup> Third,<sup>8</sup> and Eighth<sup>9</sup> Circuits, and concluded that those standards are generally consistent with each other and with the standard the Ninth Circuit adopted.

<sup>1</sup> *Dukes v. Wal-Mart Stores, Inc.*, Nos. 04 16688 and 04 16720, 2010 WL 1644259

<sup>2</sup> Rule 23(a) states that, in order to certify a class, the court must find that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b) requires that at least one of the following three conditions also be satisfied: (1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

<sup>3</sup> *E.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008); *In re Initial Pub. Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001).

<sup>4</sup> *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

<sup>5</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>6</sup> *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008).

<sup>7</sup> *In re Initial Pub. Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006).

<sup>8</sup> *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009).

<sup>9</sup> *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005).

The court acknowledged, however, that a number of district courts in the Ninth Circuit had misapplied these standards by holding that, in order to avoid impermissibly delving into the merits of the case, they were required to accept as true plaintiffs' assertions in regard to the Rule 23 prerequisites. Many of these district courts interpreted a 1975 Ninth Circuit decision, *Blackie v. Barrack*, as requiring them "to take the substantive allegations of the complaint as true."<sup>10</sup> The *Dukes* court explicitly disapproved these cases, explaining they misread *Blackie*. *Dukes* at \*11. The court also explained that a very recent Ninth Circuit decision, *United Steel Workers v. ConocoPhillips Co.*, which reversed a district court's decision to deny class certification simply because there was no "assurance" that the plaintiffs would prevail,<sup>11</sup> was consistent with the standard adopted in *Dukes*.

### Application of "Rigorous Analysis" Standard to Expert Testimony Regarding Rule 23 Prerequisites

Having held that district courts generally must resolve factual disputes bearing on the Rule 23 factors, the *Dukes* majority went on to hold that the primary dispute between the expert witnesses in that case did not have to be resolved at the class certification stage. This holding, however, must be understood in light of the facts of *Dukes*.

The major disputed criterion for class certification in *Dukes* was whether there existed "questions of law or fact common to the class" within the meaning of Rule 23(a)(2). See *Id.* at \*20-31. The common issue identified by the plaintiffs was whether all female Wal-Mart employees, other than regional or national managers, had been subject to a single, company-wide policy of gender discrimination. In support of that argument, the plaintiffs presented four categories of evidence: (1) evidence that Wal-Mart is "a highly centralized company that promotes policies common to all stores and maintains a single system of oversight"; (2) expert opinion that these company-wide policies "likely include a culture of gender stereotyping" and that the use of subjective decision-making in local promotion decisions was susceptible to gender bias; (3) expert statistical evidence of gender disparities in pay and promotion; and (4) anecdotal evidence, in the form of 120 affidavits from class members describing "discriminatory attitudes held or tolerated by management." *Id.*

The evidence in category (1) was undisputed. As for the anecdotal evidence in category (4), the main dispute was whether it was probative of company-wide discrimination against a nationwide class of as many as 1.5 million members. The Ninth Circuit majority held that the district court properly considered this evidence because it supported "an inference of common discriminatory experiences." *Id.* at \*29. The dissenting judges strongly disagreed. *Id.* at \* 50.

In category (2), plaintiffs relied on a "social framework analysis" prepared by their expert, a sociologist. Wal-Mart argued that this analysis was not scientifically reliable, but it did not offer its own expert testimony in rebuttal. The Ninth Circuit held that the district court properly accepted the testimony of the plaintiffs' expert. It did not decide whether, as the Seventh Circuit recently held,<sup>12</sup> the standard for admitting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>13</sup> applies at the class certification stage. In the majority's view, it was unnecessary to reach this question because the plaintiffs had satisfied the *Daubert* standard in full. *Id.* at \*23, n. 22. In contrast, the dissenting judges argued that *Daubert* applied and that plaintiffs' sociological evidence failed to satisfy it. *Id.* at \* 52-53.

<sup>10</sup> 524 F.2d 891, 901 n.17 (9th Cir. 1975).

<sup>11</sup> 2010 WL 22701, at \*5 (9th Cir. Jan. 6, 2010).

<sup>12</sup> *American Honda Motor Co. v. Allen*, No. 09-8051 (7<sup>th</sup> Cir. Apr. 7, 2010).

<sup>13</sup> 509 U.S. 579 (1993).

Wal-Mart did present its own statistical evidence, contradicting the plaintiffs' evidence, on the issue of pay and promotion disparities—category (3) above. The Ninth Circuit, however, held that the district court was not required to decide which of the parties' statistical experts was the most persuasive on that score. The court reasoned that “the disagreement *is* the common question”—*i.e.*, that the conflicting expert analyses framed a factual issue that was common to the class, which is all that Rule 23(a)(2) requires. *Id.*

This aspect of *Dukes* will be controversial. The five dissenting judges described the district court's examination of the statistical evidence as “superficial” and criticized the majority for ignoring the Supreme Court's statement in *Falcon* that plaintiffs must offer “significant proof” of the existence of a general policy of discrimination to achieve class certification. *Id.* at \*50-51. Wal-Mart may file a petition for certiorari asking the Supreme Court to decide these issues, among others.

It is important to recognize the pivotal limitations on the reasoning of the *Dukes* majority. Insofar as the class certification order in *Dukes* was affirmed, it was based on Rule 23(b)(2).<sup>14</sup> That Rule, in turn, incorporates the requirement of Rule 23(a)(2) that at least one common question of law or fact exist. In contrast, to certify a class under Rule 23(b)(3), which governs most class actions for money damages (including antitrust and securities cases), a district court must find not merely that common issues *exist*, but that they *predominate* over individual issues. Therefore, as the *Dukes* majority observed, it is likely that district courts “will have to make more precise factual determinations under Rule 23(b)(3) than under Rule 23(b)(2).” *Id.* at \*15.

### New Standard as to Rule 23(b)(2) Classes; Open Questions as to Rule 23(b)(3)

Rule 23(b)(2) applies only where the primary relief sought is declaratory or injunctive relief, as opposed to money damages. Applying this standard in *Dukes*, the Ninth Circuit affirmed the class certification order insofar as current Wal-Mart employees sought back pay (a “make-whole” remedy), but reversed, and remanded for further consideration, insofar as the class members sought punitive damages. In the process, the court set out a new standard—which conflicts with a leading Fifth Circuit decision<sup>15</sup>—for determining whether monetary relief “predominates.” The court held that a Rule 23(b)(2) class could be certified so long as monetary damages were not “superior [in] strength, influence, or authority” to injunctive and declaratory relief. *Dukes* at \*35. The court rejected the previous standard used in the Ninth Circuit,<sup>16</sup> which focused on the plaintiffs' subjective intent in bringing the suit. The court also declined to adopt an alternative standard used in a number of circuits,<sup>17</sup> which requires that monetary relief be no more than “incidental” to the injunctive or declaratory relief. Rather, the court held that district courts must consider on a “case-by-case basis, the objective effect of the relief sought on the litigation,” and set out a non-exclusive list of factors such as whether monetary relief would determine whether a judge or jury would hear key issues, whether new factual issues would be introduced, the size of the potential monetary award, and whether quantifying damages would require individualized findings. *Id.* at \*38.

The court noted that if the district court on remand found that the punitive damages claims caused monetary damages to predominate, it could certify separate classes for non-monetary relief under Rule 23(b)(2)

<sup>14</sup> Rule 23(b)(2) was deemed applicable in part because the plaintiffs sought back pay, rather than traditional compensatory damages.

<sup>15</sup> *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

<sup>16</sup> *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) (citing *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)).

<sup>17</sup> *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs Local No. 139*, 216 F.3d 577 (7th Cir. 2000).

and for punitive damages under Rule 23(b)(3). *Id.* at \*40. Similarly, the court held that women who had left Wal-Mart's employ before the lawsuit was filed would lack standing to seek declaratory or injunctive relief, and therefore would have to proceed under Rule 23(b)(3), rather than Rule 23(b)(2). *Id.* at \*41.

### Implications of the *Dukes* Standard for Future Cases

Wal-Mart has vowed to seek review in the Supreme Court, and *Dukes* will not be the last word (even in the Ninth Circuit) on many important unanswered questions regarding class certification. Nonetheless, in the wake of the *Dukes* decision, it is clear that district courts must conduct a rigorous inquiry into disputed factual issues relating to the requirements of Rule 23 in all but the most obvious cases. Courts will not have the option of avoiding such an inquiry because they overlap with the merits or require resolution of a "battle of the experts." While *Dukes* recognizes that the nature of the inquiry will vary both with the substantive law and with whether certification is sought under Rule 23(b)(2) or Rule 23(b)(3), the decision provides an opportunity to reinforce class certification as an important checkpoint in the life of a case, whether it be in antitrust, employment, securities or other areas of substantive law. Whether the district courts will accept this directive, and whether the Ninth Circuit will hold them to it, remains to be seen.

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