

Ninth Circuit Applies Dukes

September 26, 2011 by [Sean Wajert](#)

The Ninth Circuit issued an interesting class action decision applying several of the key aspects of the recent Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*. See *Ellis v. Costco Wholesale Corp.*, 2011 WL 4336668 (9th Cir. 2011).

The case was a gender discrimination claim; while we don't focus on labor law here at *MassTortDefense*, the Rule 23 guidance is instructive generally for many of our class action cases.

The district court certified the class, which alleged gender discrimination, and Costco appealed. Let's focus on three instructive aspects of the Ninth Circuit's analysis.

The trial court had found the commonality prerequisite, but the court of appeals noted that it is insufficient for plaintiffs to merely allege a common question. See *Wal-Mart*, 131 S.Ct. at 2551–52. Instead, they must pose a question that “will produce a common answer to the crucial question.” *Id.* at 2552; see also *id.* at 2551 (“What matters to class certification is not the raising of common ‘questions’ ... but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.”). In other words, plaintiffs must have a common question that will connect many individual promotional decisions to their claim for class relief.

In thinking about common issues, some courts have remained reluctant to delve into the merits of the claims. The Ninth Circuit reminds us that it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements. Here, the defendant challenged the admissibility of the plaintiffs' experts' opinions, and the district court seemed to have confused the *Daubert* standard with the distinct “rigorous analysis” standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented about commonality, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible. To the extent the district court limited its analysis of whether there was commonality to a determination of whether plaintiffs' evidence on that point was admissible, it did so in error.

(Specifically, while plaintiffs alleged nationwide discrimination, their proof seemed to show great variation in defendant alleged conduct by region. Plaintiffs would face an exceedingly difficult challenge in proving that there were questions of fact and law common to the proposed nationwide class, but the district court failed to engage in a “rigorous analysis” on this point.)

Next is typicality. Costco argued that plaintiffs could not satisfy the typicality requirement because each of the named plaintiffs' respective discrimination claims were subject to unique defenses. The district court rejected this argument and held that, as a general matter, individualized defenses do not defeat typicality. This was also error. A named plaintiff's motion

for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to him or her. A unique background or factual situation may require a named plaintiff to prepare to meet defenses that are not typical of the defenses which may be raised against other members of the proposed class.

Third, the court examined the effort of plaintiffs to get damages in a 23(b)(2) class. The prior thinking was that in Rule 23(b)(2) cases, monetary damage requests might be allowable if they were merely incidental to the litigation, but "this standard has been called into doubt by the Supreme Court" in *Wal-Mart*, 131 S.Ct. at 2560. The Supreme Court rejected the "predominance" test for determining whether monetary damages may be included in a 23(b)(2) class certification. *Id.* at 2559. Instead of considering the amount of the damages sought or the subjective intent of the class members seeking relief to determine if injunctive relief "predominates," the first relevant inquiry, said the Ninth Circuit, is what procedural safeguards are required by the Due Process Clause for the type of relief sought. *Id.* at 2557–58.

While rule 23(b)(3) arguably expanded the breadth of possible class actions, it also expanded the procedural protections afforded the class. Unlike classes certified under Rule 23(b)(1) or (b)(2), a(b)(3) class is not mandatory. Instead, putative class members are afforded the right to be notified of the action and to opt out of the class. The absence of these protections in a class action predominantly for monetary damages violates due process. And the *Wal-Mart* court opined: "We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction." 131 S.Ct. at 2559.

Even beyond the due process issue, the Supreme Court also stated that claims for individualized relief (like the backpay at issue here) do not satisfy Rule 23(b)(2), because the "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted." *Id.* at 2557. Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. Here, the district court erred, therefore, by focusing on evidence of plaintiffs' subjective intent, instead of on whether the monetary relief could be granted absent individualized determinations of each class member's eligibility.

The court of appeals vacated the district court's order finding that Plaintiffs had satisfied Rule 23(b)(2) and remand for the district court to apply the legal standard confirmed in *Wal-Mart*.