

THIS ARTICLE FIRST APPEARED IN THE NEWSLETTER OF THE SECTION OF LITIGATION,
CONSUMER & CIVIL RIGHTS OF THE AMERICAN BAR ASSOCIATION ON FEBRUARY 1, 2011

This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored
in an electronic database or retrieval system without the express consent of the American Bar Association.

LOWER STANDARDS ANNOUNCED FOR CLASS CERTIFICATION AS MASSIVE DISCRIMINATION SUIT MOVES FORWARD

By Elizabeth E. McGinn, Benjamin P. Saul, and Sarah Betts Esterhay*

What do 1.5 million current or former female employees of the world's largest retailer have in common? Courtesy of the Ninth Circuit, they are all potential class members in a lawsuit against Wal-Mart alleging gender discrimination. In *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), an *en banc* court upheld the certification of the largest ever civil rights lawsuit with a nationwide class of women who worked at Wal-Mart stores at any point since 1998.

In this case, the Ninth Circuit lowered the standard for class certification under Rule 23 of the Federal Rules of Civil Procedure. The court announced a more lenient standard of proof at the certification stage and eased restrictions on expert testimony and statistical evidence. In addition, the court allowed the lawsuit to proceed under the less restrictive standard in Rule 23(b) for cases seeking equitable relief, as opposed to the more stringent standard for cases where monetary relief predominates. Furthermore, the court held that a defendant's right to assert defenses against the individual claims can be satisfied by conducting a series of sample mini-trials and then using a formula to calculate damages.

This decision is significant not only for the parties in this case, but also for employers and class action litigants generally. Courts, moreover, have already applied the decision outside the employment discrimination context, including in fair lending class action cases. This note overviews the *Dukes* ruling and discusses its prospective influence on class action lawsuits.

BACKGROUND

In 2001, a small group of women currently or formerly employed by Wal-Mart, the largest private employer in the world, brought a class action in a California district court for sex discrimination under Title VII of the 1964 Civil Rights Act. The plaintiffs asserted that Wal-Mart had engaged in company-wide discriminatory practices, resulting in female employees receiving less pay and fewer promotions than their male counterparts. They sought injunctive and declaratory relief, back pay, and punitive damages on behalf of a proposed class of an estimated 1.5 million female employees (current and former) who worked at any time since December 1998 in any of Wal-Mart's 3,400 United States stores.

* Elizabeth E. McGinn is Partner in the New York office of BuckleySandler LLP. Benjamin P. Saul is Partner and Sarah Betts Esterhay is an Associate in the Washington DC office of BuckleySandler LLP. The authors represent financial services companies in connection with government civil and criminal enforcement proceedings, regulatory examinations and investigations, and class action litigation. They can be reached at emcginn@buckleysandler.com, bsaul@buckleysandler.com, and sesterhay@buckleysandler.com.

In 2004, the district court certified two classes: one class of current and former female employees seeking injunctive and declaratory relief and back pay, and a separate class of the same employees seeking punitive damages. The district court declined to certify claims for back pay based on Wal-Mart's failure to promote.

Wal-Mart appealed the certification of both classes. In 2007, an appellate panel affirmed the district court's ruling, and the Ninth Circuit then granted *en banc* review. The *en banc* court affirmed the certification of the claims for injunctive and declaratory relief and back pay; affirmed the district court's refusal to certify a class of employees who were allegedly denied promotions; excluded the former employees and remanded for the district court to consider whether a subclass or separate class would be appropriate; and remanded the punitive damages class for the district court to make further determinations. The *en banc* court was sharply divided (6-5), and both the majority and the dissent issued lengthy opinions. On August 25, 2010, Wal-Mart filed a petition for certiorari with the United States Supreme Court.¹ On December 6, 2010, just before publication of this article, the Court agreed to hear the case.² The Court is likely to hear oral argument in the spring of 2011 with a full bench.

NINTH CIRCUIT'S RULINGS

Overall standard to be applied in class certification

After an extensive review of Ninth Circuit precedent and other circuits' case law, the court purportedly clarified the standard to be applied at the class certification stage. The court determined that the district court must perform a "rigorous analysis" to ensure that the Rule 23 requirements are in fact satisfied, rather than merely presumed from the pleadings. The court explained that while this analysis will often require the district court to look beyond the pleadings, the district court may not analyze any portion of the merits that does not overlap with Rule 23 requirements. In addition, the district court must conduct separate inquiries for the different parts of Rule 23. Furthermore, the district court retains wide discretion in class certification decisions, and under certain circumstances, the district court may properly limit discovery to avoid a mini-trial on the merits.

In adopting this "rigorous analysis" standard, the court expressly rejected the dissent's "significant proof" approach. The dissent's standard would require a plaintiff to demonstrate a general policy of discrimination which was implemented through subjective decision making processes in a way that affected all members of the class, rather than merely discrete instances of discrimination. However, the Ninth Circuit did not take this approach.

¹ See Petition for Writ of Certiorari, *Dukes*, ___ U.S. ___ (No. 10-277), available at www.scotusblog.com/wp-content/uploads/2010/08/Wal-Mart-petition-8-25-10.pdf. The petition presents the following questions to the Court: (1) whether claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances; and (2) whether the certification order at issue conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Rule 23.

² The Court granted certiorari on both questions presented.

Rule 23(a)(2) – the “commonality” requirement

The court may certify a class only if it meets all the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Rule 23(a) requires 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.

In this case, the court focused its attention on the second of these requirements, that the class members have common issues of law or fact. The court held that test is “qualitative rather than quantitative,” and that the requirement is met if the evidence shown merely “raises” the common question of whether the plaintiffs were subjected to a single set of company-wide discriminating practices, versus independent discriminatory acts.

***Daubert’s* role at the class certification stage**

The *Dukes* court significantly limited the restrictions on expert opinion at the class certification stage. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court announced the standard governing the admissibility of expert testimony, which requires the district judge to act as a “gatekeeper” and consider certain factors to ensure that the evidence is relevant and reliable.

Splitting with at least one other circuit, the Ninth Circuit in *Dukes* held that a full *Daubert* examination is not required at this stage of the proceedings, and that the district court did not abuse its discretion by denying Wal-Mart’s request for a *Daubert* hearing. With respect to both expert testimony and statistical evidence, the court emphasized that the persuasiveness of the evidence should not be evaluated at the certification stage, but rather is a determination on the merits which should be made at a later time. This decision allows a defendant to seek a *Daubert* review at the merits stage, which could result in exclusion of this evidence and defeat the class action.

The dissent argued that the district court has a responsibility to use its “gatekeeping” function to establish that expert testimony is relevant and reliable before relying on it for a substantive decision. Likewise, the Seventh Circuit recently held that a full *Daubert* analysis is required where the expert opinion is critical to certification. In *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), the Seventh Circuit reached the opposite conclusion as the Ninth Circuit, and held that the district court must conduct a *Daubert* analysis at the class certification stage for any key testimony.

Standard for whether monetary relief predominates under Rule 23(b)

Once the district court finds that a class meets all of the requirements under Rule 23(a), the court must further find that the class satisfies one of 23(b)(1), (b)(2), or (b)(3). Rule 23(b)(2) allows certification for claims for injunctive and declaratory relief, while claims in which monetary relief “predominates” must be certified under Rule 23(b)(3). Since Rule 23(b)(3) imposes a more rigorous standard than Rule 23(b)(2), it is not surprising that the *Dukes* plaintiffs sought to certify their class under the latter.

The Ninth Circuit announced a new test for determining when monetary relief predominates such that certification under Rule 23(b)(2) is not appropriate: whether monetary damages are “superior [in] strength, influence, or authority” to injunctive and declaratory relief. Four factors must be considered: (1) “whether the monetary relief sought determines the key procedures that will be used,” (2) “whether it introduces new and significant legal and factual issues,” (3) “whether it requires individualized hearings,” and (4) “whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns.” *Dukes*, 603 F.3d at 617.

In *Dukes*, the court held that the claims for back pay did not predominate over the claims for injunctive and declaratory relief. However, the court concluded that the district court failed to consider whether certifying the punitive damages claims caused monetary relief to predominate, and remanded for the district court to apply the four-factor test to those claims. The court also excluded former employees from the class, because they cannot claim injunctive or declaratory relief, and remanded to the district court for a determination of whether certification is appropriate under Rule 23(b)(3).

Other circuits have taken different approaches to determine when monetary relief predominates. The Fifth, Sixth, Seventh, and Eleventh Circuits hold that monetary relief predominates unless it is “incidental” to injunctive or declaratory relief. The Second Circuit focuses on the plaintiffs’ “subjective intent” in bringing the lawsuit. However, the Ninth Circuit “see[s] no need to employ either approach.”

Availability of affirmative defenses and due process concerns

In *Dukes*, Wal-Mart argued that it was entitled to present affirmative defenses on an individualized basis, pursuant to the Title VII and the Rules Enabling Act, as well as their due process rights. The Ninth Circuit rejected this argument, and held that Wal-Mart’s statutory and due process rights would be protected by a “formula” method to calculate back pay on a class-wide basis. Under this approach, the district court would select “sample cases,” and discount the award to the class by the proportion of meritless cases in the sample.

The dissent argued that Wal-Mart has the right to raise affirmative defenses as to each class member’s claim, and that the procedure suggested by the majority should not be used in a Title VII case. Likewise, the Fifth Circuit rejected this formula approach in *Cimino v. Raymark Indus. Inc.*, 151 F.3d 297, 319 (5th Cir. 1998).

LOOKING FORWARD AFTER *DUKES*

Implications for Class Actions Generally

Dukes is likely to increase the number of class actions filed and impact the evidence used to support certification. It is especially likely that there will be more actions targeting discretion in decision-making as the basis for a policy of discrimination. While discretion alone is not sufficient to meet the burden of proof, it is acceptable when considered with other evidence, such as statistics and anecdotal evidence. Discretion provides the “nexus” between subjective decision-making and statistically significant disparities. The result is paradoxical. Discretion implies that decision-making is not consistent across class members, which should be a basis for defeating certification, but after *Dukes*, a “policy of discretion” may form the basis for a claim of a pattern or practice of discrimination. Employers may want to consider reviewing corporate decision-making practices and evaluate the level of discretion given to employees.

In addition to lowering the standard for certification under Rule 23(a), the *Dukes* court also lowered the standard for expert opinion allowed at this stage. Accordingly, this decision encourages greater use of expert opinion and statistical evidence. The *Dukes* decision may also result in a decline in the quality of this expert opinion, since parties will not be required to undergo a full *Daubert* examination of their evidence. Where plaintiffs are seeking equitable relief along with back pay or some other form of monetary damages, it may be easier for them to achieve certification under Rule 23(b). The Ninth Circuit created a new rule for determining whether monetary relief predominates, and if the court finds it does not, then plaintiffs are not subject to the additional requirements of Rule 23(b)(3). Finally, courts may place greater reliance on formulas to determine damages as opposed to individual hearings. This raises a variety of due process and case management concerns.

Implications in the Fair Lending Context

The impact of the *Dukes* decision will extend far beyond the employment context to other areas of law, including fair lending. Indeed, at least one court has already applied *Dukes* to grant class certification in a fair lending case. In *Ramirez v. GreenPoint Mortgage Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010), the United States District Court for the Northern District of California granted certification for a nationwide class of minority borrowers alleging that a wholesale mortgage lender violated the Fair Housing Act (“FHA”) and the Equal Credit Opportunity Act (“ECOA”) by giving its brokers discretion to mark up the price of wholesale loans, a policy which led to higher rates for minority borrowers.

In granting the motion for certification, the *Ramirez* court relied heavily on the *Dukes* decision. In particular, the court determined that the plaintiffs’ reliance on statistical evidence to meet the commonality requirement was “well-founded in Ninth Circuit precedent.” The court cited *Dukes* for the proposition that statistical disputes are part of the merits inquiry and need not be resolved at the certification stage.

The court followed the *Dukes* approach that a policy of discretion may form the basis for certification. The court stated that “[a]s in *Dukes*, Plaintiffs are challenging a subjective policy

that applied to all of GreenPoint's authorized brokers and, hence, every member of the proposed class. . . . The claims of all class members hinge on a common question: whether GreenPoint's discretionary pricing policy had a disparate impact on minority borrowers." Similarly, the court found that the typicality requirement was satisfied because like the named plaintiffs, all class members were subject to the discretionary pricing policy. *Ramirez*, 2010 WL 2867068, at *6-7.

Ramirez, thus, illustrates the way in which *Dukes* could operate to ease plaintiffs' class certification and related burdens under Rule 23 in other fair lending litigation. Given the increasing number of fair lending lawsuits that have been brought against financial services companies in the wake of the credit crisis, lenders should examine the *Dukes* decision and its emerging fair lending progeny with care.