



CLASS ACTION LITIGATION



REPORT

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In its decision in *Dukes v. Wal-Mart*, the Ninth Circuit addressed “several cutting-edge class action issues. These issues are of substantial importance to employment discrimination class action litigation and to employers generally, particularly in the Ninth Circuit,” write attorneys Gerald Maatman and Laura J. Maechtlen in this BNA Insight. “As circuit splits continue to form on many of these Rule 23 questions, many believe that these cutting-edge issues are apt to receive review by the U.S. Supreme Court in the near future,” the authors say.

Dukes, Maatman and Maechtlen say, “provides several touchstones for the class certification process. In so doing, *Dukes* establishes a roadmap for plaintiffs’ lawyers and defense counsel alike in approaching class certification briefing and hearings.”

***Dukes v. Wal-Mart* Part III—What Employers Need to Know About the Future of Class Actions Based on the En Banc Ruling**

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In its long awaited ruling in *Dukes v. Wal-Mart Stores, Inc.*, 2010 U.S. App. LEXIS 8576 (9th Cir. April 26, 2010), the U.S. Court of Appeals for the Ninth Circuit—in a 6 to 5 *en banc* decision—affirmed in part, and reversed and remanded in part, the class certification order in a gender discrimination pay and promotions class action brought under Title VII of the Civil Rights Act of 1964. In two previous rulings, a three-judge panel of the Ninth Circuit had found that the U.S. District Court for the Northern District of California had acted within its discretion in certifying the class,

which encompasses an estimated 1.5 million employees, both salaried and hourly, with a range of positions, employed at one or more of Wal-Mart’s 3,400 stores across the United States.¹

The April 26 *en banc* ruling in *Dukes* addresses several cutting-edge class action issues. These issues are of substantial importance to employment discrimination class action litigation and to employers generally, particularly in the Ninth Circuit. As circuit splits continue to form on many of these Rule 23 questions, many be-

¹ The district court’s ruling is reported as *Dukes, et al. v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

lieve that these cutting-edge issues are apt to receive review by the U.S. Supreme Court in the near future.

I. The Ninth Circuit's *En Banc* Decision

A. Clarification of Rule 23 Standards

The Ninth Circuit's ruling exhaustively examines the elements that plaintiffs must establish to certify a class under Rule 23 of the Federal Rules of Civil Procedure.² *Dukes* seeks to harmonize prior Ninth Circuit case law, Supreme Court precedents, and the landscape of Rule 23 opinions from various circuits. It provides several touchstones for the class certification process. In so doing, *Dukes* establishes a roadmap for plaintiffs' lawyers and defense counsel alike in approaching class certification briefing and hearings.

The Ninth Circuit's first touchstone is that, while a district court may not make determinations on the merits in the context of a class certification motion, Rule 23 requires that a district court must make a finding that each specific requirement of the rule is met. In examining these requirements, district courts must undertake a "rigorous analysis" of any legal or factual issues necessary to make a determination as to each element required by Rule 23, and whether the suit is appropriate for class resolution must actually be demonstrated, not just alleged.³ In so holding, the Ninth Circuit opined that many district courts have misread prior circuit precedent—such as *Blackie v. Barrack*, 524 F. 2d 891 (9th Cir. 1975)—for the proposition that the district court must take the substantive allegations of plaintiff's complaint as true and that any issues pertaining to the merits can never be examined in deciding a class certification motion. The Ninth Circuit determined that the proper rigorous analysis often will require looking behind the pleadings to issues overlapping with the merits of the underlying claims, and that a district court must examine those issues so long as they bear upon the Rule 23 elements.⁴

The Ninth Circuit's second touchstone is an admonition to district courts and litigants relative to the scope and context of future class certification hearings. *Dukes* holds that a class certification hearing is not a mini-trial. In order to avoid mini-trials on the merits at the certification stage, the Ninth Circuit instructed that district courts have broad discretion to cut off discovery as may be necessary to prevent either party from boot-

strapping a trial or a summary judgment-like motion into the certification stage.⁵

The Ninth Circuit's third touchstone emphasizes the flexible standard and analysis required by different types of cases and substantive legal theories.

The Ninth Circuit's third touchstone emphasizes the flexible standard and analysis required by different types of cases and substantive legal theories. *Dukes* instructs that district courts must be aware that in the application of Rule 23, different outcomes may result depending upon the underlying legal and factual framework of plaintiffs' claims. In employment discrimination class actions where plaintiffs present statistical evidence—as compared to a securities fraud class action—disputes over whether the plaintiffs' statistics or the defendant's statistics are more persuasive typically are not disputes over whether plaintiffs raise common issues or questions for purposes of Rule 23, but are in reality arguments going to the proof of the merits. Thus, the district courts must analyze statistical evidence to the extent it bears upon a determination of whether or not plaintiffs satisfy the commonality requirement of Rule 23(a)(2), as opposed to the underlying merits of the claims asserted.⁶

The Ninth Circuit's fourth touchstone clarified the role of experts in class certification hearings. *Dukes* reasoned that a disagreement among experts on the merits in an employment discrimination class action is not a valid basis for denial of class certification. Thus, employers stand little to no chance of success in asserting "battle of the experts" arguments at the class certification stage. Instead, a district court's examination of expert testimony is limited to how the expert evidence bears upon the Rule 23 elements.⁷

The Ninth Circuit's fifth touchstone is that different standards may apply with respect to evaluating evidence under Rule 23(a) as compared to Rule 23(b)(3). Hence, *Dukes* established that the differences in the text in these sub-parts of Rule 23 may require a different standard of evidence under different sub-parts of Rule 23. The Ninth Circuit reasoned that "we would expect that cases in which parties are contesting facts underlying the Rule 23(b)(3) determination may often require more determinations by the district court than those in which Rule 23(a)(2) is the primarily contested issue . . . we thus should not be surprised that a district court will have to make more precise factual determinations under Rule 23(b)(3) than under Rule 23(a)(2)."⁸

² Rule 23, subdivision (a), states that a district court may certify a class if four factors are met: (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, subdivision (b), requires that, in addition to Rule 23(a) factors, at least one of three conditions must 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 class members predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

³ *Dukes*, 2010 U.S. App. LEXIS 8576, at *55-56.

⁴ *Id.* at *40-41.

⁵ *Id.* at *56-57.

⁶ *Id.* at *57.

⁷ *Id.* at *80-85.

⁸ *Id.* at *52-53.

B. Regardless of Wal-Mart's Challenges, Plaintiffs' Expert Presentation Supported a Finding of Commonality

Based on these touchstones and clarified standards, the Ninth Circuit examined the district court's analysis of the expert testimony submitted by the parties for purposes of analyzing satisfaction of the commonality requirement under Rule 23(a)(2). Among other grounds, Wal-Mart challenged the expert proof submitted by plaintiffs in support of commonality under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

The Ninth Circuit determined that the district court correctly made factual determinations regarding the expert evidence as it related to the issue of the existence of common questions of fact or law. Furthermore, the Ninth Circuit held that the district court properly did not decide which parties' evidence was ultimately more persuasive as to liability. Thus, the Ninth Circuit concluded that in considering the plaintiffs' expert testimony in this manner, the district court did not abuse its discretion in making Rule 23 determinations.⁹ The Ninth Circuit bolstered this conclusion by noting that Wal-Mart did not challenge the methodologies of the plaintiffs' expert testimony, but only whether certain inferences could be persuasively drawn from the expert data. The Ninth Circuit, therefore, rejected the defense contention that the district court was required to strike the expert testimony offered by plaintiffs under *Daubert* at the class certification stage because the conclusions reached by the plaintiffs' experts were unpersuasive absent other evidence. For these reasons, the Ninth Circuit found no error in the district court's acceptance of the expert testimony presented by plaintiffs to support a finding of commonality.¹⁰

The Ninth Circuit also found no error in the district court's acceptance of plaintiffs' statistical evidence of discrimination in determining that the Rule 23(a) elements had been satisfied. Although Wal-Mart argued that the plaintiffs' expert used a faulty analysis in conducting research on a regional level (rather than analyzing employment data on a store-by-store basis, or at the organizational level where the discriminatory practices allegedly took place), the Ninth Circuit determined that the proper test of whether the workforce statistics should be viewed at the macro (regional) or micro (store) level depends largely on the similarity of the employment practices and the interchange of employees at various facilities. The Ninth Circuit concluded that the district court did not abuse its discretion because, after a "rigorous analysis," the district court had reasonably decided to credit the statistical showing of plaintiffs' expert.¹¹

The Ninth Circuit did not decide whether *Daubert* applies to expert testimony offered in a class certification hearing. In an important footnote, the Ninth Circuit determined that it need not decide that issue because the district court's examination of the expert testimony was more than adequate and did not constitute an abuse of discretion.¹²

⁹ *Id.* at *82, 86-91.

¹⁰ *Id.* at *113-114.

¹¹ *Id.* at *103-106.

¹² *Id.* at *81 n. 22.

C. Multi-Factored Approach for Determining Whether Monetary or Injunctive Relief Predominate Under Rule 23(b)(2)

One of the more controversial aspects in *Dukes* is plaintiffs' request to certify a class under Rule 23(b)(2) for punitive damages. Plaintiffs argued that their claims for injunctive relief predominated over claims for monetary relief, and therefore certification under Rule 23(b)(2) was proper. Wal-Mart argued to the contrary, given the millions of putative class members at issue and plaintiffs' likely request for billions of dollars in damages.

In examining this issue, the Ninth Circuit overruled its previous precedent—*Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) - because it provided no useful guidance to district courts as to whether, within the meaning of Rule 23(b)(2), claims for injunctive or equitable relief predominate as compared to claims for money damages.¹³ *Molski* established a standard focused on the plaintiffs' intent, *i.e.*, whether that intent was to bring a claim predominantly for injunctive relief, or predominantly for monetary relief. By overruling *Molski* and rejecting an "incidental damages standard" used by other circuits, the Ninth Circuit articulated a multi-factored approach that analyzes whether claims for monetary damages are impermissibly "superior in strength, influence, or authority" to claims for injunctive or declaratory relief. *Dukes* identified factors that district courts must consider, including: (i) whether the monetary relief sought determines the key procedures that will be used; (ii) whether the monetary relief sought introduces new and significant legal and factual issues; (iii) whether its size and nature - as measured by recovery per class member - raise particular due process and manageability concerns; and (iv) whether the request for relief requires individual damages determinations. The Ninth Circuit indicated that no single factor would be determinative.¹⁴ This new standard deepens an existing circuit split on the "punitive damages" only certification theory which plaintiffs pursue in employment discrimination class actions to gain leverage over defendants for settlement purposes.

In evaluating these factors vis-à-vis plaintiffs' claims, the Ninth Circuit determined that three of the four factors weighed in favor of a finding that monetary relief would predominate. First, the inclusion of a punitive damages request means that the key issue in the case—Wal-Mart's liability—will be decided by a jury, rather than a judge. Second, plaintiffs' request for punitive damages introduced a new substantive factual issue. To recover punitive damages, plaintiffs must show not only that Wal-Mart engaged in a pattern or practice of discrimination, but also that it did so with malice or reckless indifference to the rights of the class members. The Ninth Circuit opined that this additional factual question likely requires plaintiffs to introduce significant evidence and legal argument that would not have otherwise been necessary. Third, the Ninth Circuit noted that the size of the potential punitive damages award—measured on an individual basis—could be quite significant, and therefore a large potential award raises due process and manageability concerns. The *en banc* panel concluded that this would trigger the need for safe-

¹³ *Id.* at *126-127.

¹⁴ *Id.* at *141-145.

guards when a class is certified under Rule 23(b)(3), rather than Rule 23(b)(2).¹⁵

Perhaps most significantly, the Ninth Circuit affirmed the finding, with little analysis, that punitive damages do not require individualized determinations of harm so long as plaintiffs have alleged that the company's policies and practices affect all class members in a similar way. Courts have traditionally rejected the imposition of punitive damages on a class-wide basis before a showing of individual harm because the Supreme Court has determined that an award of punitive damages must be related to the monetary harm suffered by individual plaintiffs.

Based on this analysis, the Ninth Circuit did not jettison plaintiffs' punitive damages class certification theory from the case. Instead, the Ninth Circuit held that the district court abused its discretion by failing to analyze these factors in certifying plaintiffs' punitive damages claims under Rule 23(b)(2), and remanded the punitive damages claim to the district court for a further hearing. In doing so, and without expressing an opinion about whether the claims at issue met the requirements of Rule 23(b)(3), the Ninth Circuit determined that the district court also should consider whether class certification of the punitive damages claims is appropriate under Rule 23(b)(3). Under this hybrid approach, in order to protect the due process interest of absent class members, the Ninth Circuit opined that notice and opt-out rights would be required for the Rule 23(b)(3) punitive damages proceeding, and the Rule 23(b)(2) phase of the proceeding could be adjudicated without the costly notice and opt-out procedures.¹⁶

D. The Manageability of A Class Of 1.5 Million Employees

In addressing Rule 23(b)(3) manageability concerns, the Ninth Circuit rejected arguments by Wal-Mart that a trial would be unmanageable because of the size of the class, and unconstitutional because the district court's tentative trial plan would deprive Wal-Mart of its right under Title VII to defend individual pay and promotion decisions.¹⁷ The Ninth Circuit determined that, if the company were found liable for discrimination at the merits stage of the trial, the company could defend its individual decisions in a statistical sample of "test cases" with the result of those cases being subject to a statistical analysis to provide a formula for class-wide liability.

In determining that individual hearings are not required and that statistical methods can be used to determine the appropriate damages on a class-wide basis, *Dukes* cited *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). *Hilao*, a 2-1 panel decision, addressed the highly unusual circumstance of how to try the case of multiple Philippine nationals who alleged "torture, summary execution and 'disappearance' committed by the Philippine military and paramilitary forces under the command of Ferdinand E. Marcos during his nearly 14-year rule of the Philippines."¹⁸ *Dukes* noted that as it had approved of statistical modeling to manage the

claims at issues in *Hilao*, a determination of punitive damages in this respect was not error.¹⁹

This is surely one of the most controversial aspects of *Dukes*. In rejecting this very analysis, a number of courts have noted that the defendant in *Hilao* failed to challenge the method of computing damages, and failed to raise any Seventh Amendment concerns.²⁰ Numerous commentators also have criticized *Hilao* in failing to engage in the thorough analysis required by Rule 23.²¹

The Ninth Circuit's ruling also dismissed many of Wal-Mart's particular objections by refusing to express any opinion on the district court's tentative trial plan. Instead, the Ninth Circuit held that statistical sampling, which provides the company an opportunity to raise its defenses in the "test cases," is one method the district court could choose to use. Because at least one reasonable method exists for trial, the Ninth Circuit reasoned that the class is manageable.²²

Finally, the Ninth Circuit ruled in favor of Wal-Mart and upheld the district court's decision not to certify promotion claims by class members who lacked objective evidence of their interest in a promotion. The Ninth Circuit recognized that absent objective evidence of interest, such as a written application for a potential promotion, the district court would need to conduct individualized hearings to determine, after the fact, who was interested in a particular promotion. Since the sheer volume of such hearings would be unmanageable, the Ninth Circuit concluded that the district court did not abuse its discretion in denying certification of this sub-class.

¹⁹ *Dukes*, 2010 U.S. App. LEXIS 8576, at *159 ("Because we see no reason why a similar procedure to that used in *Hilao* could not be employed in this case, we conclude that there exists at least one method of managing this large class action, that, albeit somewhat imperfect, nonetheless protects the due process rights of all involved parties.").

²⁰ See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (rejecting the plaintiffs' proposed three step trial plan, the court notes that the *Hilao* opinion failed to address Seventh Amendment concerns, and concluded that "we find ourselves in agreement with the thrust of the dissenting opinion there"); *Zapata v. IBP, Inc.*, 175 F.R.D. 578, 581 (D. Kan. 1997) (court declines to apply *Hilao*, noting among other matters that in that case "the defendant had waived questions concerning the propriety of the methodology employed"); *Arch v. The American Tobacco Co.*, 175 F.R.D. 469, 493-94 (E.D. Pa. 1997) (court declined to apply *Hilao*, finding that, "[u]nlike *Hilao*, defendants in this case do not waive any challenge to the computation of damages" and further that its application would require the court "to bifurcate issues in violation of the Seventh Amendment").

²¹ See, e.g., Margaret G. Perl, Note, Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations, 88 Geo. L.J. 773, 782-87 (2000) (noting that *Hilao* cannot be reconciled with class certification precedent in other mass tort cases); George A., Martinez, Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device, 33 L. Legis. 181, 185-86 (2007) (criticizing *Hilao* for not engaging in rigorous analysis); cf. *Kpadeh v. Emmanuel*, 261 F.R.D. 687, 691 (S.D. Fla. 2009) (rejecting *Hilao*'s reasoning the court found that even human rights advocates who applaud the result in *Hilao* concede that the court "did not engage in [an] intellectually rigorous analysis of class certification requirements").

²² *Dukes*, 2010 U.S. App. LEXIS 8576, at *159.

¹⁵ *Id.*

¹⁶ *Id.* at *145-146.

¹⁷ *Id.* at *152-157.

¹⁸ *Hilao*, 103 F.3d at 771.

II. Defense Of Class Actions in the Wake of the *Dukes* Ruling

The *Dukes* decision provides an exhaustive roadmap of key issues for plaintiffs and employers litigating class actions in the Ninth Circuit and beyond. The Ninth Circuit's decision is apt to have a significant impact on the course of class certification hearings and success and failure for Rule 23 motions.

A. Plaintiffs Have a Robust Burden of Proof to Certify a Class, and Defendants Can Insist on a "Rigorous Analysis" to Ensure That the Rule 23 Prerequisites Are Met

Dukes clearly casts the die in the Ninth Circuit about what plaintiffs must prove to certify a class action. Plaintiffs have a robust burden of proof to establish satisfaction of the Rule 23 requirements, and this burden is particularly acute in terms of Rule 23(b) issues of predominance and superiority. Moreover, it will be insufficient if a district court does not employ a "rigorous" analysis in evaluating all the Rule 23 factors. Defendants should therefore implore the district court to look "beyond the pleadings" by using a "rigorous" analysis in deciding whether all the Rule 23 factors are met. Absent any of the necessary Rule 23 elements, a class cannot be certified.

B. Merits Based Inquiries Unnecessary For the Class Certification Elements Are Prohibited

Any attack on the merits of plaintiffs' case during the class-certification stage is likely doomed. The defense must focus on the evidence underlying the Rule 23 factors, rather than on merits-based arguments. Thus, defendants seeking to resist pre-certification class-wide discovery may persuasively point to these burden of proof factors from *Dukes* to argue that a district court should use its discretion to limit discovery to avoid a mini-trial on the merits at the certification stage.

C. Attacks by Defendants on Plaintiffs' Statistical Evidence Must Focus on Rule 23 Factors

A defendant's attack on plaintiffs' expert testimony should avoid arguments over which competing expert model is more persuasive. *Dukes* teaches that the key focus is on how the defense expert's presentation demonstrates that plaintiffs are unable to show a Rule 23 element. In addition, defendants are best served to attack the type/level of analysis (nationwide aggregated statistics vs. regional/district statistics) in terms of the proper theoretical model for consideration of the commonality issue.

D. Defendants Remain Free to Attack Plaintiff's Expert Presentations

The Ninth Circuit's ruling did not decide whether *Daubert* has the same application for expert testimony offered at the class certification stage as it does for testimony offered at trial. Accordingly, while defendants in class actions remain free to argue that plaintiffs' expert presentations are flawed and/or lack a theoretical basis to qualify as sufficient proof to establish class certification requirements, the application of *Daubert* in the class certification context is an open issue in the Ninth

Circuit given the statement in footnote 22 of the *Dukes* opinion.²³

E. The Ninth Circuit Did Not Address Rule 23 (b)(3) in *Dukes*

Dukes involved an "injunctive relief" class certified under Rule 23(b)(2), and not a "predominant common issues" class under Rule 23(b)(3). In this respect, the Ninth Circuit did not address either Rule 23(b)(3)'s requirement that issues common to the class predominate over issues unique to individual class members' claims, or its demand that class treatment be superior to other methods for fairly and efficiently resolving the controversy. On that basis, the decision may be distinguishable in other future cases relying on Rule 23(b)(3).

F. Defendants Should Put the Focus on Monetary Damages Claims

Dukes identifies various factors for determining whether monetary relief predominates, "such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature . . . raise particular due process and manageability concerns."²⁴ These factors provide a strong argument that many—if not most—class actions involving monetary damage claims cannot be certified under 23(b)(2). Moreover, because a Rule 23(b)(2) class is not maintainable unless injunctive or declaratory relief "is appropriate respecting the class as a whole," the same sort of arguments would seem viable even where the individualized issues arise with respect to claims for equi-

²³ This issue continues to divide the courts, and remains a battleground for differing interpretations of Rule 23 procedure. The Seventh Circuit recently held in *American Honda Co. v. Allen*, 2010 U.S. App. LEXIS 7153 (7th Cir. April 7, 2010), that it was error for a district court to fail to conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. While Plaintiffs might argue that, under *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1982), a detailed analysis of an expert's opinion is an unwarranted intrusion on the merits, and therefore inappropriate at the class certification level, a number of courts reject that view of their gate-keeping responsibilities under *Daubert*. See, e.g., *Cooper v. Southern Co.*, 390 F.3d 746, 752-54 (11th Cir. 2004) (*Eisen* cannot be involved "to artificially limit a trial court's examination of factors necessary to a reasoned determination of whether a Plaintiff has met her burden of establishing each of the Rule 23 criteria"). Several commentators also have argued that a full *Daubert* analysis should apply to expert testimony at the class certification stage. See L. Elizabeth Chamblee, Between "Merit Inquiry" And "Rigorous Analysis": Using *Daubert* to Navigate The Gray Areas Of Federal Class Action Certification 31 Fla. St. U.L. Rev. 1041, 1090 (2004). Employers can argue that anything less would deprive them, in derogation of the Rules Enabling Act, of their due process rights to exclude inadmissible evidence. 28 U.S.C. §§ 2071-2077; see generally *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure shall not abridge, enlarge, or modify any substantive right."). Courts have applied the Rules Enabling Act in the class action context to disallow interpretations of Rule 23 that would improperly alter the substantive rights of the parties. See *Windham v. American Brands*, 565 F.2d 59, 72 & n.41 (4th Cir. 1977) (disallowing fluid recovery under Rule 23, as being in violation of the Rules Enabling Act).

²⁴ *Dukes*, 2010 U.S. App. LEXIS 8576, at *127.

table relief. For example, if a request for back pay required consideration of predominantly individualized evidence, the *Dukes* standard would support denial of a class action under 23(b)(2).

G. Defendants Can Preemptively Move for Class Decertification

Perhaps one of the most significant developments in 2009 on the class action front is *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009). In that case, the Ninth Circuit held that a defendant is entitled to bring a motion under Rule 23 seeking a determination that a class should not be certified. Coupled with the clarification of Rule 23 standards in *Dukes*, defendants can use a *Vinole* motion as an offensive tactic to preempt plaintiffs and their class certification filing.

III. The Implications of *Dukes* for Defense of Class Actions

The *Dukes* decision provides useful guidance for employers who want to avoid class action litigation.

Employers must be cognizant that, following *Dukes*, decentralizing decision-making does not necessarily block the certification of a class action involving discrimination claims. For that reason, it is important for employers to review HR practices related to pay and promotion decisions on a regular basis to determine whether the company practices, policies or procedures are adversely impacting any classification of employee. *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558 (W.D. Wash. 2001), is a good example for review of policies

and practices because it was distinguished by the district court in *Dukes*. In that case, the district court failed to find Rule 23 commonality due to a “well-crafted” combination of both objective and subjective measures with respect to promotion decisions, features the Ninth Circuit found were not present at Wal-Mart, such as bi-annual performance evaluations, advance mapping of goals and objectives, and an appeal process for employees considered for promotion.

Following the *Dukes* decision, employers might feel incentivized to adopt an informal quota system in pay and promotions to avoid class action lawsuits. However, a quota system applied to pay or promotions decisions also would be subject to challenge under Title VII for discrimination by employees who are affected by a quota system based on their protected status. For that reason, employers should be careful when adopting any system affecting hiring, promotion, and pay practices, including implementation of other practices, such as testing or ranking of employees.

In the end, Wal-Mart is apt to seek U.S. Supreme Court review of the Ninth Circuit’s decision. The ruling, if not overturned, heightens the risk for employers doing business in the Ninth Circuit (encompassing Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), and provides warning signals that statistical disparities, subjective decision-making, and relatively few anecdotal claims of discrimination may continue to give rise to company-wide class action litigation.

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