

## Class Action Defense Strategy Blog

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## [Ninth Circuit Clarifies Rule 23 Class Certification Standard](#)

By [John M. Landry](#) and [Jonathan D. Moss](#)

In [Dukes v. Wal-Mart Stores, Inc.](#), Nos. 04-16688, 04-16720, 2010 WL 1644259 (9th Cir. Apr. 26, 2010), the [United States Court of Appeals for the Ninth Circuit](#), sitting *en banc*, affirmed in part and reversed in part an order certifying what is likely the largest class of employment claims in the history of the United States. The decision is highly significant for class action practitioners in all areas of the law because it clarifies the standard in the Ninth Circuit for determining whether a party has met its burden under [Rule 23 of the Federal Rules of Civil Procedure](#) to certify a class.

Plaintiffs in *Dukes* are female employees of Wal-Mart, Inc. who allege a pattern and practice of discrimination against them in violation of [Title VII of the Civil Rights Act of 1964](#). The [United States District Court for the Northern District of California](#) granted in substantial part plaintiffs' motion to certify the class. In an eighty-four page ruling, the district court, among other things, analyzed plaintiffs' evidence and found it raised a sufficient inference that Wal-Mart engaged in conduct affecting all class members. It rejected Wal-Mart's challenges largely on the ground that they went more to the weight of the evidence and thus should properly be addressed by a jury considering the merits. Wal-Mart appealed pursuant to Federal Rule of Civil Procedure 23(f). After a panel of the Ninth Circuit affirmed, the Ninth Circuit granted *en banc* review.

The *en banc* Court largely affirmed the order certifying the class, while reversing certain aspects and remanding them to the district court for further proceedings. At the outset of the opinion, the Court took the opportunity to address the proper standard and processes for analyzing a motion for class certification under Rule 23, a matter as to which there has been substantial confusion in the district courts of this Circuit for many years.

The Court explained that the [United States Supreme Court](#)'s decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982), constitutes the leading authority and

makes clear that district courts must conduct a “rigorous analysis” to determine that each Rule 23 requirement is met, even if that entails looking behind the pleadings to decide factual issues overlapping with the merits of the underlying claims. It attributed any misunderstanding (and relaxation) of the “rigorous analysis” standard to a misreading of an earlier Supreme Court comment in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that “[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it can be maintained as a class action.” According to *Dukes*, a proper reading of *Eisen* shows that a district court may indeed probe facts insofar as they overlap with Rule 23 compliance, but should not conduct an inquiry into standalone, non-overlapping merits issues.

The *Dukes* Court also identified footnote 17 of *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), as another possible source of confusion. That footnote states that district courts are “bound” at the class certification stage “to take substantive allegations of the complaint as true.” The Court in *Dukes* warned that the footnote should not be read to foreclose a Rule 23 inquiry into merits-related issues. Rather, it should be read in the full context of *Blackie*, a decision that clearly requires district courts obtain sufficient information to allow “an informed judgment on each of the Rule’s requirements.”

The Ninth Circuit noted that many of its sister circuits have recently been called upon to clarify the standard governing Rule 23 determinations. Among these circuits, the *Dukes* court aligned itself most closely with the Second Circuit in [\*In re Initial Public Offerings Securities Litigation\*](#), 471 F.3d 24 (2d Cir. 2006) (“*IPO*”), calling it the “leading case” and “the most notable.” Significantly, *IPO* requires district courts to weigh conflicting evidence — even evidence overlapping with the merits — at the Rule 23 stage. As *Dukes* states, “*IPO* held that factual disputes concerning each of the Rule 23 factors must be analyzed and resolved.” The Ninth Circuit agreed that *Falcon* and *Eisen* require *IPO*’s approach.

Offering a number of observations, the *Dukes* Court outlined the approach a district court should take when adjudicating a Rule 23 motion:

- Courts must perform a “rigorous analysis” to ensure the prerequisites of Rule 23 are satisfied, even though this analysis often requires looking behind the pleadings to overlapping merits issues.
- Courts may not analyze the merits of a claim that do not overlap with Rule 23 requirements.
- Courts should keep in mind that different parts of Rule 23 require different inquiries, *e.g.*, although Rule 23(a)(2) and Rule 23(b)(3) both involve questions of commonality, the more-demanding Rule 23(b)(3) inquiry goes a step further to consider whether common questions *predominate* over individualized issues.
- Courts retain broad discretion in class certification, including the discretion to cut off discovery to avoid a mini-trial.

- In certain types of cases, courts are more likely to abrogate discovery at the class certification stage, *e.g.*, merits-heavy Title VII cases versus fraud-on-the-market actions that require closer inquiries at the class certification stage.

Turning to the record on appeal, the *Dukes* Court concluded that the district court's Rule 23(a)(2) commonality determination conformed to the clarified standard. According to the majority opinion, the district court, in ruling the evidence before it sufficient to raise an inference that Wal-Mart engaged in discriminatory practices that affected all putative class members in a common manner, "actually weighed evidence" and looked "well beyond the pleading." Among other notable things, the district court had devoted fifteen pages of its opinion to probing the parties' statistics. Significantly for the Ninth Circuit, plaintiffs' Rule 23(a)(2) evidence needed only to raise a common question. Plaintiffs did not need to show that common questions predominated under Rule 23(b)(3) or that their evidence was ultimately more persuasive as to liability.

Ultimately, the Court held that the district court properly concluded that all Rule 23(a) requirements were met and Rule 23(b)(2) furnished a proper basis for certifying the class with respect to Title VII back-pay and declaratory and injunctive relief claims. Nevertheless, the district court abused its discretion when it certified a Rule 23(b)(2) punitive damages class without considering whether punitive relief "predominantly" related to money damages. The circuit court remanded to permit the district court to make this determination. It also remanded with respect to putative class members who no longer worked for Wal-Mart when the complaint was filed so that the district court could consider whether to certify an additional class or classes under Rule 23(b)(3).

The dissenting opinion did not disagree with the majority's clarification of the proper standard for analyzing class certification under Rule 23. It focused mainly on what it saw as the district court's failure to apply a special "significant proof" standard set forth in *Falcon* to determine Rule 23(a)(2) commonality in the Title VII context.

*Dukes* is now the leading case on class certification in the Ninth Circuit. Counsel opposing class certification should highlight *Dukes*' affirmation that the certification process is not a "rubber stamp." A district court must conduct a "rigorous analysis" into the Rule 23 factors and such analysis properly includes probing into matters that overlap with the underlying merits of the case. Arguments to the contrary — particularly those relying upon *Blackie* — are now eradicated. Further, *Dukes* clearly has signaled that a Rule 23(b)(3) predominance determination (typically in actions for damages) will likely require an even greater degree of factual determinations by the district court. In light of the closeness of the decision (6-5), the size of the certified class (estimates range from 500,000 to 1.5 million persons) and the potentially massive exposure to an iconic American corporation, request for Supreme Court review seems highly likely.