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REPORT

Three U.S. Courts of Appeal recently have held that class action plaintiffs must establish compliance with each Rule 23 class requirement by a preponderance of the evidence, even if such issues overlap with merits issues. In *Dukes v. Wal-Mart Stores Inc.*, the Ninth Circuit is poised to decide whether it should adopt the preponderance standard. ''Regardless of the outcome,'' write attorneys Lester Sotsky, Michael Daneker and Christopher Jaros, ''the Ninth Circuit's forthcoming decision will propel toward resolution a tipping of the balance of power in class action litigation.'' The authors examine the likely certification consequences of a decision either way in *Dukes*.

Tipping the Leverage in Class Actions: Ninth Circuit Poised to Weigh in on Critical Evidentiary Standards

By Lester Sotsky, Michael Daneker and Christopher Jaros

Class actions have long been recognized as important vehicles to enable individuals to pursue rights and claims that cannot be effectively prosecuted unless bundled with those of others. At the same time, class actions have also been recognized as potentially coercive, pressuring defendants to settle cases before ever getting to the merits, because of the greatly magnified exposure often faced in such bundled litigation. *See, e.g., Szabo v. Bridgeport Machines, Inc.* 249 F.3d 672, 675 (7th Cir. 2001) (Easterbrook, J.) (stating class claims can ''. . . put[] a bet-your-company decision to [defendants] and may induce a substantial settlement even if the [plaintiff's] position is weak.''). Both sides commonly seek to capitalize on this inherent tension. While plaintiffs strive to ''get to the jury'' by sidestepping early evidentiary and procedural hurdles, many defendants seek to ''knock out the class'' (and, thus, the coercive leverage of vastly multiplied recoveries) by challenging certification, imposing rigorous pre-trial

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burdens of proof (*e.g.*, through *Lone Pine* orders)[1] or otherwise putting plaintiffs to the test of establishing each element of each cause of action on an individualized basis.

In a recent series of rulings, three U.S. Courts of Appeal (together with several lower courts) have thrown a significant wrinkle into this dynamic, holding that class action plaintiffs must establish compliance with each Rule 23 class requirement by a ***preponderance of the evidence***, even if such issues overlap with merits issues. In effect, this may mandate a mini-trial with a high evidentiary bar, just to get past the hurdle of class certification. This Spring, an 11-judge *en banc* panel of the Ninth Circuit heard argument in *Dukes v. Wal-Mart Stores, Inc.*, on the question of whether that Circuit should adopt the preponderance standard. Regardless of the outcome, the Ninth Circuit's forthcoming decision will propel toward resolution a tipping of the balance of power in class action litigation. If the Ninth Circuit embraces the preponderance of the evidence standard, that standard will be further entrenched in federal law and will have been adopted by four Circuits in this decade, with several likely consequences:

(i) Under the preponderance of the evidence standard, an evidentiary hearing on class certification issues will likely be necessary in many cases. Gone will be the day that class actions may be certified on bare averments of the required elements of numerosity, commonality, typicality, and adequacy of representation;

(ii) This will enhance defense opportunities to mitigate what has been a somewhat reflexive acceptance by some courts of plaintiffs' pleadings in ruling on certification motions; instead, class certification will now turn on both fact and expert testimony, including testimony previously reserved for the trial stage;

(iii) This also means that the parties' competing proffers of often highly technical – and highly inflammatory – issues that may lie at the core of the case will be heard first by the judge, not by a jury, a profound shift of the rules of the game; parties counting on a jury's sympathies, emotions or lack of sophistication to make them less exacting than a seasoned jurist might be in demanding that counsel cut evidentiary sharp corners, may need to rethink their cases;

(iv) This prospect of a *judicial* hearing on complex scientific, legal or testimonial matters as a requisite hurdle just to get one's case before a jury may lead some plaintiffs' counsel to reconsider the desirability of the class action vehicle (versus mass joinder or other ways to prosecute multiple actions) and/or to file actions in state courts that have not adopted and may be less swayed by the federal Court of Appeals rulings on the preponderance of evidence standard;

(v) These and other reconfigurations of threshold procedural matters may alter fundamentally the leverage and dynamics of settlement, at least at the precertification and pretrial phases; and

(vi) Finally, in some quarters, it is conventional wisdom that many plaintiffs wait until the eve of trial to dig in and prepare their case, while defense lawyers more typically search exhaustively for any point of leverage or weakness in plaintiffs' case to achieve an early knockout or some pathway to ''shrink'' their clients' exposure through motions, etc. Whether true or not, the preponderance of evidence standard may modify this equation—plaintiffs will need to be more ready on more issues to ''prove up'' their case, lest they lose a critical evidentiary hearing before ever getting to the merits.

A contrary ruling by the court would create a sharp split among the circuits and increase the likelihood that the U.S. Supreme Court would enter the fray.

Even if the Ninth Circuit *rejects* the preponderance of evidence test, we submit these prospective consequences remain very much in play. A contrary ruling by the court would create a sharp split among the circuits and increase the likelihood that the U.S. Supreme Court would enter the fray. Given its recent track record, as noted further below, that may not bode well for opponents of the preponderance of evidence standard.

Background

On March 24, 2009, an 11-judge *en banc* panel of the Ninth Circuit heard argument of an appeal challenging class certification in *Dukes v. Wal-Mart Stores, Inc.*, an employment discrimination suit recently certified as the largest class action lawsuit in history, with an estimated class of 1.5 million members. *See Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007), *rehearing en banc granted*, 556 F.3d 919 (9th Cir. 2009). Wal-Mart's challenge, which asserts, *inter alia*, that the plaintiff failed to demonstrate adequately the requirements for class certification under Fed. R. Civ. P. 23 (''Rule 23''), comes fresh on the heels of decisions in the Second, Third, and Fifth Circuits, requiring plaintiffs to establish compliance with each Rule 23 class requirement by a ***preponderance of the evidence*** at the class certification stage. This higher burden of proof not only requires plaintiffs to submit to increased discovery and motions practice at the class certification stage, but also may require plaintiffs to proffer convincing evidence on issues that may often be highly germane to the merits, effectively changing the rules of the game in class action litigation.

Under Rule 23, a class action may be certified only if it meets several specific statutory requirements. First, the purported class must meet the four prerequisites of

[1] *Lone Pine* orders, which derive their name from the Superior Court of New Jersey case *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, *1-*3 (N.J. Super. Ct. Law Div. Nov. 18, 1986), are pre-trial orders in toxic tort lawsuits requiring plaintiffs to produce basic evidence supporting a prima facie case, such as injury or causation, at an early stage in the discovery process. Such orders allow courts to organize claims and focus on key issues early in litigation. Since the *Lone Pine* decision, federal courts have routinely issued *Lone Pine* orders to allow for better management of mass tort cases. *See, e.g., Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000); *In re Silica Products Liab. Litig.*, 398 F. Supp. 2d 563, 576 (S.D. Tex. 2005).

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Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. In addition, the action must also fit within of one of the three enumerated categories in Rule 23(b). Historically, courts have held plaintiffs to a low burden of proof when establishing these class certification requirements. District courts generally demanded that a plaintiff only make a threshold showing to establish each of the requisite factors, and many did not consider a defendant's opposition when determining the certification question. *See, e.g., Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) (permitting class certification if a Plaintiff made ''some showing'' with regard to each Rule 23 requirement). Consequently, class action plaintiffs could successfully meet Rule 23 by presenting little more than the assertions contained in their complaints. This low threshold enabled plaintiffs to seize readily a significant advantage in early settlement negotiations—after presenting only nominal evidence to support certification.

In the past ten years, many courts have expressly addressed the coercive effect of this easy access to certification, fueling a trend to increase the burden of proof for plaintiffs seeking certification. One of the first Circuits to consider this issue was the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001) (Easterbrook, J.). In *Szabo*, the plaintiff asserted breach of warranty and fraud claims against a machine tools manufacturer, and sought certification for a class consisting of ''all persons who . . . bought machine tools'' manufactured by the defendant over a five year period. *Id*. at 673. In certifying the class, the district court assumed the plaintiff's contested allegations to be true, and the court's certification resulted in an increase of claimed damages from $200,000 to $200 million. On appeal, the Seventh Circuit vacated the district court's certification, holding that under Rule 23, a district court should not ''accept all of the complaint's allegations when deciding whether to certify a class . . . .'' *Id*. at 675. Instead, citing the settlement advantage gained by plaintiffs, the Circuit required that district courts ''. . . make whatever factual and legal inquiries are necessary under Rule 23.'' *Id*. at 676.

The Fourth Circuit soon followed suit in *Gariety v. Grant Thornton*, 368 F.3d 356, 366-67 (4th Cir. 2004), and further increased the burden on plaintiffs seeking to certify a class. Citing *Szabo*, the Fourth Circuit reversed the district court's certification, holding that ''. . . the district court failed to comply adequately with the procedural requirements of Rule 23,'' because it simply accepted the plaintiff's allegations in certifying the class. *Id*. at 365. In addition, relying on the Advisory Committee's Notes to the 2003 amendments to Rule 23,[2] the Fourth Circuit held that overlapping merits issues must also be considered when determining class certification. *Id*. at 366.

Following *Gariety*, the Second Circuit expressly overruled two of its previous opinions,[3] and held that a threshold showing was not enough to establish a plaintiff's compliance with Rule 23. *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) (''*In re IPO*'') (stating ''we can no longer continue to advise district courts that 'some showing' of meeting Rule 23 requirements will suffice . . . or that an expert's report will sustain a plaintiff's burden so long as it is not 'fatally flawed' . . . .'') (internal citations omitted). The Second Circuit also supported the Fourth Circuit's finding in *Gariety* regarding overlapping issues, and held that overlap between merits issues and certification issues did not lessen ''the obligation to make such determinations . . . .'' *Id*.

The Emerging, Higher Standard of Proof

Since the Second Circuit's 2006 opinion in *In re IPO*, several Circuits have endorsed an even more rigorous burden of proof, requiring plaintiffs to demonstrate compliance with each of the Rule 23 requirements by ***a preponderance of the evidence*** at the certification stage. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2009); *Teamsters Local 445 Freight Div. v. Bombardier Inc.*, 546 F.3d 196 (2d Cir. 2008) (''*Teamsters*''); *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) (''*Oscar*'').

Since the Second Circuit's 2006 opinion in *In re IPO*, several Circuits have endorsed an even more rigorous burden of proof, requiring plaintiffs to demonstrate compliance.

The first circuit to invoke a full preponderance standard for Rule 23 class determinations was the Fifth Circuit in *Oscar*. In that case, the circuit overruled the district court's certification, and held that a plaintiff must assert and prove each of the requirements of Rule 23 by a ''preponderance of all admissible evidence,'' even when those issues overlap with merits issues. *Id*. This standard has since been adopted by both the Second and Third Circuits. *See Teamsters*, 546 F.3d at 202 (clarifying the Second Circuit's previous holding in *In re IPO* and adopting a preponderance standard); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 307 (holding that ''[f]actual determinations supporting Rule 23 findings must be made by a preponderance of the evidence'' even if they ''overlap with the merits . . . ''). This standard has since served as a basis for district court decisions elsewhere. *See, e.g., In re HealthSouth Corp. Sec. Litig.*, No. CV-03-BE-1500-S, 2009 WL 1040107, at *9 (N.D. Ala. March 31, 2009) (stating that ''the preponderance of the evidence standard seems to be gaining momentum'' and applying it). No Circuit has expressly opposed the preponderance standard adopted in the Second, Third and Fifth Circuits, and the issue has not been presented to the Supreme Court.

[2] *See* Fed. R. Civ. P. 23 advisory committee's note to 2003 amendments (stating ''it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis.'').

[3] *Caridad*, 191 F.3d at 292 (allowing class certification because the Plaintiff had made ''some showing'' with regard to each Rule 23 requirement); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (holding that expert testimony is enough to show commonality as long as it is not ''fatally flawed'').

Dukes v. Wal-Mart

In its petition for rehearing *en banc*, Wal-Mart identifies three bases for review, including its belief that both the district court and Ninth Circuit applied the incorrect burden of proof when determining whether class certification was proper under Rule 23. Notably, Wal-Mart attacks the district court and Ninth Circuit's reliance on *Caridad* and *In re Visa Check*, both of which were expressly overruled by the Second Circuit in *Teamsters*, 546 F.3d at 202-03, and asserts that Rule 23 requires courts to consider and resolve overlapping merits issues before certification can be made. *See* Wal-Mart Petition for Rehearing En Banc, No. 04-16688, 2007 WL 1420550 (filed Feb. 20, 2007). Wal-Mart's argument received the support of Judge Kleinfeld on panel rehearing, *see Dukes v. Wal-Mart*, 509 F.3d at 1194 (2-1 decision) (Kleinfeld, J., dissenting) (asserting that under a proper Rule 23 analysis, plaintiffs failed to meet each Rule 23 requirement other than numerosity), and may receive more traction *en banc* as a result of the ***subsequent*** holdings in the Second, Third, and Fifth Circuits.

What Does the Future Hold?

No one can know how the Ninth Circuit *en banc* panel will come out on the new, stringent evidentiary test for certification. Several district courts within the Circuit have refused to adopt the Fifth Circuit's holding in *Oscar*, expressing their belief that Rule 23 does not require a plaintiff to prove overlapping merits issues at the certification stage. *See In re Connetics Corp. Sec. Litig.*, No. C 07-02940, 2009 WL 1309739, at *6 (N.D. Cal. May 12, 2009) (stating that ''precedent strongly suggests'' the Ninth Circuit would not accept Oscar); *In re LDK Solar Sec. Ligit.*, 255 F.R.D. 519, 530 (N.D. Cal. 2009) (same). On the other hand, a number of courts elsewhere have begun to follow the lead of the Second, Third, and Fifth Circuits. For example, a Minnesota appeals court recently rejected a lower court decision to certify a class and held that plaintiffs were required to prove the elements necessary for class certification by a preponderance of the evidence. *Whitaker v. 3M Company*, 764 N.W.2d 631, 638 (Minn. Ct. App. April 28, 2009). The *Whitaker* court stated that '' [w]e find the federal caselaw persuasive and conclude that the certification requirements of Minnesota's rule 23 - like those of its federal counterpart—must be established by a preponderance of the evidence.'' *Id. See also Lasson v. Coleman*, No. 21524, 2007 WL 1934320, at *6 (Ohio Ct. App. June 29, 2007) (stating that ''[a] court may properly certify a class only if it finds, by a preponderance of the evidence, that the class meets the numerosity finding of Civ. R. 23(A).''). Certainly, the road is sufficiently open for the Ninth Circuit to join the trend in raising the bar for class certification. If it elects not to do so, the Ninth Circuit will tee up the issue for the Supreme Court. And the Supreme Court's recent track record in class action and other matters certainly suggests that the Court looks favorably upon the application of strict procedural, evidentiary and jurisdictional rules to limit the availability and the coerciveness of class actions.[4]

The road is sufficiently open for the Ninth Circuit to join the trend in raising the bar for class certification. If it elects not to do so, the Ninth Circuit will tee up the issue for the Supreme Court.

In one prominent area of our practice — environmental and toxic tort litigation—one can readily foresee several significant consequences from further adoption of the preponderance of the evidence standard. Certainly, unless and until the Ninth Circuit, as well as other appellate courts, rule unfavorably on the application of the preponderance of the evidence standard to class certification determinations—and *none* have yet done so—class action litigants face a somewhat altered landscape. To illustrate the point, we postulate a fairly typical profile of a theoretical environmental or toxic tort class action. We assume the following: Long before contemporary environmental regulation, defendant's former factory released chemicals into the groundwater, creating an underground plume of contamination extending well into nearby residential neighborhoods. Two adjacent property owners filed a lawsuit seeking (i) to certify a class of all residents within two miles of the factory, (ii) property damages, (iii) medical monitoring for potential future health effects, (iv) compensation for ''unjust enrichment,'' (v) damages for personal injuries, and (vi) punitive damages. To achieve certification, the two named plaintiffs must demonstrate, *inter alia,* that common questions of law predominate over questions affecting individual putative class members' claims and that the elements of commonality, adequacy of representation, numerosity, and typicality are met.[5]

To rule on certification in this hypothetical case under a preponderance of the evidence standard, one might anticipate that most courts would be persuaded to hold an extensive evidentiary hearing, replete with both factual and expert testimony, including some that might heretofore have been reserved for trial on the issues. Take, for example, whether the case should be certified for class adjudication of the medical monitoring claim. In the toxic tort arena, in appropriate cases class action plaintiffs may be entitled to medical moni-

[4] *See e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2508-11 (2007) (requiring heightened pleading standards for class actions in cases under the Private Securities Litigation Reform Act); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006) (limiting the jurisdiction and reviewability of federal district court decisions in Securities Litigation Uniform Standards Act litigation); *Merrill Lynch, Peirce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (holding that preemption provisions in the Securities Litigation Uniform Standards Act should be interpreted broadly); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006) (limiting the ability of an individual to pursue a § 1981 claim in part because of a desire to preclude class action suits).

[5] Most environmental or toxic tort class actions are sought to be certified under Rule 23(b)(3), and thus must meet these requirements.

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toring upon proving, *inter alia*, that they have been exposed to a contaminant in a manner giving rise to a substantial risk of a serious latent disease or injury for which there is a recognized medical monitoring procedure that would not ordinarily be prescribed, but which could successfully enable treatment by early detection.[6] As a starting point, the inquiry turns on significant factual questions, such as the dose and duration of exposure suffered by plaintiffs, and highly sophisticated expert matters relating to the efficacy, prudence, and value of medical monitoring regimes not ordinarily prescribed to the general public.

In seeking to establish that their medical monitoring claims should be tried on a class-wide basis, plaintiffs at the certification stage would need to substantiate, *inter alia*, the seriousness of the risk of injury from their exposures, the representativeness of their exposures to those of other class members, and the requisite *bona fides* of the class-wide medical monitoring procedures sought. The defendant, among other things, might seek to introduce evidence relating to a wide variety of individualized facts and factors germane to the class (and coincidentally merits) questions presented by the medical monitoring claim. For example, whether and to what extent individual health conditions, family histories, personal exposures to other contaminants or other confounding or contributing sources affect the need for or selection of any particular monitoring regimen, each could be relevant to the hearing of the typicality, commonality, or representativeness of the named plaintiffs' claim for medical monitoring.

Similarly, a number of very technical questions central to the class certification (again, also relevant to the merits) of a medical monitoring claim likely require the introduction of still other evidence. For example, hydrogeologists and or other experts may be needed to testify on the location of the alleged plume, the history of its migration, the relative concentrations and contaminants, and the pathways of alleged exposure; toxicologists may be called to opine on the potential significance to human health arising from those conditions, both historically and currently; and experts in the medical monitoring field will need to extrapolate from the conditions and toxicological profile to opine on the availability and suitability of one or more medical monitoring programs. At the class certification stage, the defense will certainly seek to examine whether there are inconsistencies, conflicts, or incompatibilities between and among members of the putative class, as these issues relate to the requisite elements under Rule 23.

In our hypothetical case, any number of other causes of action could also merit, for purposes of class certification under the new standard, additional factual and/or expert evidentiary inquiry. Thus, for example, on plaintiffs' alleged personal injury claims, evidence could well be needed on each and every injury or illness alleged, the ostensible commonality of those ailments (*e.g.*, common causation *versus* intervening or overriding individual, competing causes), and a host of individual questions relating to each class member's exposure to contamination, both from the alleged conduct of the defendant and from any number of other sources. These and other questions relevant to plaintiffs' claims may potentially necessitate a considerable amount of discovery, prior to class certification.[7] In turn, such early discovery and early development of associated expert testimony may position defendants to defeat class certification altogether or, at least, to reduce either the size of the certified class or the scope of the claims that are certified. In our hypothetical, for example, one possible outcome might be that a smaller geographic class is certified than the one proposed. Another potential outcome might be that the court certifies only one type of claims, but not others. Or the court might decide that common issues of law or fact do not predominate and no class should be certified.

The prospect of a mini-trial on class certification may also alter plaintiffs' views on class actions and strategies for class certification.

The prospect of a mini-trial on class certification may also alter plaintiffs' views on class actions and strategies for class certification. Faced with significant evidentiary hurdles to class certification, plaintiffs may increasingly turn to mass joinder or even multiple individual lawsuits as a way to prosecute numerous claims. The preponderance of the evidence standard in federal courts may encourage plaintiffs to bring class actions in state courts which have not adopted the evolving federal rule.[8]

Finally, one may reasonably expect the prospect of an evidentiary hearing or mini-trial on class certification to alter settlement dynamics. Both sides may have an incentive to look critically and *early* at the potential size and scope of a putative class. Both may have greater opportunities to take discovery that will likely shed light not only on the strengths or weaknesses of the other side's respective positions on class certification, but on the underlying merits of the claims. This

[6] Typical factors courts require plaintiffs to satisfy to state a claim for a medical monitoring program include: 1) exposure is greater than normal levels; 2) to a proven hazardous substance; 3) caused by defendant's tortuous conduct; 4) as a proximate result of exposure, plaintiff has a significantly increased risk of contracting serious latent disease; 5) a monitoring procedure exists that makes early detection possible; and 6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure. *See, e.g.*, *Abbatiello v. Monsanto Co.*, 552 F. Supp. 2d 524 (S.D.N.Y. 2007); *Redland Soccer Club, Inc. v. Dept. of the Army*, 696 A.2d 137 (Pa. 1997).

[7] This is not to suggest that the preponderance of evidence standard will negate the efficacy or propriety of bifurcation or other case management tools to achieve an orderly, efficient sequence of discovery; whether or not certain class certification issues overlap with certain merits issues, there still may be considerable benefit to the court and the parties to bifurcate or organize discovery (*e.g.*, class issues first, liability issues second) intelligently and with precision, in appropriate cases.

[8] While plaintiffs will sometimes couple federal citizen-suit type causes of action with underlying tort causes of action when bringing a case in federal court, an increased propensity for filing these cases in state court may result in litigation on two fronts and in two courts: plaintiffs may be more likely to bring citizen suit lawsuits seeking to address remediation in federal court while bringing common law tort claims for environmental damages or injury in a class action forum in state court.

will undoubtedly inform their valuation of the case and their consequent settlement positions. In theory, plaintiffs may feel that obtaining certification is less a ''sure thing,'' under this rigorous test, and defendants may be more hard-nosed in early settlement negotiations. Of course, as is always true, those and myriad dynamics will turn entirely on the specific risks, personalities, and circumstances of each case; however, those idiosyncrasies will play out against a different backdrop, whatever the Ninth Circuit does in the *Wal-Mart* case.

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