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Commentary: In light of 'Wal-Mart,' D.C. Circuit should correct its approach to class actions

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In recent years, the U.S. Court of Appeals for the D.C. Circuit has become a surprising outlier in allowing district courts to certify class actions without ensuring all of the requirements under Federal Rule of Civil Procedure 23 are in fact met. The U.S. Supreme Court's recent decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), has made the D.C. Circuit's position untenable, however, and it should be corrected sooner rather than later.

The D.C. Circuit has not modernized its class action standards for many years. For example, in a 2009 ruling denying a petition to appeal a class certification order, the D.C. Circuit missed an opportunity to join the 2d Circuit, the 3d Circuit and several other circuits that — long before Dukes — had clarified the plaintiff's burden, and the district court's duty, at the class certification stage to resolve disputed factual issues (and competing expert testimony) when necessary to resolve the class certification analysis. See *In re Nifedipine Antitrust Litig.*, No. 08-8014 (D.C. Cir. Feb. 23, 2009) (order denying Rule 23(f) petition). Like the district court in Dukes, the D.C. Circuit invoked a mistaken interpretation of the 1974 Supreme Court decision *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), to conclude that, at the class certification stage, a district court should not review "merits" issues or resolve differences in key disputes between competing experts.

That issue has now been conclusively resolved. In Dukes, the Supreme Court emphasized that " 'it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' " and that "[f]requently" this "'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." Dukes, 131 S. Ct. at 2551 (quoting Gen. *Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). In so ruling, the Court acknowledged that "[a] statement in one of our prior cases, Eisen …, is sometimes mistakenly cited to the contrary." Dukes, 131 S. Ct. at 2552 n.6. But the Court explained that Eisen's statement — that there is "'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 may be maintained as a class action' " — "is the purest dictum and is contradicted by our other cases." Id. (quoting Eisen, 417 U.S. at 177).

Dukes therefore abrogates existing D.C. Circuit precedents — like *Nifedipine* — that rely on a mistaken reading of *Eisen*. The D.C. Circuit remains a curious outlier in adhering to the now-repudiated "Eisen rule." The 2d Circuit rejected the Eisen rule in 2006 in *11*, 471 F.3d 24, 33–42 (2d Cir. 2006), and the 3d Circuit did so in 2009 in In *re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 316–20 (3d Cir. 2009). Other circuits have similarly made clear that Eisen is no justification for refusing to resolve merits issues that are necessary ingredients of the findings required by Rule 23. See, e.g., *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010); *Vallario v. Vandehey*, 554 F.3d 1259, 1266–67 (10th Cir. 2009); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005); *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 364–66 (4th Cir. 2004).

It is time to bring the D.C. Circuit's class certification standards into modernity. Certification is a pivotal moment in a putative class action, and the stakes are high on both sides. If the court refuses to certify a class, the case generally can go forward only in the form of individual claims by each plaintiff. On the other hand, if the court certifies a class, the defendant's prospect of aggregated liability to thousands or millions of class members can turn the case into a "bet-the-company" proposition, exerting substantial in terrorem settlement pressure.

Class certification decisions usually turn on the plaintiffs' burden of proof. This raises two analytical questions: First, do plaintiffs need to meet Rule 12(b)(6)-type pleading standards, or must they support their certification motion with evidence supporting their Rule 23 allegations? Second, should the court resolve any disputed facts at this stage--especially when those facts overlap with the ultimate merits of the case?

In addressing these questions, some federal courts initially misinterpreted *Eisen*. The *Eisen* Court held that a district court should not conduct an initial inquiry into the merits of the case when deciding which party should bear the costs of notice to the class. The usual rule is that the plaintiff must bear the costs of notice, but the district court in *Eisen* had shifted 90% of that cost to the defendants because the court found the plaintiffs were likely to win on the merits. The Supreme Court rejected the cost-shifting approach, holding that the plaintiff must bear the cost of notice regardless of its likelihood of success: "We 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 may be maintained as a class action." 417 U.S. at 177.

In the years following *Eisen*, some lower courts took the quoted passage out of context, expanding its meaning beyond the cost-of-notice issue, and applying it to Rule 23's core requirements. The mistaken interpretation of Eisen led some courts to hold that plaintiffs need only allege — not introduce any evidence supporting — Rule 23's requirements (such as predominance and superiority). In particular, some courts believed they could not resolve any factual disputes that overlapped with the merits of the case, and had to assume that any facts plaintiff alleged in its class certification motion were true. It led other courts to hold that any expert testimony on Rule 23's requirements introduced by the plaintiffs should be accepted as long as the expert's report was not "fatally flawed."

The D.C. Circuit has repeatedly embraced this misreading of *Eisen* — now abrogated by *Dukes*. *See Nifedipine*; *In re Rand Corp*., No. 02-8007, 2002 WL 1461810, at *1 (D.C. Cir. 2002) (order denying Rule 23(f) petition) ("[T]he propriety of a district court's refusal to scrutinize for admissibility and probative value evidence proffered to demonstrate that the requirements of [Rule 23(a)] are satisfied is well-settled.") (citing Eisen, 417 U.S. at 177).

Dukes means it's time for a change. The *Eisen* debate has been definitively resolved by the Supreme Court: "Rule 23 does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551. "A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id.

The D.C. Circuit has not yet had occasion to address its reading of *Eisen* since *Dukes* was decided. In recent years, the D.C. Circuit has sparingly granted discretionary Rule 23(f) appeals from certification decisions; the court stood its ground in adhering to its class action precedents against even the most persuasive advocates. See In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 100 (D.C. Cir. 2002) (denying leave to appeal on a petition filed by then-private practitioner (and now-Chief Justice) John Roberts Jr.). The D.C. Circuit has not granted any defendant-filed Rule 23(f) petitions since 1998, and granted only three plaintiff-filed petitions, out of 20 total petitions filed. See Julian W. Poon, Blaine H. Evanson and William K. Pao, "Interlocutory Appellate Review of Class-Certification Rulings under Rule 23(f): Do Articulated Standards Matter?" Certworthy (Winter 2009) (updated statistics through March 2011 on file with the authors).

The D.C. Circuit should put an end to the Eisen mistake and give its district courts clear guidance: classes cannot be certified until the plaintiff proves that Rule 23's requirements have been met, even if the facts bearing on certification also implicate the merits of the case.

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