The Post-*Dukes* "Rigorous Analysis" and Pre-Certification

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ABSTRACT

The Dukes *"rigorous analysis" blurs the line between "certification" and "merits" discovery in class action litigation. Without adequate discovery, class counsel risk finding themselves without a sufficient record to survive appellate review of class certification orders. Class counsel must be aware of how commonality challenges based on the merits of the class allegations can defeat certification. Therefore, class counsel must anticipate merit-based challenges and develop a discovery strategy that will enable a sufficient demonstration to the appellate courts that common issues predominate in the case.*

After surveying current case law, this article provides class counsel and the judiciary with recommendations regarding requirements for pre-certification discovery.

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INTRODUCTION

Prior to the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,[1] class action procedure was generally guided by *Eisen v. Carlisle & Jacquelin*,[2] which rejected a preliminary inquiry into the merits of a proposed class action at the class certification stage.[3] Over thirty-five years later, the Supreme Court in *Dukes* blurred this seeming clarity by stating that the "rigorous analysis" of plaintiffs' compliance with Rule 23 will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim."[4] As a result, courts have struggled to find the line of demarcation between proper pre-certification discovery and those matters that should be stayed until after district courts resolve the class certification question.

It is clear that the complete bifurcation of discovery that prevailed before *Dukes*, where discovery concerning the merits was generally stayed until after the certification question was answered, would now prevent a district court from conducting the required "rigorous analysis" and "probe behind the pleadings" review called for in *Dukes*.[5] On the other hand, unfettered discovery of both class and merits issues can unnecessarily increase litigation costs for all parties and lessen the judicial economy derived from Rule 23's directive that district courts determine whether to certify a class "[a]t an early practicable time after a person sues or is sued as a class representative."[6] As a result, parties and the courts will now need to devote much more time and resources to gathering and reviewing the evidence necessary for the court to conduct the "rigorous analysis" called for in *Dukes*.

To accommodate the *Dukes* "rigorous analysis" standard, some have

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1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

2 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

3 *See id.* at 177–78.

4 *Dukes*, 131 S. Ct. at 2551 (internal quotation marks omitted).

5 *Id.*

6 FED. R. CIV. P. 23(c)(1)(A).

even proposed moving class certification to the post-discovery phase.[7] The more reasoned analysis, it seems, would be that district courts exercise their discretion in controlling discovery, which is already allowed under Rule 23, Rule 26, and case law, in a fashion that allows adequate merits discovery early on to determine whether plaintiffs have demonstrated their compliance with Rule 23 requirements. Of course, any such policy requires the parties and the courts alike to be aware of *Dukes*'s challenges and to identify those areas where merits discovery may be necessary to demonstrate compliance with Rule 23. Class counsel must now avoid arguing for completely bifurcated discovery on class and merits issues, recognizing that there may be a challenge to the common resolution of allegations. Instead, they must recognize that compliance with *Dukes* may require a discovery plan that provides adequate merits discovery to address any anticipated merits-based challenges to certification. Class counsel may even need to create a record for appeal in the event that the district court refuses to allow the discovery necessary to undertake the "rigorous analysis" and then denies certification.

District courts thus need to be cognizant of the need for merits discovery and not issue discovery plans that bifurcate class and merits discovery where it is likely that the court's evaluation of class certification will necessarily require a look into the merits of the claims. It therefore seems necessary that all parties properly frame potential certification issues at the outset in order to proceed efficiently with discovery proceedings.

Prior to *Dukes*, commonality was often considered the easiest of the Rule 23 factors to demonstrate. Now it is nearly always challenged by defense counsel seeking to defeat a motion for class certification. As a result, there is a growing body of law around the question of commonality and how much "merits" discovery is necessary to build an evidentiary record to support class certification. As evident from the survey of post-*Dukes* appellate decisions below, in cases where plaintiffs have developed an adequate evidentiary record to demonstrate commonality or predominance, the reviewing courts have upheld the district courts' certification orders. Where the record was not sufficient to demonstrate common facts and questions of law, however, appellate courts have upheld district court orders denying class certification on that basis. Following this survey, the authors provide recommendations to address the *Dukes* "rigorous analysis" and survive the inevitable challenge to certification,

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[7] *See* Zachary W. Biesanz & Thomas H. Burt, *Everything That Requires Discovery Must Converge: A Counterintuitive Solution to a Class Action Paradox*, 47 U.S.F. L. REV. 55, 56 (2012).

including: developing an early discovery strategy for commonality issues, exercising caution before agreeing to stipulated discovery plans that attempt to bifurcate "certification" and "merits" discovery, and preparing to articulate to the bench why *Dukes* may make "merits" discovery at the "certification" stage imperative.

I. THE *DUKES* "RIGOROUS ANALYSIS"

In *Dukes*, Wal-Mart Stores, Inc. ("Wal-Mart") petitioned for certiorari from an en banc decision of the Ninth Circuit Court of Appeals,[8] which affirmed in part and remanded in part the district court's partial grant of certification.[9] The district court and court of appeals approved the "certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege[d] that the discretion exercised by their local supervisors over pay and promotion matters violate[d] Title VII by discriminating against women."[10] Plaintiffs sought injunctive and declaratory relief, as well as backpay.[11] The Supreme Court considered whether the certification was consistent with Rules 23(a) and (b)(2).[12]

As evidence that the alleged discrimination was "common to *all* Wal-Mart's female employees,"[13] plaintiffs relied on statistical analysis of disparities in pay and promotion between men and women at the company, approximately 120 anecdotal reports of discrimination from women at the company, and testimony from a sociologist who analyzed Wal-Mart culture and determined it was susceptible to gender discrimination.[14] Wal-Mart unsuccessfully attempted to strike much of this evidence and offered its own "countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements of commonality, typicality, and adequate representation."[15]

The district court granted certification of the proposed class, although it "excluded backpay claims based on promotion opportunities that had not been publicly posted."[16] Subsequently, a divided en banc Ninth Circuit

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[8] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

[9] *Id.* at 628.

[10] *Dukes*, 131 S. Ct. at 2547.

[11] *See id.*

[12] *See id.*

[13] *Id.* at 2548.

[14] *See id.* at 2549.

[15] *Id.*

[16] *Id.* at 2549 & n.3.

"substantially affirmed" the district court's decision,[17] concluding that plaintiffs provided sufficient evidence to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII."[18]

Writing for the majority, Justice Antonin Scalia identified that the "crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'"[19] Noting that "[a]ny competently crafted class complaint literally raises common questions," the Court stated the language of Rule 23(a)(2) is "easy to misread."[20] The Court stated that class certification turns not on raising common questions, but on "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[21]

The Court also stated: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[22] Then the Court held that in order to decide the certification question, "sometimes it may be necessary for the court to probe behind the pleadings . . . and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[23] This "rigorous analysis" frequently will "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."[24] The Court then concluded: "[C]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[25]

In coming to these conclusions, the Court distinguished the seminal case of *Eisen*, which had for almost forty years stood for the proposition that certification and merits discovery should be separate inquiries: "We find nothing in either the language or history of Rule 23," the *Eisen* Court

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17 *Id.* at 2549.

18 Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 612 (9th Cir. 2010) (emphasis removed), *rev'd*, *Dukes*, 131 S. Ct. 2541.

19 *Dukes*, 131 S. Ct. at 2550–51 (quoting FED. R. CIV. P. 23(a)(2)).

20 *Id.* at 2551 (alteration in original) (internal quotation marks omitted).

21 *Id.* (internal quotation marks omitted).

22 *Id.*

23 *Id.* (internal quotation marks omitted).

24 *Id.* (internal quotation marks omitted).

25 *Id.* at 2552 (internal quotation marks omitted).

noted, "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."[26] The Court addressed *Eisen* by noting that the district court in *Eisen* had already determined to certify the class, and, therefore, the only real issue as to the merits analysis was whether to shift the notice costs from the plaintiff to the defendants.[27] As such, reliance on this language in *Eisen* at the class certification stage was misplaced.[28]

The Court concluded in *Dukes* that the "proof of commonality necessarily overlaps with [the plaintiffs'] merits contention that Wal-Mart engages in a *pattern or practice* of discrimination . . . because, in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision."[29] "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[30]

The Court then returned to its decision in *General Telephone Co. of the Southwest v. Falcon*,[31] which the Court identified as "describ[ing] how the commonality issue must be approached."[32] There are two ways the commonality issue can be approached in a Title VII case: (1) plaintiffs can show the employer "'used a biased testing procedure to evaluate'" employees, or (2) plaintiffs can offer "'[s]ignificant proof that an employer operated under a general policy of discrimination.'"[33] Because testing was not an issue in *Dukes*, the Court moved on to evaluate whether plaintiffs had offered significant proof that Wal-Mart operated under a general policy of discrimination.[34] Finding that plaintiffs' sociological expert could not answer a question essential to their commonality question—how often stereotypes influenced employment decisions—the Court disregarded his testimony.[35] The Court then concluded that the plaintiffs failed to identify "a common mode of exercising discretion that pervades the entire

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26 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

27 *See Dukes*, 131 S. Ct. at 2552 n.6.

28 *See id.*

29 *Id.* at 2552 (internal quotation marks omitted).

30 *Id.*

31 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982).

32 *Dukes*, 131 S. Ct. at 2552–53.

33 *Id.* at 2553 (alteration in original) (quoting *Falcon*, 457 U.S. at 159 n.15).

34 *See id.*

35 *See id.* at 2553–54. The court also questioned the district court's conclusion that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), did not apply to expert testimony at the certification stage of class-action proceedings. *See id.*

company" beyond the rejected expert testimony.[36]

As to the other evidence presented, the Court—agreeing with Circuit Judge Sandra Segal Ikuta's dissent in the Ninth Circuit—rejected the plaintiffs' statistical evidence, finding that disparities at regional and national levels were not evidence of disparities in individual stores.[37] Further, the Court held that discretionary decisions in individual stores did not create an inference of companywide discrimination.[38] The Court concluded the plaintiffs' anecdotal evidence shared the same failings, and their statistical evidence "[was] too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."[39] As a result, the Court found that plaintiffs "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy" and that plaintiffs did "not establish[] the existence of any common question."[40]

The dissent, written by Justice Ginsburg, argued that the majority "blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer easily satisfied."[41] The dissent continued that the majority's reliance on *Falcon* was misplaced because the "case has little relevance" to the *Dukes* case; in Falcon, "[t]here were *no* common questions of law or fact between the claims of the lead plaintiff and the applicant class."[42] The plaintiff in Falcon alleged that the employer had "discriminated against him intentionally" whereas in *Dukes* "the same practices touch[ed] and concern[ed] all members of the class."[43]

As a result, although prior to *Dukes* commonality was considered the easiest requirement to satisfy under Rule 23(a),[44] following *Dukes* plaintiffs seeking to certify a class have begun to find it the most contested. Repeatedly, defense counsel now endeavor to show that there is no "glue"[45] beyond the similarities of the plaintiffs to support class certification, thereby requiring plaintiffs to present merits evidence of defendants' actions, policies, and procedures in order to show commonality.

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36 *Id.* at 2554–55.

37 *See id.* at 2555.

38 *See id.* at 2555–56.

39 *Id.* at 2556.

40 *Id.* at 2556–57.

41 *Id.* at 2565 (Ginsburg, J., dissenting) (internal quotation marks omitted).

42 *Id.* at 2565 n.7 (internal quotation marks omitted).

43 *Id.*

44 *See* John C. Coffee, Jr., *"You Just Can't Get There From Here": A Primer on* Wal-Mart v. Dukes, 80 U.S.L.W. 93, 95 (2011).

45 *See Dukes*, 131 S. Ct. at 2552.

II. POST-*DUKES* DECISIONS

In reviewing the post-*Dukes* decisions to date, there seems to be a clear pattern emerging that where plaintiffs have developed an adequate evidentiary record, appellate courts have agreed that common questions predominate over individual questions, and class certification has been upheld. As such, in the few appellate court decisions applying the *Dukes* rigorous analysis to a district court's grant or denial of class certification, where plaintiffs have developed an adequate evidentiary record to support their class certification motions and demonstrate commonality or, in some cases, a blend of commonality and predominance, the district court's certification order was upheld.[46] Where there was no clear allegation of a common policy or procedure or where the evidence supporting the alleged common facts or legal questions was found deficient, however, refusals to certify a class were upheld and orders granting certification were vacated.[47] Where plaintiffs have not engaged or have not been permitted to engage in adequate discovery to demonstrate to the district court that there are common facts and questions of law, appellate courts have generally upheld district court orders denying class certification.[48]

A. Certification of Class Upheld Applying Dukes

1. Third Circuit

In *Sullivan v. DB Investments, Inc.*,[49] the Third Circuit, sitting en banc, reviewed "the District Court's certification of two nationwide settlement classes comprising purchasers of diamonds from De Beers S.A. and related entities."[50] The district court approved the class settlement agreement and certified both the direct and indirect purchaser classes under Rules 23(b)(2) and 23(b)(3).[51] The *Sullivan* court conducted its review after objectors to the class certification argued that when "deciding whether to certify a class, a district court must ensure that each class member possess a viable claim or some colorable legal claim."[52]

The *Sullivan* court stated that Rule 23(b)(3)'s stringent predominance

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46 *See supra* Part II.A.

47 *See supra* Part II.B.

48 *See supra* Part II.D. Note that in a few cases where the district court misstated the rigorous analysis standard but still conducted a rigorous analysis of the evidence, the appellate courts have generally found the misstatements to be harmless error. *See supra* Part II.D.

49 Sullivan v. DB Invs., Inc., 667 F.3d 273 (3d Cir. 2011) (en banc).

50 *Id.* at 285.

51 *Id.*

52 *Id.* (internal quotation marks omitted).

requirement incorporates Rule 23(a)(2)'s commonality requirement and, therefore, they should be examined together.[53] *Sullivan* rejected the argument that *Dukes* requires "an inquiry into the existence or validity of each class member's claim . . . at the class certification stage."[54] Instead, *Sullivan* found that *Dukes* reinforced the position "that the focus is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a 'colorable' claim."[55]

Quoting the 2003 Amendments to Rule 23, *Sullivan* specifically found that a district court should not be conducting an analysis into the validity of the claims at the class certification stage.[56] In addressing merits discovery at the class certification stage, the *Sullivan* court analyzed and targeted what it felt to be appropriate:

> Rule 23 makes clear that a district court has limited authority to examine the merits when conducting the certification inquiry:
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> > Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," *limited to those aspects relevant to making the certification decision on an informed basis*.
>
> A court may inquire whether the elements of asserted claims are capable of proof through common evidence, but lacks authority to adjudge the legal validity or soundness of the substantive elements of asserted claims. Put another way, a district court may inquire into the merits of the claims presented in order to determine whether the requirements of Rule 23 are met, but not in order to determine whether the individual elements of each claim are satisfied.[57]

The *Sullivan* court continued that "[s]uch an inquiry into the merits goes beyond the requirements of Rule 23, for Rule 23 does not require a district court to determine whether class members individually have a colorable claim—one that appears to be true, valid, or right."[58] Indeed,

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[53] *See id.* at 297.

[54] *Id.* at 299.

[55] *Id.* at 299.

[56] See *id.* at 305.

[57] *Id.* (quoting FED. R. CIV. P. 23 advisory committee's note (2003)) (internal citations omitted).

[58] *Id.* at 308 (internal quotation marks and alteration omitted).

pursuing such a Rule 12(b)(6) analysis at the class certification stage would "gut commonality, for, most certainly, individual issues would then predominate [and there] would simply be no class that could meet this commonality and predominance test."[59]

Of course, *Sullivan* must be read in conjunction with *In re Hydrogen Peroxide Antitrust Litigation*.[60] There, the Third Circuit established its standard for a "rigorous analysis" of the proposed classes in light of the Rule 23 requirements for class certification.[61] The Third Circuit considered *Dukes* to be a validation of its "rigorous analysis" standard.[62]

2. Sixth Circuit

In *Young v. Nationwide Mutual Insurance Co.*,[63] plaintiffs alleged that insurers overcharged them for the local government tax on their premiums.[64] The district court certified statewide plaintiff subclasses and the insurers appealed.[65] The Sixth Circuit affirmed the class certifications.[66]

The *Young* court found the plaintiffs presented two facts common to the class: "(1) whether each member was charged an incorrect amount for local government premium taxes; and (2) whether the insurer had a uniform, institutional policy or practice to identify local government taxing districts for its insureds."[67] It also found that plaintiffs had presented seven common legal questions.[68]

Defendants challenged the district court's finding of commonality, arguing "that litigation by policyholders is advanced only by examining each individual policyholder's circumstances."[69] The *Young* court found "the injury sustained by the named Plaintiffs could have been prevented by

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59 *Id.* at 310.

60 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

61 *See id.* at 309–10 (internal quotation marks omitted).

62 *See* Behrend v. Comcast Corp., 655 F.3d 182, 190 n.6 (3d Cir. 2011) (internal quotation marks omitted) ("The Supreme Court confirmed our interpretation of the Rule 23 inquiry in [*Dukes*]."), *rev'd*, 133 S. Ct. 1426 (2013) (holding that Rule 23(b)(3) predominance requirements extend to pre-certification determination of whether plaintiffs' damages model demonstrated commonality of damages across the proposed class), *remanded sub nom. to* Glaberson v. Comcast Corp., 295 F.R.D. 95 (E.D. Penn. 2013) (certifying narrowed class).

63 Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012).

64 *See id.* at 535.

65 *See id.* at 536.

66 *See id.* at 546.

67 *Id.* at 542.

68 *See id.*

69 *Id.* at 543.

appropriate practices, such as utilization of geocoding software, which would also have prevented similar harm to others."[70] The commonality element was satisfied because the use of geocoding software was "central to all of Plaintiffs' claims and would advance the interests of the class as a whole."[71] Further, like the Third Circuit in *Sullivan*, the Sixth Circuit concluded that the existence of individualized defenses to certain policyholders would not defeat class certification.[72]

Similarly, in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*,[73] the Sixth Circuit again upheld the district court's certification.[74] The case involved multidistrict litigation concerning alleged design defects in certain Whirlpool front-load washing machines.[75] Plaintiffs alleged that the front-load washing machines did not "prevent or eliminate accumulating residue, which [led] to the growth of mold and mildew in the machines, ruined laundry, and malodorous homes."[76]

In support of their motion for class certification, plaintiffs submitted the report of an expert who opined on a common design defect in the front-load washing machines.[77] Further, plaintiffs' evidence showed that Whirlpool knew of the design defects in some models: in fact, Whirlpool received two to three customer complaints each day about the problem, and Whirlpool service calls confirmed the problems.[78] Subsequent design changes and new cleaning products failed to resolve the problems.[79] Although Whirlpool asserted "numerous liability questions exist[ed] as to each of the legal claims, requiring individual proof of the elements of each claim by each consumer," the district court certified the Ohio subclass.[80]

On appeal, Whirlpool argued the district court had "improperly relied on *Eisen* to avoid consideration of the merits of plaintiffs' legal claims, failed to conduct the required 'rigorous analysis' of the factual record, and failed to make specific findings to resolve factual disputes before certifying the liability class."[81] The Court disagreed, finding that "[t]he district court

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70 *Id.*

71 *Id.*

72 *See id.*

73 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.).

74 *See id.* at 421.

75 *See id.* at 412–13.

76 *Id.* at 412.

77 *See id.* at 413–14.

78 *See id.* at 414.

79 *See id.* at 414–15.

80 *Id.* at 415.

81 *Id.* at 418.

closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met."[82]

B. Vacating Class Certification Following Dukes

As shown above, appellate courts have been examining the extent to which plaintiffs are able to support the existence of material questions of law or fact common to the class, and then upholding certification where the record is adequate to support the allegations. In those cases, the existence of individual defenses to claims of certain members of the class have not been held sufficient to defeat class certification. On the other hand, where the record is deficient with regard to commonality, the appellate courts have affirmed the district courts' denials of class certification.

1. Fifth Circuit

In *M.D. ex rel. Stukenberg v. Perry*,[83] the Fifth Circuit overturned the district court's certification of a class, finding that "[a]lthough the district court's analysis may have been a reasonable application of pre-[*Dukes*] precedent, the [*Dukes*] decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court's analysis insufficient."[84] In *Stukenberg*, nine children who were in the custody of Texas's Permanent Managing Conservatorship ("PMC"), which is the state's long-term foster care program, filed suit under 42 U.S.C. § 1983[85] against three Texas officials, seeking to represent a class of all children who were currently in the state's PMC and who would be in the future.[86] The children "sought declaratory and injunctive relief to redress alleged class-wide injuries caused by systemic deficiencies in Texas's administration of the PMC."[87]

The district court found that although "each class member experienced the alleged shortcomings in the State's administration of its PMC in a

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[82] *Id.* The Supreme Court subsequently granted certiorari, vacated the judgment, and remanded the case for reconsideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.). On remand, however, the Sixth Circuit reaffirmed the class certification, noting that, unlike in *Comcast*, where the "plaintiffs failed to establish that damages could be measured on a classwide basis," *Whirlpool* only involved certification of "a liability class and reserved all issues concerning damages for individual determination." *In re* Whirlpool Corp. Front-Loading Prods. Liab. Litig., 722 F.3d 838, 860–61 (6th Cir. 2013).

[83] M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012).

[84] *Id.* at 839.

[85] 42 U.S.C. § 1983 (2012).

[86] *See id.* at 835.

[87] *Id.*

different way, . . . the class satisfied commonality because all class members are within the same system and subject to the alleged deficiencies in that system."[88] Relying on *James v. City of Dallas*,[89] the district court concluded that "to require more for the 'common question' analysis would run afoul of the Fifth Circuit's dictate that the test for commonality is not demanding, and that merely having different claims, or claims that may require some individualized analysis, is not fatal to commonality."[90] The district court further found that there were common questions of fact and that "the proposed class claims raised common questions of law."[91]

In reviewing this decision, the Fifth Circuit noted that the court below had relied upon its pre-*Dukes* precedent.[92] The Fifth Circuit then concluded that now the "district court's Rule 23(a)(2) analysis was deficient" for purposes of establishing commonality.[93] It found that the district court "failed to consider or explain how the determination of those [common] questions would 'resolve an issue that is central to the validity of each one of the [individual class member's] claims in one stroke.'"[94]

Additionally, the *Stukenberg* court found that the district court's "formulation of [the] common questions of law [was] too general to allow for effective appellate review."[95] It concluded that because the district court failed to provide any analysis of the elements and defenses for establishing the class claims and to explain how those claims "would resolve an issue that is central to the validity of each of [the individual's] claims in one stroke," it had not conducted a "rigorous analysis" as required under Rule 23.[96] The *Stuckenberg* court vacated the certification order, remanding the case to the district court for further analysis.[97]

2. Seventh Circuit

In *Jamie S. v. Milwaukee Public Schools*,[98] the Seventh Circuit vacated the district court's order granting certification to a class of special education students who alleged violations of the Individuals with

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88 *Id.* at 838–39 (internal quotation marks and alteration omitted).

89 James v. City of Dall., 254 F.3d 551 (5th Cir. 2001).

90 *Stukenberg*, 675 F.3d at 839 (internal quotation marks and alterations omitted).

91 *Id.*

92 *See id.* at 839–40.

93 *Id.* at 841.

94 *Id.* (alteration in original) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

95 *Id.* at 842.

96 *Id.* at 842 (alteration in original) (quoting *Dukes*, 131 S. Ct. at 2551).

97 *See id.* at 849.

98 Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481 (7th Cir. 2012).

Disabilities Education Act ("IDEA") and sought reforms of the manner in which Milwaukee Public Schools ("MPS") provided special education services.[99] The district court had confirmed class certification,[100] and then had granted preliminary approval of a settlement with the Wisconsin Department of Public Instruction ("DPI"),[101] establishing a procedural framework for awarding damages.[102]

After restating the *Dukes* requirement for rigorous analysis, the Seventh Circuit found there were "several basic flaws in the district court's class-certification decision," because "the class [was] both fatally indefinite and lack[ed] the commonality required by Rule 23(a)(2)."[103] In discussing the commonality requirement, the *Jamie S.* court noted that "the Supreme Court explained in [*Dukes*] that superficial common questions—like whether each class member is an MPS student or whether each class member suffered a violation of the same provision of law—are not enough."[104]

The *Jamie S.* court held that in order to bring individual claims together as a class, the "plaintiffs must show that they share some question of law or fact that can be answered *all at once* and that the *single answer* to that question will resolve a central issue in all class members' claims."[105] The court went on to state it is not enough that "all class members have 'suffered' as a result of disparate individual IDEA child-find violations";[106] in the absence of "significant proof that MPS operated under child-find *policies* that violated IDEA," there was none of the "glue necessary to litigate otherwise highly individualized claims as a class."[107] The court then vacated the certification, settlement approval, and remedial orders.[108]

C. Certification of Employment Classes Following Dukes

In two employment actions, which, like *Dukes*, considered Title VII allegations, the Eighth and Ninth Circuits found that there were no common issues that could sustain a class action.

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99 *See Jamie S.*, 668 F.3d at 485.

100 Jamie S. v. Milwaukee Pub. Sch., 519 F. Supp. 2d 870, 871, 903 (E.D. Wis. 2007), *vacated*, 668 F.3d 481 (7th Cir. 2012).

101 *See* Jamie S. v. Milwaukee Pub. Sch., No. 01-C-928, 2008 WL 2340362, at *2, *12 (E.D. Wis. June 6, 2008), *vacated*, 668 F.3d 481 (7th Cir. 2012).

102 *See id.*

103 *Jamie S.*, 668 F.3d at 493.

104 *Id.* at 497 (internal quotation marks omitted).

105 *Id.*

106 *Id.*

107 *Id.* at 498 (internal quotation marks omitted).

108 *See id.* at 503.

1. Eighth Circuit

In *Bennett v. Nucor Corp.*,[109] the Eighth Circuit reviewed the district court's denial of plaintiffs' request for class certification where "[s]ix current and former African-American employees brought [an] action against Nucor Corporation and Nucor-Yamato Steel Company, L.P. (collectively, "Nucor"), alleging racial discrimination in violation of 42 U.S.C. § 1981 and Title VII."[110] After the district court denied plaintiffs' motion for class certification and granted summary judgment to Nucor on several claims, the case went to trial.[111] The jury returned verdicts against Nucor and awarded each plaintiff damages.[112] The parties appealed and cross-appealed various rulings.[113]

In their appeal, plaintiffs argued that the "district court erred in denying their motion for certification of a class of all black individuals who were employed at the Blytheville plant at any time since December 8, 1999."[114] Plaintiffs sought certification for both their "disparate treatment and their disparate impact claims."[115] The district court denied the motion, finding that "Nucor had presented overwhelming evidence of decentralized decision making, and that the diversity of employment practices, job classifications, and functions among the production departments at Nucor, standing alone, precludes a finding that the commonality and typicality requirements are met in this case."[116]

In *Bennett*, the parties had "created an extensive record on class certification that included more than a thousand pages of expert reports, business records, sworn declarations, deposition transcripts, answers to interrogatories, and other evidentiary exhibits and materials."[117] Defendants introduced evidence about the "decentralized management structure" and "autonomous nature of the various departments," as well as "detailed evidence showing that this operational independence . . . resulted in a wide variety of promotion, discipline, and training policies that vary substantially among departments."[118]

Ultimately, the court rejected plaintiffs' argument that their statistical

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109 Bennett v. Nucor Corp., 656 F.3d 802 (8th Cir. 2011).

110 *Id.* at 807.

111 *See id.*

112 *See id.*

113 *Id.*

114 *Id.* at 813.

115 *Id.*

116 *Id.* at 813–14 (internal quotation marks and alterations omitted).

117 *Id.* at 814.

118 *Id.* at 814–15.

and anecdotal evidence was adequate to satisfy their burden of showing the existence of a policy that allowed lower-level supervisors to make employment decisions and that the lower-level supervisors exercised that discretion in a common way.[119] Because plaintiffs' statistical expert "assumed for purposes of his assessment that all department managers follow[ed] a single common hiring and promotion policy," the court found this evidence had "little value in the commonality analysis."[120] In rejecting the anecdotal evidence, the court focused on the fact that declarants "worked exclusively in the roll mill department, so their observations [did] little to advance a claim of commonality across the entire plant."[121]

The court in *Bennett*, citing *Dukes*, held that there must be a "'common contention'" that is "'capable of classwide resolution.'"[122] The court also cited *Falcon* for the requirement that a "district court considering a motion for class certification must undertake 'a rigorous analysis' to ensure the requirements of Rule 23(a) are met,"[123] while noting that the rigorous analysis will frequently "entail some overlap with the merits of the plaintiffs' underlying claim."[124] Finally, the *Bennett* court concluded that the district court "did not abuse its discretion by concluding that the plaintiffs had not met their burden of demonstrating the commonality of their claims."[125]

2. Ninth Circuit

In *Ellis v. Costco Wholesale Corp.*,[126] the district court granted class certification to plaintiffs alleging Costco's promotion practices discriminated based on gender.[127] The Ninth Circuit vacated and remanded the district court's finding of commonality under Rule 23(a) because the court "failed to conduct the required 'rigorous analysis' to determine whether there were common questions of law or fact among the class members' claims. Instead it relied on the admissibility of Plaintiffs' evidence to reach its conclusion on commonality."[128]

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119 *See id.* at 815.

120 *Id.*

121 *Id.* at 816.

122 *Id.* at 814 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

123 *Id.* (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)).

124 *Id.* (internal quotation marks omitted).

125 *Id.* at 816.

126 Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011).

127 *See id.* at 974.

128 *Id.* (internal citation omitted). On remand, the district court held that the commonality requirement was satisfied, that availability of punitive damages was most appropriately adjudicated on a classwide basis in liability stage with the determination of the

Discussing the district court's obligation in reviewing a motion for class certification, the *Ellis* court stated that when "considering class certification under Rule 23, district courts are not only at liberty to, but must perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied."[129] The Ninth Circuit found it difficult to determine from the district court's order the "precise standard the district court used to evaluate commonality."[130] As a result, the court continued that "[r]egardless of whether the district court applied an erroneous standard," it would take the "opportunity to clarify the correct standard."[131] Finding "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class," the *Ellis* court held "it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements."[132]

The *Ellis* court proceeded to suggest that the district court may have "confused the *Daubert* standard it correctly applied to Costco's motions to strike with the 'rigorous analysis' standard to be applied when analyzing commonality."[133] Rather than "judging the persuasiveness" of plaintiffs' evidence, the district court incorrectly ended its analysis after determining the evidence was admissible.[134] The district court needed to conduct a "rigorous analysis" in order to determine if plaintiffs had shown there were "questions of fact and law common to the *nationwide* class" in order "to resolve the critical factual disputes centering around the national versus regional nature of the alleged discrimination."[135]

In *Stockwell v. City & County of San Francisco*,[136] however, the Ninth Circuit recently reversed the district court's denial of certification in a disparate impact age discrimination class action.[137] *Stockwell* involved a 1998 promotion test used by the San Francisco Police Department to fill

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aggregate amount and individual distribution of punitive damages to be reserved for the remedial stage, and that class certification would be appropriate for issues of liability and injunctive relief. Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 510, 540–44 (N.D. Cal. 2012).

129 *Ellis*, 657 F.3d at 980 (internal quotation marks and alteration omitted).

130 *Id.* at 981.

131 *Id.*

132 *Id.*

133 *Id.* at 982.

134 *Id.*

135 *Id.* at 983–84.

136 Stockwell v. City & Cnty. of S.F., 749 F.3d 1107 (9th Cir. 2014).

137 *Id.* at 1109.

Assistant Inspector positions and to create a list for future promotions.[138] The test was administered pursuant to a consent decree covering race and gender discrimination in the Police Department.[139] In 2005, before the consent decree ended, the Police Department decided to administer and use a new exam to fill openings.[140] The Chief of Police claimed that the change was made to "improve operational flexibility and rationalize the promotional progression."[141] Those remaining on the consent decree list sued under ADEA and the California Fair Employment and Housing Act, alleging that the decision had a disparate impact on those over forty years old.[142] Citing *Dukes*, the district court concluded that Rule 23(a) was not satisfied because plaintiffs' statistical report did not establish significant proof of a general policy of discrimination.[143]

The Ninth Circuit reversed, citing *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*[144] for the proposition that "demonstrating commonality does not require proof that the putative class will prevail on whatever common questions it identifies."[145] The Court found that the plaintiffs identified "a single, well-enunciated, uniform policy"—the decision to "make investigative assignments using" a new test in violation of the consent decree.[146] The Court then concluded that the plaintiffs produced a statistical study "purportedly showing a disparate impact" and "whatever the failings of the class's statistical analysis, they affect every class member's claims uniformly."[147] In particular, the Court found that the questions raised by the defendant about the statistics "strengthened, not weakened, the case for certification, as it [had] identified a common question, the resolution of which will uniformly affect all members of the class."[148] The Court found that the alleged defects go to "the merits" or the "predominance question" and that the defendant's affirmative defenses were not relevant to Rule 23(a)(2) commonality.[149] The Court then remanded for consideration of whether the case satisfied Rule 23(b)(3)

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138 *See id.* at 1109–10.

139 *See id.*

140 *See id.*

141 *Id.*

142 *See id.* at 1110.

143 *See* Stockwell v. City & Cnty. of S.F., No. C 08-5180 PJH, 2011 WL 4803505, at *1 (N.D. Cal. Oct. 11, 2011), *rev'd*, *Stockwell*, 749 F.3d 1107.

144 Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013).

145 *Stockwell*, 749 F.3d at 1112.

146 *Id.* at 1114.

147 *Id.* at 1115.

148 *Id.* at 1116.

149 *Id.*

predominance.[150]

D. Misstatement of Standard Found to Be Harmless Error

1. Sixth Circuit

In *Gooch v. Life Investors Insurance Co. of America*,[151] the Sixth Circuit Court of Appeals reviewed the district court's grant of class certification.[152] *Gooch* involved a class-action lawsuit against Life Investors Insurance Company and its parent company, Aegon ("Life Investors").[153] Plaintiff alleged "breach of contract because Life Investors [began] interpreting the 'actual charges' provision of his cancer-insurance policy to mean the charges that the medical provider accept[ed] as full payment from the primary insurer and the insured."[154] Plaintiff, on the other hand, "claim[ed] that the policy entitle[d] him to be paid the higher 'list prices' that appear[ed] on his hospital bills before the primary insurer negotiate[d] a lower rate."[155]

Although the Sixth Circuit ultimately vacated the certification order because of an intervening Arkansas state court class action that was settled,[156] the court undertook a discussion of *Dukes* "in aid of further proceedings."[157] Notably, the Sixth Circuit rejected Life Investors' argument that the plaintiff did not satisfy the Rule 23(a) requirements.[158] After restating the *Dukes* standard of "rigorous analysis" of the Rule 23(a) prerequisites, the Court found the district court had engaged in harmless error in its statement of the law:

> Nevertheless, the district court took plaintiff's allegations as true and resolved doubts in the plaintiff's favor while conducting what it called a limited factual inquiry into the class allegations, including the deposition of the named plaintiff. This standard is clearly wrong. A limited factual inquiry assuming plaintiff's allegations to be true does not constitute the required rigorous analysis we have repeatedly emphasized.[159]

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150 *See id.* at 1116–17.

151 Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402 (6th Cir. 2012).

152 *See id.* at 409–10.

153 *See id.* at 409.

154 *Id.*

155 *Id.*

156 *See id.* at 409–10.

157 *Id.* at 417.

158 *See id.*

159 *Id.* (internal quotation marks, alteration, and citation omitted).

After a full review of the district court's opinion, the Sixth Circuit determined that "[t]he district court probed behind the pleadings, considering all of the relevant documents that were in evidence," which "render[ed] any error in its statement of the law harmless."[160] The *Gooch* court then observed that the issues of the case were legal and not factual, and that the Eighth Circuit in *In re Zurn Pex Plumbing Products Liability Litigation*,[161] discussed below, had found no reversible error in a similar situation.[162]

2. Eighth Circuit

In *Zurn Pex*, the Eighth Circuit reviewed and affirmed the district court's grant of the Minnesota homeowner plaintiffs' motion for class certification.[163] There, Plaintiffs alleged the defendants, Zurn Pex, Inc. and Zurn Industries, Inc. (collectively, "Zurn"), used inherently defective brass fittings in their cross-linked polyethylene plumbing systems.[164] Plaintiffs moved for certification and Zurn moved to strike the testimony of two of the plaintiffs' experts.[165]

The district court denied Zurn's motion to strike and granted plaintiffs' motion for class certification of their warranty and negligence claims.[166] Additionally, the Eighth Circuit noted that "[t]he parties disagreed about pretrial discovery."[167] The plaintiffs sought a "single phase discovery plan," but the district court adopted Zurn's suggestion to bifurcate the discovery.[168]

Although much of the Court's opinion addressed the district court's decision to conduct a less-than-complete *Daubert* evaluation of the expert witnesses as part of its Rule 23(b) analysis,[169] the Eighth Circuit did evaluate Zurn's contention that the district court erred in stating it would take "the substantive allegations in the plaintiff's complaint as true while

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160 *Id.* at 418.

161 *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604 (8th Cir. 2011).

162 *See Gooch*, 672 F.3d at 418 (citing *Zurn Pex*, 644 F.3d at 618).

163 *Zurn Pex*, 644 F.3d at 608.

164 *See id.*

165 *See id.*

166 See *id.*

167 *Id.* at 609.

168 *Id.*

169 *Id.* at 610, 613 (finding the district court properly "charted a middle course" when it concluded a "full and conclusive *Daubert* inquiry would not be necessary or productive" and instead conducted a "focused *Daubert* inquiry to assess whether" the expert opinions should be considered).

considering a motion for class certification."[170] Noting that the district court "did not simply take as true all of the homeowner allegations," but rather scrutinized the plaintiff's testimony and claims, the Eighth Circuit concluded that the district court had conducted the proper review.[171]

Finally, the Court stated that the

> allegation that all of Zurn's brass fittings suffer from a universal defect along with the expert testimony which supports it differentiates this case from . . . [*Dukes*]. . . . Here, [unlike in *Dukes*], the evidence of a universal defect raises a critical question common to all members of the classes certified by the district court.[172]

E. Various District Courts' Applications of Dukes

In *Ries v. Arizona Beverages USA LLC*,[173] plaintiffs challenged defendants' representation that "AriZona Iced Tea is 'All Natural,' given that it contains high fructose corn syrup (HFCS) and citric acid."[174] Defendants moved for summary judgment and plaintiffs moved to certify a class defined as: "All persons in California who purchased an Arizona brand beverage from March 17, 2006 until the present time which contained High Fructose Corn Syrup or citric acid which were marked, advertised or labeled as being 'All Natural,' or '100% Natural.'"[175]

In undertaking its review of the class certification motion, the *Ries* court cited *Ellis*: "'[A] district court *must* consider the merits if they overlap with the Rule 23(a) requirements.'"[176] Significantly, the *Ries* court acknowledged the Ninth Circuit decision did not provide the practical standard of analysis a district court must undergo to satisfy such an inquiry.[177] The *Ries* court then noted, however, that such an analysis was limited to determining whether plaintiffs had met their burden under Rule 23: "That said, it remains relatively clear an ultimate adjudication on the merits of plaintiffs' claims is inappropriate, and any inquiry into the merits must be strictly limited to evaluating plaintiffs' allegations to determine

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170 *Id.* at 618 (internal quotation marks omitted).

171 *See id.*

172 *Id.* at 619 n.7.

173 Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523 (N.D. Cal. 2012).

174 *Id.* at 527.

175 *Id.* (internal quotation marks and alteration omitted).

176 *Id.* at 529 (quoting Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011)).

177 *See id.*

whether they satisfy Rule 23."[178]

The *Ries* court found the plaintiffs had "identified several legal and factual issues common to the putative class's claims, including, for instance, whether the use of the terms 'All Natural' or '100% Natural' to advertise beverages that contain HFCS or citric acid violates" the Unfair Competition Law, False Advertising Law, or Consumers Legal Remedies Act.[179] Further, "[b]y definition, all class members were exposed to such representations and purchased AriZona products, creating a common core of salient facts."[180] The court concluded that plaintiffs met "the *Dukes* standard because the entire proposed class has suffered the same injuries flowing from the alleged misrepresentations, and the requested injunctive relief . . . will have the effect of remedying the purported harm class-wide."[181]

In *In re Checking Account Overdraft Litigation*,[182] plaintiffs alleged that defendant, Comerica Bank, manipulated debit card transactions to resequence them from highest-to-lowest dollar amount at the time of posting, causing plaintiffs accounts to be depleted more rapidly and thereby resulting in excessive overdraft fees.[183] Plaintiffs moved for class certification and the district court granted the motion.[184] The district court noted that

> [u]nlike the plaintiffs in *Dukes*, Plaintiffs here have provided evidence of a common corporate policy or practice, namely, Comerica's systematic, computerized and uniform manipulation and re-ordering of debit card transactions, its development and implementation of overdraft limits, and its concealment of its overdraft practices, all to increase the number of overdraft fees imposed.[185]

The district court then proceeded to set out in detail the "common issues of law and fact" satisfying the commonality and typicality standards.[186] All "Plaintiffs and members of the proposed class, whose accounts were governed by common and materially uniform agreements, were subjected to Comerica's practice of re-sequencing debit card

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178 *See id.*

179 *Id.* at 537.

180 *Id.* (internal quotation marks omitted).

181 *Id.* at 538.

182 *In re* Checking Account Overdraft Litig., 286 F.R.D. 645 (S.D. Fla. 2012).

183 *See id.* at 649.

184 *See id.* at 661.

185 *Id.* at 652.

186 *Id.* at 652–53.

transactions," and "Plaintiffs allege that they and all members of the proposed class were assessed additional overdraft fees as a result."[187] The district court concluded: "[W]hen the finder of fact determines whether Comerica's uniform application of high-to-low reordering, as applied to all of [its] customers in the same way, was unlawful, there will be a common answer that will resolve a central issue in the case, thus satisfying the commonality requirement."[188]

III. THE AUTHORITY OF DISTRICT COURTS TO CONTROL DISCOVERY IN CLASS ACTIONS

A. Civil Rules

It has long been true that permitting discovery in a class action "lies within the sound discretion of the trial court."[189] The Federal Rules of Civil Procedure and the district court's inherent power and judicial guidance, such as the Manual for Complex Litigation, support the fact that a district court has the authority to manage the discovery process in a manner that will ensure the parties are provided the opportunity to conduct such discovery as is necessary to fully brief class certification.[190] Post-*Dukes*, it is clear that fully briefing class certification may require the parties to provide the district court with adequate evidence to conduct the "rigorous analysis" of the Rule 23(a) prerequisites, which will often include probing behind the pleadings.

In *Vinole v. Countrywide Home Loans, Inc.*,[191] the Ninth Circuit once again recognized that pre-certification discovery lies within the trial court's discretion:

> District courts have broad discretion to control the class certification process, and whether or not discovery will be permitted lies within the sound discretion of the trial court. Although a party seeking class certification is not always entitled to discovery on the class certification issue, we have stated that the propriety of a class action cannot be determined in some cases

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187 *Id.* at 653.

188 *Id.*

189 Kamm v. Cal. City Dev. Co., 509 F.2d 205, 209 (9th Cir. 1975); *see also* Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2nd Cir. 1978) (stating "management of discovery is committed to the sound discretion of the trial court").

190 *See* FED. R. CIV. P. 23 advisory committee's note (2003); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004).

191 Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009).

> without discovery, and that the better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action was maintainable. Our cases stand for the unremarkable proposition that often the pleadings alone will not resolve the question of class certification and that some discovery will be warranted.[192]

District courts nationwide have recognized the importance of permitting discovery that may substantiate class allegations and their discretion to control the pre-certification discovery process. For instance, in *Vallabharpurapu v. Burger King Corp.*,[193] the court held that "[a]lthough pre-certification discovery is discretionary, courts generally permit such discovery if it would substantiate the class allegations or if plaintiff makes a prima facie showing that the requirements of Rule 23 are satisfied."[194] In *Artis v. Deere & Co.*,[195] the court held that "[t]o deny discovery where it is necessary to determine the existence of a class or set of subclasses would be an abuse of discretion."[196]

Moreover, as a general directive on discovery, Rule 26(b)(1) provides the parties with a presumed right to a broad range of discovery absent a court order otherwise:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.[197]

Although Rule 23(c)(1)(A) directs the district court to determine whether to certify the class "[a]t an early practicable time after a person

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192 *Id.* at 942 (internal quotation marks, alterations, and citations omitted).

193 Vallabharpurapu v. Burger King Corp., 276 F.R.D. 611 (N.D. Cal. 2011).

194 *Id.* at 615.

195 Artis v. Deere & Co., 276 F.R.D. 348 (N.D. Cal. 2011).

196 *Id.* at 351 (citing Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1313 (9th Cir. 1977)).

197 FED. R. CIV. P. 26(b)(1).

sues or is sued as a class representative,"[198] the 2003 Amendments recognize the possibility that both "certification" and "merits" discovery may be necessary in the pre-certification stage:

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery."[199]

B. Manual of Complex Litigation on Bifurcation of Class and Merits Discovery

Although not authoritative, the Manual for Complex Litigation ("MCL")[200] provides considerable guidance for district courts as to how to manage the pre-certification discovery phase. As a general matter with regard to discovery, the MCL suggests:

> The court should ascertain what discovery on class questions is needed for a certification ruling and how to conduct it efficiently and economically. . . . Discovery may proceed concurrently if bifurcating class discovery from merits discovery would result in significant duplication of effort and expense to the parties.[201]

Stating that "[f]undamental to controlling discovery is directing it at the material issues in controversy," the MCL also encourages district courts overseeing complex litigation, including class actions, to engage in "[e]arly identification and clarification of issues" because it will "enable[] the court to assess the materiality and relevance of proposed discovery and provides the basis for a fair and effective discovery plan."[202]

With regard to pre-certification discovery, the MCL recognizes that some "merits" discovery may be necessary:

> A threshold question is whether precertification discovery is

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198 FED. R. CIV. P. 23(c)(1)(A).

199 FED. R. CIV. P. 23 advisory committee's note (2003).

200 MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

201 *Id.* § 11.213.

202 *Id.* § 11.41.

> needed. Discovery may not be necessary when claims for relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation). Some discovery may be necessary, however, when the facts relevant to any of the certification requirements are disputed, or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues. Generally, application of the Rule 23 criteria requires the judge to examine the elements of the parties' substantive claims and defenses in order to analyze commonality, typicality, and adequacy of representation under Rule 23(a), as well as the satisfaction of Rule 23(b)'s maintainability requirements.
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> . . . A preliminary inquiry into the merits may be required to decide whether the claims and defenses can be presented and resolved on a class-wide basis. Some precertification discovery may be necessary if the allegations in the pleadings—with affidavits, declarations, and arguments or representations of counsel—do not provide sufficient, reliable information. To make this decision, the court should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed, to reduce the extent of precertification discovery, and to refine the pertinent issues for deciding class certification.
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> Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations. Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. There is not always a bright line between the two. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.[203]

In fact, the MCL makes it clear that district courts should exercise their

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[203] *Id.* § 21.14 (citations and footnotes omitted).

sound discretion over the discovery process to ensure that an adequate evidentiary record is created to allow the court to conduct the requisite "rigorous analysis" of the Rule 23 requirements.[204] The district court does not have to accept even joint discovery plans from the parties "uncritically."[205]

IV. RECOMMENDATIONS

As a practical matter, post-*Dukes*, practitioners should be careful before stipulating to a discovery plan that bifurcates class and merits discovery when there is any possibility that there may be challenges to the commonality element of Rule 23(a) (or even the preponderance element of Rule 23(b) to the extent it may subsume the Rule 23(a)(2) analysis). Such a stipulation could hamper effective briefing on class certification questions and impair a district court's ability to conduct its "rigorous analysis" appropriately. Rather, practitioners as soon as possible need to gauge the extent of merits discovery that is necessary.

It is also important that the district court appreciate and exercise its "sound discretion" over the discovery process to ensure that the parties are engaging in discovery that will provide it with an adequate evidentiary record to conduct its post-*Dukes* rigorous analysis of Rule 23(a) prerequisites. To the extent parties attempt to stipulate to discovery plans that may result in an inadequate record, the district court should itself reject those plans and define the discovery believed to be necessary to ensure that an adequate record will be considered.

Early on, counsel must be prepared to articulate what commonality issues may require merits discovery and the types of discovery necessary to show commonality. Counsel should be able to explain to the district court why merits discovery is necessary and have a plan for seeking that discovery. Following the *Dukes* decision, it would not be unreasonable for a district court to insist on such an articulation and only agree to bifurcation of "certification" and "merits" discovery in those few cases "when claims for relief rest on readily available and undisputed facts or raise only issues of law."[206]

CONCLUSION

It is clear that the district courts have the authority and discretion to manage pre-certification discovery in order to ensure that the parties have

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204 *See id.*

205 *See id.* § 11.42.

206 *See id.* § 21.14.

adequate discovery to fully engage the Rule 23(a) prerequisites, including commonality, as well as the Rule 23(b) predominance question. Particularly in those cases where there may be any reason to "probe behind the pleadings" and into the merits of plaintiffs' claims in order to determine whether the allegations are susceptible to class-wide resolution, the district court should allow necessary pre-certification merits discovery.