Class Action Watch

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Members of Congress Propose Amendment to Medicare Secondary Payer Statute

by Edwin Meese III & Hans A. von Spakovsky

The current Medicare statute simply ensures that Medicare is reimbursed for the medical benefits it pays when a third party is legally responsible for a Medicare beneficiary's injuries. However, critics argue that a new amendment to the health care reform bill in the U.S. House of Representatives would modify this system by:

- Allowing new types of lawsuits against the makers of consumer products for injuries to Medicare beneficiaries based on questionable statistical speculation;
- Flooding the federal courts with lawsuits that circumvent state tort law and federal requirements for class action lawsuits, diversity jurisdiction, or amount in controversy;
- Violating the privacy of Medicare beneficiaries by making their medical records available to tort lawyers without their permission (or that of the government);
- Interfering with the rights of beneficiaries against third parties responsible for their medical costs; and
- Turning the Medicare reimbursement provision into a *qui tam* statute that would allow plaintiffs' lawyers to pursue claims that Medicare does not think are valid, reducing the availability of medical treatment for Medicare beneficiaries.

The amendment—Section 1620—was removed before final passage of the health care bill in the House Ways and Means Committee on July 17, 2009, but it may be added in the Senate or in conference if the Senate and House pass different versions of the proposed government health care system.

Current Law

"Subrogation" is the legal doctrine under which one party assumes the rights of an injured party to seek compensation from the individual responsible for the injuries. In a typical example, a drunk driver might injure a victim, and the victim's automobile insurer might pay the victim's initial health bills. The automobile insurer can then assert a claim against the drunk driver for the benefits the automobile insurer has paid.

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Dukes v. Wal-Mart and Statistical Proof in Class Certification Proceedings

by Stephen J. Newman

It has now been more than seven months since *Dukes v. Wal-Mart* was argued en banc in the Ninth Circuit, five years since the district court entered its class certification order, and eight years since the underlying litigation was filed.[1] At issue in the appeal is whether the district court properly certified the largest employment class action in history, by approximately 1.5 million female workers at Wal-Mart stores nationwide. The Ninth Circuit issued two opinions at the panel level before the case was ordered for a hearing en banc. (The setting of an

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Endnotes

1 478 U.S. 546 (1986).

2 *Id.* at 565.

3 532 F.3d 1209 (11th Cir. 2008).

4 *Id.* (reflecting a 9-3 vote against rehearing en banc).

5 Judge Carnes noted that the lodestar multiplier issue affects "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party," and that "[t]he record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can." *Id*. at 1337.

6 Black's Law Dictionary 1026 (Bryan A. Garner, ed., 9th ed. 2009).

7 461 U.S. 424 (1983).

8 *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87, 91-94 (1989); H.R. Rep. No. 94-1558, p. 8 (1976); S. Rep. No. 94-1011, p. 6 (1976).

9 *Hensley*, 461 U.S. at 434.

10 *Id.* at 435 (emphasis added).

11 465 U.S. 886 (1984).

12 *Id.* at 899.

13 *Id*. at 900.

14 *Id.* at 891.

15 Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

16 *Id.*

17 *Id.* at 565-566.

18 505 U.S. 557 (1992).

19 *Id.* at 559.

20 *Id.* at 562.

21 *Id.* at 563.

22 Kenny A. *ex rel.* Winn v. Perdue, 454 F. Supp. 2d at 1260, 1268-69 (N.D. Ga. 2006).

23 *See, e.g.,* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

Dukes v. Wal-Mart and Statistical Proof in Class Certification Proceedings

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en banc hearing vacates prior appellate rulings.) That no opinion has yet issued suggests continuing debate within the appellate court. It remains to be seen what path the Ninth Circuit ultimately will take, and if the path will end there or continue to the U.S. Supreme Court.

One of the most significant issues the Ninth Circuit needs to resolve is the proper role for statistical or scientific evidence at the class certification stage.[2] The legal standard remains undefined; a district court must undertake a "rigorous analysis" to determine whether each element of class certification has been established.[3] Some federal appellate courts have rejected classes when an overall review of the statistical or scientific evidence shows that plaintiffs have not met their burden. In the Second Circuit, for example, district courts have been directed to resolve factual disputes relating to the elements of certification; they may not accept plaintiffs' experts without question if the defendant challenges them with its own expert testimony.[4] The Fourth and Fifth Circuits similarly hold that plaintiffs' experts may be rejected if they do not satisfy the usual strict standards (such as under *Daubert*[5]) for admissibility of scientific or technical opinions.[6] The Third Circuit recently joined these other appellate courts in requiring careful review of both the plaintiffs' and the defendants' statistical and scientific evidence at the class certification stage, and further requiring the district court to resolve any factual disputes between the parties that relate to the certification elements.[7]

Historically in the Ninth Circuit, however, the level of "rigor" in class certification analysis has not, as a practical matter, been substantial. A legal test stated by the *Dukes* panel is simply whether the plaintiffs have presented any "properly-analyzed, scientifically reliable evidence tending to show that a common question of fact… exists."[8] The panel's "tending to show" language suggests that so long as the plaintiffs' evidence tends to speak in favor of class certification, the defendants' countervailing evidence should be disregarded (or at least weighted much less heavily). This is a more pro-plaintiff standard than other appellate courts apply.

In *Dukes*, the plaintiffs offered sociological evidence that Wal-Mart had a pro-male culture which, when coupled with the overall policy of allowing promotion and pay decisions to be made based upon the discretion of store or regional managers, resulted in statistical disparities, regionally, in how women were treated. Based upon this information, the district court came to the conclusion that virtually all women, company-wide, were potentially subject to a "common" pattern of discriminatory conduct, and that the proposed class representatives, because they had been denied promotions or pay increases, had claims that were "typical" of the other 1.5 million class members. Evidence from the defendant suggesting that no systematic discrimination had occurred, based upon examination of store-by-store and department-by-department promotion and pay rates, was rejected out-of-hand.[9]

On appeal, the Ninth Circuit panel majority found, "It is well-established that commonality may be established by raising an inference of class-wide discrimination through the use of statistical analysis."[10] In evaluating each side's statistical evidence on appeal, however, the panel said that district courts are entitled to nearly complete discretion in rejecting the defendants' contrary evidence, and strongly suggested that (at the class certification stage) such a rejection usually will be beyond the scope of appellate review.[11]

Judge Andrew Kleinfeld wrote in his dissent from the second panel opinion that this approach is not "rigorous" and violates Supreme Court authority:

> Plaintiffs' only evidence of sex discrimination is that around 2/3 of Wal-Mart employees are female, but only about 1/3 of its managers are female. But… "[i]t is entirely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." Not everybody wants to be a Wal-Mart manager. Those women who want to be managers may find better opportunities elsewhere. Plaintiffs' statistics do not purport to compare women who want to be managers at Wal-Mart with men who want to be managers at Wal-Mart, just female and male employees, whether they want management jobs or not.
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> ….
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> [Moreover, the class representatives' claims] are not even typical with respect to each other, let alone with respect to the class [defined by the district court] of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." Some of the seven named plaintiffs and members of the putative class work for Wal-Mart, some have quit, some have been fired. Some claim sex discrimination, some claim mixed motive race and sex discrimination, some appear to claim only race discrimination. Some claim retaliation, and some appear to claim unfairness but not discrimination. Some of the seven plead a prima facie case, some do not.[12]

The fundamental issue remains whether, given the potentially devastating consequences of litigating a super-sized class action,[13] the Ninth Circuit should (like other courts already have done) impose stricter scrutiny on the plaintiffs' evidentiary submissions in support of a class certification motion.

The allowed use of statistics by the *Dukes* panel opinion also seems to expand Ninth Circuit law beyond what the Ninth Circuit previously approved in *Hilao v. Estate of Ferdinand Marcos*, where a special master was allowed to examine certain class members' claims and then extrapolate the resulting figures to present a recommendation for class-wide damages awards.[14] In *Hilao*, however, liability had already been established as to each of the class members, since each had been proven to be a victim of human rights abuses at the hands of the Marcos regime in the Philippines. The statistical approach approved there was primarily designed to develop a fair approximation of damages, but only after each plaintiff had established that he or she had in fact been damaged by the defendant's wrongful conduct. The panel opinion in *Dukes* suggests taking a unique procedure developed for a unique case and expand its use to more run-of-the-mill class certification proceedings, *before there is any proof of damage to, or the violation of the rights of, each class member*. If the en banc Ninth Circuit ultimately rules in *Dukes* that the techniques employed in *Hilao* may be employed more broadly by class plaintiffs, the court would make the defense of every class case significantly more challenging, in a way that departs significantly from what is allowed in other appellate circuits.

Unfortunately, the en banc oral argument questioning focused very little on the evidentiary issues, even though, for practitioners mired in the details of litigating cases, such issues are of pressing concern. Much of the argument focused on the distinct purposes and goals of Rules 23(b)(2) and (b)(3). That issue is theoretically important but of less practical impact when briefing the typical

class certification motion.[15] If the panel opinion's analysis of statistical and sociological testimony survives the en banc decision, it will be significantly more difficult for defendants to challenge class certification orders on appeal, even when the contention is that indisputably-sound science or statistics shows the lack of "rigor" in plaintiffs' evidence.

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Endnotes

1 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), *op. withdrawn and re-issued*, 509 F.3d 1168 (9th Cir. 2007), *petition for reh'g en banc granted*, 556 F.3d 919 (2009). Oral argument occurred on March 24, 2009. *See also* J. Beisner, E. Becker & K. Thompson, Dukes, et al. v. Wal-Mart Stores, Inc., *Ninth Circuit Affirms Largest Employment Discrimination Class in History*, Class Action Watch (March 2008).

2 Other significant legal issues presented include whether a plaintiff may use Fed. R. Civ. P. 23(b)(2) (allowing certification of injunctive relief classes) as the primary legal driver to certification, even when there are potentially massive claims for punitive damages that would tag along to the certification order. Normally, damages claims must be certified under Rule 23(b)(3), where the standard for certification can be more difficult to meet. *See* Beisner et al., *supra* note 1. Another major issue is whether such a large class, encompassing business conduct at so many different physical store locations, is simply too unwieldy to justify class treatment. *See id.*

3 *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir. 1996).

4 *See In re* IPO Secs. Litig., 471 F.3d 24, 40 & n.1 (2d Cir. 2006) (rejecting principles that "some showing" by plaintiff will satisfy Rule 23 or that so long as an expert report is not "fatally flawed" the report is sufficient foundation for a certification order); Heerwagen v. Clear Channel Commc'ns, Inc., 435 F.3d 219, 232-33 (2d Cir. 2006) (district court may weigh competing expert testimony).

5 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

6 *See* Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 310-11 (5th Cir. 2005) (excluding a purported expert at class certification stage because his study was unreliable); Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 260-61 (4th Cir. 2005) (same).

7 *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008), *amended* (2009) ("The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands. "); *see also* I. Simmons & A. Okuliar, *The Third Circuit Joins the Majority with In re Hydrogen Peroxide*, Class Action Watch (May 2009); C. Mitchell & M. Scott, In re Hydrogen Peroxide Antitrust Litigation*: A Forecast of the Future of Class Certification in the Ninth Circuit*, Competition: The Journal of the Antitrust & Unfair Competition Law Section of the State Bar of California (Fall 2009) (suggesting that if *Dukes* ultimately upholds class certification by ruling in a manner inconsistent with *Hydrogen Peroxide*, the U.S. Supreme Court will grant certiorari, reverse the Ninth Circuit, and confirm that the Third Circuit's approach is the correct one).

8 *Dukes*, 509 F.3d at 1179.

9 *See* 222 F.R.D. at 154-165.

10 509 F.3d at 1180.

11 *Id.* at 1181-82.

12 *Id.* at 1194-96 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).

13 The U.S. Supreme Court has recognized that abuses of the class device are prone "to injure the entire U.S. economy," that "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years" and that "these abuses resulted in extortionate settlements." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104-369, p. 31 (1995)).

14 103 F.3d 762 (9th Cir. 1996). In the Fifth Circuit, by contrast, statistical evidence is scrutinized very carefully, out of concern that to expose a defendant to potentially large liability simply on the basis of statistics and generalizations risks a deprivation of due process, and such evidence may not be used to extrapolate damages to the broader class. *See In re* Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990) (rejecting sampling in a class action because it would allow proof of causation to be made on a group rather than individual basis); Cimino v. Ray-Mark Indus., Inc., 151 F.3d 297, 319-320 (5th Cir. 1998) (holding that the use of statistical sampling violated the defendant's Seventh Amendment rights).

15 It is, of course, extremely important to the litigants in *Dukes* itself, particularly in regard to whether the punitive damage claim may proceed under Rule 23(b)(2). Under Rule 23(b)(2), the plaintiffs still must establish the elements of commonality and typicality, but to certify a class they need not establish key elements of Rule 23(b)(3): "that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy" (emphasis added).