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# Class Actions Evolve in the Fifth Circuit

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September 25, 2012 – Applying the landmark Supreme Court case of *Wal-Mart v. Dukes,* which rejected a nationwide class of female employees seeking injunctive relief, the Fifth Circuit recently affirmed certification of a class of bankruptcy debtors who sought injunctive relief about wrongful foreclosure fees. *Rodriguez v. Countrywide Home Loans,* No. 11-40056 (Sept. 14, 2012). Against a background of other recent cases that reject classes seeking damages, *Rodriguez* signals the potential future of federal class litigation in the Fifth Circuit after *Dukes*.

*Dukes* focused on Wal-Mart's national policy against discrimination, and characterized its managers' alleged violations of that policy as individual acts that did not create class-wide "commonality." In contrast, *Rodriguez* asked whether Countrywide had a systematic practice of *inaction* by not getting approval of certain fees in bankruptcy court. This different focus suggests a way to favorably phrase class allegations by emphasizing a defendant's silence or failures to act over its affirmative actions. Ultimately, the analysis of *Rodriguez* may guide class claims in industries where authorizations, preclearances, or other such procedures are common in the course of business.

*Rodriguez* is part of a trilogy of recent class cases. In the first of the three cases, *Ahmad v. Old Republic Title Insurance,* the Fifth Circuit reversed the certification of a class making claims about title insurance premiums. No. 11-10695 (Aug. 13, 2012). The Court relied on an earlier opinion which declined to certify a similar class of title insurance buyers because "[t]he resulting trial would require the factfinder to determine whether each individual qualified for the discount based on the evidence in his or her file." *Id.* at 9 (citing *Benavides v. Chicago Title,* 636 F.3d 699 (5th Cir. 2011)). The Court declined to distinguish *Benavides* even though a particular discount was mandatory once "the requirements of R-8 [a Texas Insurance Code provision]" were satisfied, because each plaintiff would present unique facts abo ut those requirements. *Id.* at 10-11. Therefore, the class did not meet the commonality requirement of Fed. R. Civ. P. 23(a)(2).

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In the second, *Funeral Consumers Alliance v. Service Corp. Int'l,* a consumer group sued under the Clayton Act about the market for funeral caskets. No. 10-20719 (Sept. 13, 2012). Among other holdings, the Court affirmed the denial of class certification, finding that the scope of the putative nationwide class fit poorly with the evidence offered about localized market activity for the sale of funeral services and caskets. *Id.* at 27.

The final case, *Rodriguez,* involved claims in bankruptcy court by plaintiffs who cured their pre-petition mortgage arrearages, completed their Chapter 13 plans, and received a discharge. They alleged that Countrywide then threatened foreclosure based on fees charged while their bankruptcy cases were pending. The bankruptcy court conducted a 3-day hearing and certified a class on the plaintiffs' claim for injunctive relief against collection of fees incurred during bankruptcy that were not disclosed and authorized under applicable court rules, while declining to certify a class for damages. *Id.* at 3.

The Fifth Circuit affirmed, finding that Countrywide's acts were "generally applicable" ›

to the "narrowly certified . . . class of approximately 125 individuals." *Id.* at 6. The Court distinguished the denial of certification in a similar case on the grounds that this class was not seeking disgorgement. *Id.* at 8-9 (analyzing *Wilborn v. Wells Fargo,* 609 F.3d 748 (5th Cir. 2010)). The Court also credited evidence that the relevant bank records could be readily searched, avoiding the need for loan-by-loan, file-by-file review to identify potentially inappropriate fees. *Id.* at 9-10.

The Court concluded with its key holding that analyzed *Dukes*. Countrywide contended that the bankruptcy court was wrong to find a common issue of fact when it had no corporate policy concerning compliance with the applicable bankruptcy rule. *Id.* at 10. The Court disagreed, finding that *Dukes* involved a specific corporate policy forbidding sex discrimination, which was allegedly violated by individual managers. In this case, on the other hand, there was no specific company policy and the evidence showed a uniform practice of not following the rule – "in fact, no Countrywide employee filed a Rule 2016(a) application during the time period identified in the class definition." *Id.* n.11. In sum, *Rodriguez* identifies three factors – manageable size, useable records, and a practice of failing to follow a required standard – that help establish class certification in the context of injunctive relief.

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