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TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

In the past two years, the United States Supreme Court has issued several significant opinions imposing more rigorous requirements for class certification classes under Fed. R. Civ. P. 23. This article explores the wide-ranging implications these cases have for mass tort class actions and the resultant environment of heightened "rigorous analysis" that may present an insurmountable bar for some mass tort class action plaintiffs.

Digging Deeper: Mass Toxic Tort Class Certification after *Dukes, Comcast, and Amgen*

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I. Introduction

In the past two years, the United States Supreme Court has issued several significant opinions imposing more rigorous requirements for certification of classes under Fed. R. Civ. P. 23. Specifically, the Supreme Court's decision in *Wal-Mart Stores v. Dukes*[1] held that plaintiffs must prove with affirmative evidence that they have met the requirements of Rule 23. In response, the trial and appellate courts have become more stringent about requiring plaintiffs to prove that putative class members have suffered a common injury and that the class action contains claims that may be resolved on common proof. In addition, the Supreme Court's decision in *Dukes*, and more recently in *Amgen v. Connecticut Retirement Plans and Trust Funds*[2] and *Comcast v. Behrend*,[3] have pushed the lower courts further in performing a "rigorous analysis" of class certification issues, even to the extent that they overlap with the merits of the case. These developments have wide-ranging implications for mass tort class actions, especially due to the fact-intensive nature of such cases. This article explores the potential implications of these opinions, particularly as they have been or may be applied in mass tort class action cases.

II. Courts Have Interpreted Dukes to Impose More Stringent Requirements for Certification of Mass Tort Classes

In *Wal-Mart Stores v. Dukes*, the Supreme Court rejected, under Rules 23(a)(2) and 23(b)(2), certification of an employment discrimination class consisting of approximately 1.5 million plaintiffs, which it described as "one of the most expansive class actions ever."[4] The *Dukes* opinion emphasizes several themes:

1) Heightened evidence standard: "Rule 23 does not set forth a mere pleading standard;" rather, a party seeking class certification must provide "significant" evidence to "affirmatively demonstrate his compliance with the Rule;" that is, he must prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.";[5]
2) Heightened "commonality" requirements: "Commonality" under Rule 23(a) requires a plaintiff to demonstrate that class members have suffered the same injury, and their claims must depend upon a common contention "of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke";[6] and
3) Rigorous analysis: The "rigorous analysis" required of a petition for class certification "will entail some overlap with the merits of the plaintiff's underlying claim."[7]

In the two years since *Dukes*, both federal and state courts have started to impose more stringent burdens on plaintiffs bringing mass tort class actions to affirmatively demonstrate that putative class members have all suffered the same injury, and that their claims are

[1] *Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541 (2011).
[2] *Amgen v. Connecticut Retirement Plans and Trust Funds*, 133 S Ct. 1184 (2013).
[3] *Comcast v. Behrend*, 133 S. Ct. 1426 (2013).
[4] *Dukes*, 131 S.Ct. at 2547.
[5] *Id*. at 2551.
[6] *Id*. at 2551.
[7] *Dukes*, 131 S.Ct. at 2552.

capable of classwide resolution despite any potential differences between the plaintiffs.

Less than a month after the Supreme Court handed down its opinion in *Dukes*, a Michigan court relied on *Dukes* in reversing its prior certification of a putative class in *Henry v. Dow Chemical Company*.[8] There, the court noted that, although its prior analysis had been correct under the law as the court understood it before *Dukes*, it was required to reanalyze whether the plaintiffs had met the commonality requirement as articulated in *Dukes*.[9] It found that, like *Dukes*, there was an absence of "glue" holding together plaintiffs' allegations that Dow had negligently released dioxin into the Tittabawassee River flood plain.[10] Rather, the court found too many highly individualized inquiries regarding issues such as "the level and type of dioxin contamination in the specific properties, the different remediation needs and different stages of remediation for different properties, and the fact that some of the properties have been sold" as well as the myriad ways the individual plaintiffs' use and enjoyment of their properties had been affected.[11] Thus, the court denied class certification based on the fact that, under the heightened *Dukes* standard, plaintiffs could not show that there was a common contention capable of class-wide resolution.[12]

Two months after *Dukes*, the Third Circuit issued its opinion in *Gates v. Rohm & Haas Co*., affirming the district court's denial of the plaintiffs' putative medical monitoring and property damage classes.[13] Citing *Dukes'* pronouncement that a class certification inquiry "will entail some overlap with the merits," the *Gates* court focused on the lack of common proof that all putative class members were exposed to the suspect chemical vinyl chloride.[14] Namely, the court found that the hypothetical exposures calculated by the plaintiffs' expert "could not constitute common proof of exposure above background levels" since they only showed average daily exposure, did not account for biological factors or individual activities over the class period, and could not prove that every individual class member was exposed.[15] Likewise, in *Price v. Martin*,[16] decided six months after *Dukes*, the Supreme Court of Louisiana relied heavily on *Dukes* in reversing the trial court's certification of a property damage class involving property near a wood treating facility. To prove that a "common issue" existed, the "plaintiffs were required to present evidence not simply that emissions occurred, but that the emissions resulted in the deposit of unreasonably elevated levels of toxic chemicals on plaintiffs' properties; in other words, that defendants had a duty to avoid the release of unreasonable levels of contaminants from their operations, that this duty was breached, and that the breach caused plaintiffs to sustain property damage."[17] Extensively citing *Dukes*, the court found that the plaintiffs failed to meet their burden, as neither the issue of breach nor that of causation was capable of resolution on a class wide basis on common proof.[18] Indeed, the "plaintiffs offered no evidence to demonstrate that the issue of breach could be resolved from a common nucleus of facts where the same emissions or conduct were not shown to touch or concern all members of the class" where 1)

[8] *Henry v. Dow Chemical Company*, No. 03-47775, slip op. (Saginaw Cty. Cir. Ct. July 18, 2011).
[9] *Id*. at 5.
[10] *Id*.
[11] *Id*. at 5-6.
[12] *Id*. at -6.
[13] *Gates v. Rohm & Haas* Co., 655 F.3d 255 (3rd Cir. 2011).
[14] *Id*. at 265.
[15] *Id*. at 265, 267.
[16] *Price v. Martin*, 79 So. 3d 960 (La. 2011).
[17] *Id*. at 969-970.
[18] *Id*. at 970.

three successive owners had owned the subject property over a 66-year period, 2) the owners had engaged in independent and varying operations, and 3) different legal standards had governed the facility's operations over that timeframe.[19] Likewise, the plaintiffs could provide no common proof a causal connection between specific emissions and damage to each class member's property since the contaminants at issue were "ubiquitous" and "present in virtually all communities."[20]

The following year, the Western District of Kentucky relied on *Dukes* in certifying only a limited class in *Powell v. Tosh*.[21] The plaintiffs originally alleged that noxious odors were emanating from the defendants' numerous hog barns and sought to certify a class "within a 1.25 mile radius" of each of the defendants' hog barns.[22] The plaintiffs presented expert testimony based on meteorological data, chemical data related to hog farm emissions, and sensory data gathered by independent observers to conclude that the alleged effects of one particular hog barn extended for 1.25 miles.[23] The plaintiffs' expert then extrapolated that data to the areas around each of the other hog barns, even though the expert had conducted no scientific tests of those areas.[24] Distinguishing *Dukes*, in which the Supreme Court had found no "glue" linking the course of conduct to the various alleged injuries, the *Powell* court decided that the defendant hog barn owners' course of conduct at the single hog barn caused all plaintiffs in that vicinity to suffer the same injury.[25] Commonality therefore was established among the putative class members situated around the particular hog barn, despite variations in frequency and intensity of effects they suffered.[26] The court therefore certified a putative class consisting only of people living around the particular hog barn that had been tested, but excluded potential class members living around the other hog barns subject to the defendants' services agreement based on lack of commonality.[27] The court did not, however, address the effects the individualized nature of the putative class members' injuries and exposures might have on the class litigation.

As in *Powell*, other courts have certified mass tort classes that appear to have significant individualized issues, and in doing so, have glossed over *Dukes'* heightened commonality standard. In *Donovan v. Philip Morris USA, Inc.*,[28] for instance, the United States District Court for the District of Massachusetts refused to decertify a medical monitoring class pursuant to *Dukes*, despite the fact that elements of the plaintiffs' medical monitoring claim arguably could be proved only on an individual basis, not a group-wide basis.[29] Instead, the court, without applying *Dukes'* mandate that class certification depends on "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation" rather than on the mere existence of common "questions" of a generalized nature, held that *Dukes* did not on its face compel the court to change its prior analysis and refused to revisit its certification of the class.[30]

Thus, although the courts are increasingly adhering to *Dukes'* more stringent

[19] *Id*. at 970-971.
[20] *Id*. at 971-72.
[21] *Powell v. Tosh*, 280 F.R.D. 296 (W.D. Ky 2012).
[22] *Id*. at 301.
[23] *Id*. at 305.
[24] *Id*. at 307.
[25] *Id*. at 306.
[26] *Id*. at 306-307.
[27] *Id*. at 306.
[28] *Donovan v. Philip Morris USA, Inc*., No. 06-12234-DJC, 2012 U.S. Dist. LEXIS 37974, 73 (D. Mass. Mar. 21, 2012).
[29] *Id*. at 77.
[30] *Id*. at 88-89.

"commonality" standard and applying it in the context of mass tort class actions, it is clear that *Dukes* is not being applied uniformly and as stringently by all courts. Nonetheless, *Dukes* clearly provides mass tort defendants with an effective tool to combat class certification, since the individualized issues associated with exposure, injury, and damage to property in mass tort cases are precisely the kinds of "dissimilarities within a proposed class . . . that have the potential to impede the generation of common answers" and therefore impede class certification.[31]

III. An Increasingly "Rigorous Analysis" of Class Certifications Provides a Helpful Tool for Defendants

While *Dukes* laid the groundwork for the heightened "rigorous analysis" required of a class certification petition that "will entail some overlap with the merits of the plaintiff's underlying claim,"[32] more recently, the Supreme Court issued a pair of 2013 opinions clarifying the extent to which a court can address merits issues at the class certification stage. In A*mgen Inc. v. Connecticut Retirement Plans and Trust Fund*, a securities fraud class action, the Supreme Court affirmed certification of a class of investors, holding that the plaintiffs were not required to provide proof of materiality, an element of the plaintiffs' securities fraud claim, in order to certify the class.[33] The Court noted that "[m]erits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[34] Indeed, the Court found that the question of materiality was itself common to the class and a failure of proof on the issue had no relevance at the class certification.[35] Thus, *Amgen* appears to limit inquiry into a case's merits where the class certification inquiry touches upon an indispensable element of the claim and on which a failure of proof would end the case.

Shortly thereafter, the Supreme Court added another layer to the discussion of permissible merits inquiry in *Comcast Corp. v. Behrend*. There, the Supreme Court reversed the lower court's certification of the *Comcast* class action under Rule 23(b)(3) because the lower court incorrectly refused to entertain arguments regarding damages calculations that bore on the propriety of class certification, simply because those arguments overlapped with a merits determination.[36] Instead, the Supreme Court found that the plaintiffs' expert's damages calculations "fell far short of establishing that damages in the case could be measured on a class-wide basis."[37] Thus, *Comcast* makes clear that the "rigorous analysis" required for class certification reaches not only to issues of liability, but also to damages and causation. Further, *Comcast* and *Dukes* both suggest that courts are now obligated to conduct a "rigorous analysis" of an expert's data and methodology at the class certification stage, perhaps even to the extent that some level of *Daubert* assessment is required.[38] To the extent that the expert's methodology is "arbitrary" or "speculative," courts can reject the expert's opinion and deny class certification.[39] Thus, *Comcast* reaffirms *Dukes'* pronouncement that district courts

[31] *Dukes*, 131 S.Ct. at 2551.
[32] *Id*. at 2552.
[33] *Amgen*, 133 S. Ct. at 1196.
[34] *Id*. at 1194-95.
[35] *Id*. at 1197.
[36] *Comcast*, 133 S. Ct. at 1433.
[37] *Id*. at 1433.
[38] *See Dukes*, 131 S.Ct. at 2554 (suggesting that a D*aubert* analysis may be applicable to expert testimony at the certification stage of class action proceedings).
[39] *Comcast*, 133 S. Ct. at 1433.

considering motions for class certification often must look beyond the pleadings to issues that overlap with the merits. But again, the extent to which a court must delve into the merits remains undefined.

Most recently, the Superior Court of the District of Columbia denied a motion for class certification in *Parkhurst v. D.C. Water & Sewer Auth.*,[40] based on a variety of individual issues associated with allegedly elevated lead levels in tap water that caused children to suffer cognitive or behavioral problems about which D.C. Water failed to notify them through public statements or otherwise.[41] Interestingly, the *Parkhurst* court seemingly ignored *Dukes*' heightened "commonality" standard.[42] Instead, the court relied on *Comcast*'s holding that without a method to prove damages on a class-wide basis, putative class representatives cannot show that questions common to the class predominance and "questions of individual damages calculations will inevitably overwhelm questions common to the class."[43] Indeed, the court accepted as given that its class certification inquiry would overlap somewhat with the merits of the case, and focused on the fact that "common questions" did not "predominate over" individual issues where "different class members were exposed to different [public] statements, different amounts of lead, for different amounts of time, in different ways, and over different periods; some class members suffer no physical injury, while others suffer from significant cognitive or behavioral problems."[44]

The level of merits analysis required at the class certification stage is clearly the subject of an ongoing discussion. Indeed, the question of the extent of merits inquiry is particularly pertinent in mass tort actions, where individual factual questions can "impede the generation of common answers" necessary to fulfill the requirements of Fed. R. Civ. P. 23 and certify a class. In *Cox v. Zurn Pex, Inc.*,[45] for instance, the Eighth Circuit affirmed a district court's certification of a class of homeowners who used the defendants' allegedly defective brass plumbing fittings, holding that a district court was not required conduct a full *Daubert* inquiry of the plaintiffs' expert at the class certification stage. Other courts, when faced with challenges to experts, have applied a more "rigorous analysis" and/or even *Daubert*-level scrutiny of expert witnesses at the class certification level.[46] In either case, since plaintiffs bear the burden of showing that they have met the Fed. R. Civ. P. 23 requirements, the burden of providing "significant" affirmative evidence of common questions of liability, causation, and damages, and expert testimony sufficient to meet this obligation, falls squarely on them.

[40] *Parkhurst v. D.C. Water & Sewer Auth*., No. 2009 CA 000971 B, 2013 D.C. Super. LEXIS 4 (D. D.C. April 8, 2013).
[41] *Id*.
[42] *Id*. at *40.
[43] *Id*.
[44] *Id*. at *38.

[45] *Cox v. Zurn Pex, Inc .(In re Zurn Pex Plumbing Prods. Liab. Litig.)*, 644 F.3d 604 (8th Cir. 2011).
[46] *See, e.g., Ellis v. Costco*, 657 F.3d 970, 982 (9th Cir. 2011) (finding that the district court improperly ended its *Daubert* analysis once it determined plaintiffs' expert's testimony was admissible instead of "resolv[ing] any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole"); *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 812-13 (7th Cir. 2012) (noting that pursuant to *Dukes*, a court must receive evidence and make a conclusive ruling on any material factual disputes affecting class certification, including any challenges to that expert's qualifications or submissions before deciding whether to certify the class).

IV. Conclusion

After *Dukes* and *Comcast*, as courts move toward imposing more stringent requirements for class certification, plaintiffs will face an increasingly uphill battle as they seek class certification. This will be particularly true in mass tort class actions, which are often fact-intensive. Indeed, this environment of "rigorous" scrutiny may present an insurmountable bar for some plaintiffs. While it will not always be clear how lower courts will apply the class certification standards adopted by the U.S. Supreme Court, what is clear is that *Dukes*, *Comcast*, and their progeny will continue to provide defendants with an expanding arsenal of heightened evidentiary standards with which to fight class certification in sprawling mass tort class actions.

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