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The U.S. Supreme Court in *Wal-Mart Stores v. Dukes* announced a more stringent test for evaluating commonality in all putative class actions, no matter the subject area. In the context of environmental class actions, the increased focus on commonality, along with the need to establish commonality using reliable expert evidence, has led to fewer environmental class actions being certified, attorneys Douglas A. Henderson, William M. Droze, and Steven J. Hewitson say in this BNA Insight. But not all courts follow *Dukes*, the authors note, and *Dukes* does not prohibit certification of all environmental class actions.

Environmental Class Actions After *Dukes*: Is 'Rigorous' Analysis the New Rule of Law?

By Douglas A. Henderson, William M. Droze, and Steven J. Hewitson

Although the Supreme Court's recent health care and immigration cases dominated the news this year, few recent cases cast as long a legal shadow as the Court's decision last year in *Wal-Mart Stores v. Dukes*.[1] A major employment case in its own right, *Dukes* doubles as a landmark civil procedure case with relevance for class actions in every area of the law. In *Dukes*, the Court held that ''commonality,'' one of the key elements of class certification, was not just a perfunctory legal box to check with a statement that ''common issues exist.'' Rather, according to *Dukes*, the fundamental elements of commonality and predominance must be established with ''significant'' evidence—both expert and factual—for a class to be certified.

But just how has *Dukes* affected environmental cases specifically? Has *Dukes* really rewritten how courts must enforce the commonality and closely related predominance requirements, two key considerations in environmental contamination class actions? Notably, of the 10 environmental class action decisions released since *Dukes*, all but three cite *Dukes*. Using this measure, the bench plainly views *Dukes* as a bellwether decision in the environmental arena. But even after *Dukes* however, the majority rule remains that environmental disputes are not typically appropriate for class certification given the unique characteristics usually present in

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[1] *Wal-Mart Stores, Inc.* v. Dukes, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

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those cases. This article analyzes environmental class action decisions decided since *Dukes* and summarizes the state of environmental class actions law today.

Wal-Mart v. Dukes

In *Dukes*, the Supreme Court reversed the Ninth Circuit, which had upheld certification of the largest employment class action ever filed. As class representatives for more than 1.5 million past and present female employees, Plaintiffs claimed Wal-Mart discriminated against them when it allowed local managers to exercise discretion in employment cases, and denied employees equal pay and promotions in violation of Title VII.

Justice Scalia, writing for the majority, determined the *Dukes* plaintiffs offered no convincing evidence of disparate impact because of a discrete corporate policy. The Court ruled unanimously that because of varying plaintiffs' individual circumstances, the class could not proceed as comprised, and ruled 5-4 that it could not proceed as any kind of class action suit. Procedurally, the Court held that the plaintiffs failed to prove commonality under Rule 23(a)(2). The Court announced a new rule: ''[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law . . . . Their claims must depend upon a common contention.. . . That common contention, moreover, must be of such a nature that it is capable of classwide 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.''[2]

In reaching its decision, the *Dukes* Court engaged in an extensive weighing of the merits of the claims in the class certification analysis. Specifically, the Court held, the social science, statistical, and anecdotal evidence presented by the plaintiffs was insufficient to establish commonality. The plaintiffs' evidence, a broad-based statistical analysis, drew the criticism that ''[e]ven if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a class-wide basis.''[3]

Environmental Contamination Cases Rejecting Class Certification After *Dukes*

Like *Dukes* itself, subsequent cases broadly address the requirements for class certification, not just in environmental and toxic tort cases.

Price v. Martin

In *Price v. Martin*, the Louisiana Supreme Court closely followed the teaching of *Dukes* in an environmental context.[4] In *Price*, a group of property owners near a wood treating facility sought to certify a class for property damage. Plaintiffs defined the putative class as ''all persons and entities, at any time since 1940 until the present time located or residing in . . . or who were or are physically present within the geographic area. . . .''

Citing *Dukes* repeatedly, the court noted that ''[c]lass action rules do not set forth a mere pleading standard; rather 'a party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of fact or law, etc.' ''[5] In reversing the trial court, which had certified the class, and the court of appeals, which had affirmed, the court found no questions of law or fact common to the class. But before taking up the commonality question, the court in *Price* reiterated the finding in *Dukes* that the ''commonality'' requirement is ''easy to misread, since any competently crafted class complaint literally raises common questions.''[6] Citing entire sections of *Dukes*, the court concluded the mere existence of common questions would not satisfy the commonality requirement. Commonality requires a party seeking certification to demonstrate the class members' claims depend on a common contention, and that common contention must be one capable of classwide resolution—one where the ''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.''[7]

In *Price*, as in *Dukes*, the linchpin was the commonality requirement. At the certification hearing, plaintiffs alleged the commonality requirement was satisfied by the existence of one common issue—whether defendants' off-site emissions caused property damage to the residents in the area surrounding the plant.[8] In reversing, the Louisiana Supreme Court found ''this conclusion reflects a misinterpretation of the law and of plaintiffs' burden of proof.''[9]

Rather, according to the court, to establish the ''common issue,'' 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—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.[10] Further, this common issue must be capable of resolution for all class members based on common evidence.[11] Again citing *Dukes*, the court in *Price* held proof of commonality must be ''significant.''[12] And, after reviewing the evidence, the court held that neither the issue of breach nor that of causation was capable of resolution on a classwide basis on common evidence in the case.

With respect to the breach question, the court found that, while the facility had three successive owners during the relevant time period (1944 to present), only two of the owners had been sued, but all three engaged in independent and varying operations. The specific operations that plaintiffs allege resulted in off-site emissions—such as overflow, runoff, and the burning of wood by residents—occurred at varied and specific

[2] *Id*. at 2551, 180 L. Ed. 2d at 389-90 (citations omitted).
[3] *Id.* at 2555, 180 L. Ed. 2d at 393.
[4] *Price v. Martin*, 79 So. 3d 960 (La. 2011).
[5] *Id*. at 967 (quoting *Dukes*) (emphasis in original).
[6] *Id*. at 969.
[7] *Id*. at 969 (citing *Dukes*, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389-90).
[8] *Id*. at 969.
[9] *Id*. at 969.
[10] *Id*. at 969-970.
[11] *Id*. at 969-970.
[12] *Id*. at 970 (citing *Dukes*, 131 S. Ct. at 2553, 180 L. Ed. 2d at 392).

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times. And it was undisputed the operations had changed over time, with the use of pentachlorophenol not beginning until 1964, a key point for the court.[13]

The court deemed similarly important the legal standards applicable to the wood treating operations that changed over time. The plaintiffs' own consultant testified that regulatory agencies allowed the release of certain levels of substances and that it would be ''absurd'' to hold a business to a zero emission standard. For the Louisiana Supreme Court, it was clear that a single legal standard could not be applied to a single course of conduct. For instance, class members who owned property affected by emissions in the 1950s would not be able to rely on the same environmental standards invoked by those who owned property affected by emissions in the 1980s.

As for the allegations of industrial releases, the court found the ''issue of breach will thus turn on different conduct, by different defendants, at different times, under different legal standards.''[14] Addressing the testimony, the court noted plaintiffs' expert only estimated the amount of air emissions generated by facility operations for a single year, and conceded the calculations would not be valid for other years. And even while certain samples were taken at residences, not one of the named plaintiffs was shown to have contamination at his or her property. In short, plaintiffs offered no evidence to demonstrate that the issue of breach can be resolved from a common nucleus of operative facts—*i.e.*, the same emissions or conduct by defendants were not shown to touch and concern all members of the class.[15]

Also weighing against certification of the class was the ubiquitous nature of the substances associated with the industrial facilities. Based on the evidence in the record, the court noted, the alleged substances causing the harm could have come from facilities other than those of the defendants: ''[e]vidence that a claim can exist is not evidence that it does exist or that all class members have that claim in common.'' Because plaintiffs were required to tie the alleged contamination to the defendants, and it was impossible on the record to connect the contamination to the specific defendants, it was improper to certify a class because the claims would differ based on which facility emitted the substances.[16]

Again citing *Dukes* extensively, the court held that, to prove commonality, plaintiffs must demonstrate that there is, in fact, a common question, one whose ''truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.''[17] On this point, the court noted that given the multitude of sources of PAHs and dioxins, the substances in question, it was clear that plaintiffs would not be able to offer any significant proof that causation for each class member would be determined by a common nucleus of operative facts.[18]

Surveying the landscape of environmental cases, the Louisiana Supreme Court observed that only mass torts arising from a common cause or disaster are appropriate for class certification and, citing *Dukes*, there must be ''significant'' proof, subject to ''rigorous analysis,'' of a common question—one where the ''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.''[19] Before concluding, the court wrote that because the commonality requirement had not been met, it was impossible for the predominance requirements of Rule 23(b)(3) to be met. And as for the superiority requirement, because of the highly individualized issues involved, certification would be unfair to members of the class who have claims stronger than those of the named plaintiffs. The court also found the plaintiffs failed to prove that litigation could not proceed efficiently under traditional rules of joinder.[20] In short, the Louisiana Supreme Court soundly rejected class certification for these generalized industrial emissions.

Gates v. Rohm and Haas

In *Gates v. Rohm and Haas Co.*, a case involving allegations of property damage caused by emissions of vinylidene chloride in Lake Village, Illinois, the Third Circuit addressed the requirements and considerations for certifying an environmental class action.[21] Although plaintiffs alleged multiple pathways of contamination from numerous chemicals, the putative class included only those with economic injury or exposure—and class certification was limited to a single chemical, vinyl chloride, and a single pathway, via a shallow aquifer into the air, for two separate putative classes: a medical monitoring class and a property damage class.[22]

Before addressing the class certification requirements, the court focused on the evidence presented in support of class certification by an air dispersion expert and by a toxicologist. According to the court, the air dispersion expert developed isopleths lines showing the isopleths concentrations of vinyl chloride for four time periods. The toxicologist estimated the ''average'' amount of exposure for residents over a 25-year period, derived by averaging the concentrations in the isopleths of air impacts. At the class certification hearing, the Third Circuit noted, the toxicologist testified that the hypothetical risk calculations are ''not meant to predict risk for a single individual under any specific scenario'' because of ''individual or personal-variability susceptibility.''[23]

In affirming the district court, which had rejected the medical monitoring class, the Third Circuit noted the plaintiffs failed to present proof they suffered from exposure ''greater than normal background levels.'' The

[13] *Id.* at 970.
[14] *Id.* at 971.
[15] *Id.* at 971.
[16] *Id.* at 972.
[17] *Id.* at 972 (citing *Dukes*, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389-90).
[18] *Id.* at 973.
[19] *Id.* at 975.
[20] After deciding *Price*, the Louisiana Supreme Court reversed a trial court's judgment certifying a class related to a chemical spill from a railroad tank car in the City of New Orleans. Citing both *Price* and *Dukes*, especially the commonality provisions of both, the court noted that the trial court ''failed to take into account undisputed evidence in the record demonstrating that any determination of damages will be dependent upon proof of facts individual to each putative class member.'' *Alexander v. Norfolk So. Corp.*, 82 So. 3d 1235, 1236 (La. 2012). The court noted that, according to the evidence, only individuals with a unique susceptibility to ethyl acrylate would exhibit physical symptoms at the extremely low concentrations involved in the release. *Id.*
[21] *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2001).
[22] *Id.* at 259.
[23] *Id.* at 261.

court declined to accept average exposure, as opposed to the exposure of any actual class member, and held it was inappropriate to use isopleths with a constant value across different times. Stated differently, the court found no common proof of minimum exposure level above which class members were at an increased risk of serious disease.

Without addressing each element of Rule 23(a), the Third Circuit focused on the nature of the common proof of exposure. The trial court held the isopleths could not constitute proof of common exposure above background level. On appeal, the court explained several problems with plaintiffs' approach: the isopleths only showed average daily exposure, not minimum exposure; the analysis used average exposure over very long periods of time when exposure likely varied; and plaintiffs could not show that every class member was exposed above background levels.[24]

For the Third Circuit, in class certification cases, evidence of exposure of actual class members is not a substitute for estimated evidence of hypothetical, composite persons. In other words, the evidence was not ''common'' because it was not shared by all (possibly not even most) individuals in the class. Averages or communitywide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average.[25] For the Third Circuit, the use of averages was improper given the wide variability of factors: levels of vinyl chloride varied within the times in the isopleths; releases ended in certain years; and different persons had different levels of exposures based on biological factors or individual activities over the class period, or their work habit. As a matter of evidence, plaintiffs' experts failed to provide individual average exposures of actual class members. Plaintiffs failed to use a method of proving the proper point where exposure to vinyl chloride presented a significant risk of developing a serious latent disease for *each* class member. Rather, plaintiffs provided a single concentration without accounting for the age of the class members being exposed, the length of exposure, other individualized factors such as medical history, or showing the exposure was so toxic that such individualized factors are irrelevant.[26]

Turning to predominance and superiority under Rule 23(b)(3) for the medical monitoring class claims, the court observed that, even assuming the elements of Rule 23(a) could be met, ''[c]ourts have generally denied certification of medical monitoring classes when individual questions involving causation and damages predominate over (and are more complex than) common issues such as whether defendants released the offending chemical into the environment.''[27]

Finally, in rejecting the Rule 23(b)(3) class for property damage, the Third Circuit affirmed the trial court, which found plaintiffs' evidence left unanswered key questions such as causation of contamination, extent of contamination, fact of damages, and amount of damages. Here the plaintiffs contended varied levels of vinylidene chloride at various times seeped into a shallow aquifer, degraded into vinyl chloride, diffused from the aquifer to the ground above, and evaporated into the air to be carried over the village. Given the potential difference in contamination on the properties, common issues did not predominate. And rejecting a plea for an ''issue only'' certification, the court noted that ''[a] trial on whether the defendants discharged vinlydine chloride into the lagoon that seeped in the shallow aquifer and whether the vinyl chloride evaporated [into] the air from the shallow aquifer is unlikely to substantially aid resolution of the substantial issues on liability and causation.''[28] Accordingly, class certification was denied.

Ginardi v. Frontier Gas Services

In *Ginardi v. Frontier Gas Services*, Judge Wilson of the Eastern District of Arkansas considered certification of a property damage class within a one-mile radius of natural gas compressors, from which defendants allegedly emitted ''toxic pollutants'' and loud noises.[29] Citing *Dukes,* the court held that ''Rule 23 does not set forth a mere pleading standard, but the parties seeking class certification 'must affirmatively demonstrate [their] compliance with the Rule—that is, [they] must be prepared to prove' all the requirements of Rule 23.''[30]

As for numerosity, the court noted there would be more than 1,000 putative plaintiffs who lived around the compressor stations. Without analyzing the issues in detail, and because the defendants ''failed to make a hard run at denying numerosity,'' the court held numerosity was satisfied. Turning to commonality, the court summarized the *Dukes* Court's detailed focus on commonality, relying upon the *Dukes* quote that ''[w]hat is important to class certification 'is not the raising of common 'questions'—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.' ''[31] Dissimilarities within the proposed class are what have the potential to impede the generation of common answers, the court held.[32]

In trying to establish the commonality requirement, the plaintiffs proposed that at least nine questions were common to the proposed class:

> (1) the amount of emissions from the compressor stations; (2) the level of noise caused by compressor stations; (3) the dispersal and effect of the emissions within a one-mile radius of the compressor stations; (4) the effect of noise caused by the compressor stations within a one-mile radius of the compressor stations; (5) whether Defendants have engaged in activity that is ultra-hazardous and not a common usage; (6) whether Defendants have breached the duty of care to persons and property within a one-mile radius of the compressor stations; (7) whether Defendants have committed a trespass on property within a one-mile radius of the compressor stations; (8) whether the compressor stations constitute a nuisance to person and property within a one-mile radius of the compressor stations; and (9) whether defendants have engaged in willful and wanton conduct.[33]

Citing these questions, but not addressing the rationale behind the questions, the court found the plaintiffs ''have chinned the bar in proving commonality and typi-

[24] *Id*. at 265.
[25] *Id*. at 266.
[26] *Id*. at 268.
[27] *Id*. at 270.
[28] *Id*. at 274.
[29] No. 4:11-CV-00420, 2012 BL 98229 (E.D. Ark. Apr. 19, 2012).
[30] *Id*. at *5.
[31] *Id*. at *7.
[32] *Id*.
[33] *Id*. at *8-9.

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cality.''[34] In reaching this holding however, the court agreed with the defendants that individualized issues and proof were presented.[35]

Finding commonality, the court turned to predominance and superiority under Rule 23(b). It was because of predominance, according to the court, not commonality, that the class claims failed. Noting that predominance requires a determination of whether the nature of evidence varies from member to member, the court looked to individual questions. The court noted that while mass tort cases are not categorically excluded from being certified as a class action, the ''individualized issues can become overwhelming in actions involving long-term mass torts (i.e., those which do not arise out of a single incident).''[36] Summarizing toxic tort cases, the court stated that where there is not ''one set of operative facts [that] establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues. [Thus], the district court should properly question the appropriateness of a class action for resolving the controversy.''[37]

After reviewing the arguments of the parties, the court found that ''[p]laintiffs' causes of action would require a detailed look at each plaintiff's individual damages—including the amount of noise heard, the amount of gases present, and any level of contamination in the air, groundwater or soil.''[38] With an abbreviated analysis, the court then found against plaintiffs as to the superiority prong, holding that, because of the individualized issues in the case, a class action was not the most efficient way of settling the controversy. The court concluded, ''[e]ach plaintiff would have to present individual proof of their damages, which essentially defeats any of the efficiency of trying this as a class action.''[39] No certification was warranted for these reasons, the court held.

Henry v. Dow Chemical Co.

Shortly after *Dukes* was issued by the Supreme Court, a Michigan state court addressed the clarified commonality requirement in *Henry v. Dow Chemical Company*, which involved alleged dioxin releases in Midland, Michigan.[40] There the putative class alleged Dow negligently released dioxin, a synthetic chemical potentially hazardous to human health, from its plant in Midland into the Tittabawassee River, which they used. Plaintiffs sought class certification under the Michigan class action statute, which is similar to Rule 23.

The trial court granted class certification and Dow appealed. Prior to the *Dukes* decision however, the Michigan Supreme Court found the circuit court potentially used an evaluative framework that was inconsistent with the court's interpretation of the rule and articulation of the proper analysis for class certification, and remanded to ''clarify its reasoning'' on the other elements and ''reanalyze'' the numerosity, commonality, and superiority prerequisites, if it determined that it had not used the proper standards.[41] Two years after the Michigan Supreme Court's remand in *Henry*, the U.S. Supreme Court released its decision in *Dukes*.

On remand, the trial court in *Henry* noted that, despite the focus in *Dukes* on Rule 23 of the Federal Rules of Civil Procedure, it nonetheless ''has far-reaching implications for certification of class action lawsuits, including the present case.''[42] Indeed, based on the Supreme Court's new framework in *Dukes*, the trial court reversed its earlier decision and determined plaintiffs had failed to provide sufficient information to establish the commonality prerequisite to class certification. The court reasoned that, like the plaintiffs in *Dukes*, plaintiffs in the case failed to establish any ''glue'' to hold their claims together.

For the Saginaw Circuit Court, the only common question was whether Dow released dioxin into the Tittabawassee River floodplain; but, even assuming that Dow negligently did so and that it contaminated the soil on plaintiffs' properties, ''whether and how the individual plaintiffs were injured involves highly individualized factual inquiries regarding issues such as, the level and type of dioxin contamination in the specific properties, the different remediation needs and different states of remediation for different properties, and the fact that some of the properties have been sold.''[43]

Applying *Dukes* to the facts at hand, the *Henry* court found plaintiffs' nuisance claims required similar individualized factual inquiries—''whether plaintiffs have suffered an interference with or loss of use and enjoyment of their property requires an individualized factual inquiry into each plaintiff's use and enjoyment of [his or her] property.''[44] Accordingly, because a common contention capable of classwide resolution was not established, the court held that it was unnecessary to consider the typicality and adequacy requirements and denied plaintiffs' motion for class certification.

Earley v. Village of Crestwood

Earley v. Village of Crestwood addressed class certification in the context of allegedly contaminated groundwater supplied by a muncipality.[45] In a three-page opinion, which did not cite *Dukes*, the court denied a motion for partial class certification, finding that, under Illinois law, the predominance element was not met.[46] Finding prior Illinois precedent directly on point, *Smith v. Illinois*, in which the Illinois Supreme Court denied class certification for a chemical spill from a freight train derailment, the court found this case would degenerate into multiple lawsuits tried on the issues of liability and damages.[47] Just as in *Smith*, the court held, and as the plaintiffs' own experts in the case noted, the issue of proximate causation, and Defendants' ultimate liability, will involve ''highly individual determinations,'' and ''each individual plaintiff will need to estab-

[34] *Id*. at 9.
[35] *Id*.
[36] *Id*. at *13 (citing *Georgine v. Amchem Product*, 83 F.3d 610, 628 (3d Cir 1996)).
[37] *Id*. at *13-*14 (citing *Sterling v. Velsicol Chemical Corp*., 855 F.2d 1188 (6th Cir. 1988)).
[38] *Id*. at *16.
[39] *Id*. at *17.
[40] No. 03-47775 (Saginaw Cnty. Cir. Ct. July 18, 2011).
[41] *Henry v. Dow Chemical Co*., 484 Mich. 483 (2009).
[42] *Henry v. Dow Chem. Co.,* No. 03-47775, slip op. at 3 (Saginaw Cnty. Cir. Ct. July 18, 2011)
[43] *Id*. at 6.
[44] *Id*.
[45] *Earley v. Village of Crestwood*, No. 09CH32969 (Cook Cnty. Cir. Ct. May 14, 2012).
[46] Slip op. at 2.
[47] Slip op. at 3 (*citing Smith v. Illinois*, 233 Ill. 2d. 441, 443 (2006).

lish the amount and type of their damages proximately caused by Defendants.''[48] For the court, damages could ''not be calculated by formula,'' and trials would be ''necessary for each member of the class on the issue of proximate causation and damages.''[49] For this reason, certification was denied.

Cases Granting Certification in Environmental Contamination Cases Since *Dukes*

Environmental contamination cases decided since *Dukes* have granted class certification. But in the main, their analysis is not as detailed as that of the courts denying class certification.[50]

Powell v. Tosh

In *Powell v. Tosh*, the issue was whether the trial court properly certified a class of property owners claiming devaluation from a nearby hog farm.[51] In claiming they suffered from ''recurring intolerable noxious odors,'' plaintiffs sought to certify a class ''within 1.25 mile radius'' of certain separate swine farms.[52]

In considering the class requirements, Judge Russell of the U.S. District Court for the Western District of Kentucky dispensed with numerosity quickly, finding that more than 450 persons would be affected. Judge Russell found that ''a geographical dispersion among the putative class members will usually support a finding of numerosity because such a finding supports the proposition that joinder is impracticable,'' and it was unlikely the plaintiffs, alone, would have filed the lawsuit.[53]

After finding numerosity, the court turned to commonality, focusing on *Dukes* explicitly. Citing *Dukes* that ''[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' '' the court held the claims of the plaintiffs must depend on a common contention—that is ''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.''[54]

In finding commonality, the court noted plaintiffs asserted common issues of fact including: ''Do the actions of the Defendants (1) create a temporary nuisance; (2) create a permanent nuisance; (3) constitute a trespass on another's property; (4) constitute a negligent breach of duty owed another, to the injury of the other; (5) constitute negligence per se; (6) constitute a civil conspiracy; (7) done in a manner than constitutes wanton, intentional or grossly negligent behavior, and (8) warrant injunctive relief.''[55]

Critical to the district court was an expert report submitted on behalf of the plaintiffs that used meteorological data, chemical data related to particular chemicals associated with hog farm emissions, and sensory data gathered by independent observers, which concluded the alleged effects from the farm extended the class boundary to 1.25 miles. Distinguishing *Dukes*, in which there was ''no glue holding the reasons for those employment decisions together,'' the court found the plaintiffs' complaint was aimed at a ''single hog barn'' causing the same injury.[56] In addition, in *Dukes*, the plaintiffs only engaged in a ''social framework'' analysis to support their claims, but in *Powell* the plaintiffs relied on expert testimony using data on wind speed and wind direction to confirm odor plumes. As for the defendant's claims that the impacts differed by individual property owner, the court held that ''while the frequency and intensity of the effects suffered by those within the proposed class may differ, there are common questions of law and fact capable of class-wide resolution in regards to liability.''[57]

Interestingly, the court rejected one of the proposed classes around another hog firm, finding that while the expert presented general evidence, the evidence was insufficient, because extrapolating the odor plumes from one specific farm could not be generalized to other farms. In addressing commonality, one must grapple with the commonality conclusion in *Powell*, where a single odor emanating from a single hog farm was at issue, which differs from cases such as *Price* or *Gates* where multiple constituents of concern and variable exposures were presented.

After the district court found typicality and adequacy of representation, the court turned to the elements of Rule 23(b). As for plaintiffs' Rule 23(b)(2) class, the court found, citing *Dukes*, that because their claims sought both compensatory and punitive damages, there could be no class under Rule 23(b)(2). The court then tackled whether the class met the requirements of Rule 23(b)(3), predominance and superiority. Disagreeing with defendant's view that causation could not be determined on a classwide basis, the district court found that expert testimony established that one hog farm was the source of the alleged ''recurring intolerable noxious odor'' and it is ''present throughout the entire class area.''[58] With this finding as to unity of source, the court certified the class.[59]

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[48] *Id.*

[49] *Id.*

[50] Without citing *Dukes*, in an unpublished opinion by a Kentucky state court, the Kentucky Court of Appeals concluded that it was unable to determine if class certification was proper in a case involving drinking water contamination resulting from fuel spills along the Kentucky River. *Childers Oil Co. v. Reynolds*, No. 2011-CA-001352 (Ky. Ct. App. May 25, 2012). While finding the trial court did not abuse its discretion in finding commonality and the other fundamental elements of class certification were met, the court of appeals held that it was unable to determine whether predominance was met and remanded for additional facts. *Id.* at *28.

[51] 280 F.R.D. 296 (W.D. Ky. 2012).

[52] *Id.* at *3.

[53] *Id.* at *17-*18.

[54] *Id.* at *22-*23.

[55] *Id.* at *23.

[56] *Id.* at *24.

[57] *Id.* at *27.

[58] *Id.* at *39.

[59] In *Dickens v. Zeon G.P. LLC*, No. 3:06-CV-363, 2011 BL 232408 (W.D. Ky. Sept. 12, 2011), the court certified a settlement class involving allegations from chemical and utility plants near the ''Rubbertown'' area of Louisville. To be sure, certification of a settlement class where all parties are in agreement may not be the surest precedent for a contested class decision. Notably, while concluding ''environmental impact from the odors, particulate and air contamination has affected Plaintiffs' properties in similar ways under the law,'' the court expressed skepticism over the merits of the case, although it ultimately concluded the court was ''satisfied'' the settlement class met the requirements of Rule 23(b)(3). Because it was a negotiated settlement, the court found that it

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Jackson v. Unocal

Four months after *Dukes* was issued, the Colorado Supreme Court took up an asbestos contamination case, *Jackson v. Unocal Corp*.[60] At issue in Unocal was whether two classes should be certified relating to the migration to residential properties of asbestos used in a wrap being removed from an underground pipeline: (1) an Easement Property Class that included the owners of the pipeline easement; and (2) a Contiguous Property Class that included owners of properties adjacent to the easement.

The trial court did not resolve the expert dispute over air dispersion of asbestos fibers from the easement, which may conflict with a certifying court's obligations, but then concluded that common issues predominated. In reversing the trial court, the Colorado Court of Appeals held it was essential to resolve the expert disputes as part of the class certification decision, regardless of any overlap with the merits of the class claims.

In reviewing the court of appeals' decision, the Colorado Supreme Court considered whether the class proponent was required to establish the requirements by a ''preponderance of the evidence.''[61] In addressing this issue, the *Unocal* court noted that the lower court considered 146 pages of briefs with 54 exhibits, affidavits from seven experts, portions of deposition transcripts from 12 witnesses, wind and sampling data, and numerous other documents. Unocal argued that any lesser standard would leave trial courts with virtually unfettered discretion, in essence precluding appellate review of the trial court's decision to certify a class. In rejecting this rule, which the court admitted was the recent trend among the federal courts, the Colorado Supreme Court held that class certification decisions were at the ''significant discretion'' of the trial court. For the court, ''[l]eaving class certification to the discretion of the trial court without requiring a specific burden of proof squares with the pragmatic and flexible nature of the class certification decision, recognizes the trial court's ongoing obligation to assess the certification decision in light of new evidence, and preserves the trial court's case management discretion.''[62]

That said, and citing *Dukes*, the court moved to the second issue, whether a court can consider the merits in considering the class certification requirements. Noting the Supreme Court found this ''cannot be helped,'' the Colorado Supreme Court narrowed the holding in *Dukes* so that in considering a class certification decision, a trial court may consider factual and legal issues that overlap with the merits, but only to the extent necessary to satisfy itself that the class certification requirements have been met.[63]

Working from this framework, the *Unocal* court turned to the key issue—whether a trial court is required to resolve expert disputes as part of the class certification decision. Finding that while a trial court may not uncritically accept contested expert testimony offered in support of class certification, the court held that at the class certification stage a trial court ''need not'' determine which expert will prevail for that is ''simply a merits decision best left for the jury.''[64] It is unnecessary, the court noted, for the trial court to declare a ''proverbial winner of battling experts'' at the class certification stage.[65] Nor, according to the *Unocal* court, does a trial court have to determine whether the expert testimony will be admissible at trial. While acknowledging its holding was contrary to most federal law, the *Unocal* court held that, when analyzing expert testimony for class certification, the issue for a trial court is whether the expert testimony establishes class certification ''to its satisfaction.''[66] In light of this departure from the federal standard, the value of this precedent is questionable outside of Colorado.

Framing the proof and evidentiary requirements for class certification, the court considered whether the predominance requirement had been met.[67] It first questioned whether the class had been defined sufficiently. For the court, when a plaintiff defines a class in geographic terms, one key question is whether there is a ''logical reason'' or ''evidentiary basis'' for drawing class boundaries at a particular location. Without weighing the evidence, the court noted that plaintiffs provided testimony from an air quality scientist, but Unocal also presented testimony that the asbestos was not friable and could not be transported by air. In reversing the court of appeals, the Colorado Supreme Court held there was no need for the trial court to resolve the expert dispute by preponderance of the evidence. The court noted that the admissibility of the air emissions data could be addressed in a pre-trial hearing.

Justice Eid, joined by Justice Rice, issued a blunt dissent, finding the rule put forth by the majority to be unworkable. The problem, they wrote, was the majority's confusion of the trial court's discretion with the plaintiffs' burden of proof. As the dissent noted, ''[d]iscretion is what a trial court exercises in choosing from available options; it is, by definition, a dynamic concept. A burden of proof, by contrast, is a static, legal concept that is applicable to all cases in a particular category.''[68] Under the rule put forth by the majority, the dissent maintained, class certification decisions would essentially be unreviewable in Colorado—the only person who needs to be ''satisfied'' is the trial judge. Put simply, there was no objective standard of proof that a class proponent must produce. As such, there is nothing for an appellate court to review—''if the trial court is 'satisfied' when it enters an order certifying the class, the amount of proof produced to meet the trial court's discretion is, by definition, sufficient.''[69] Citing *Dukes*, the dissent noted that it was imperative for a trial court to resolve the evidentiary issues—without those being resolved, there could be no meaningful analysis of class certification.

Johnson v. Walsh

In *Johnson v. Walsh*, the Common Pleas Court of Philadelphia County addressed whether class certification should be granted in the context of property owners claiming their developers and broker failed to dis-

had a ''much easier time finding commonality for purposes of the settlement.'' *Id.* at *9.

[60] 262 P.3d 874 (Colo. 2011).

[61] *Id*. at 881.

[62] *Id*. at 882.

[63] *Id*. at 885.

[64] *Id*. at 885-886.

[65] *Id*. at 886.

[66] *Id*. at 886.

[67] *Id*. at 878.

[68] *Id*. at 891.

[69] *Id*. at 891.

close elevated levels of lead and arsenic in soils at the property.[70] In considering the elements of Pennsylvania's class action statute, which differed from Rule 23, the court noted that it ''must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of witnesses, and the substantive merits of defenses raised.''[71] Speaking of the burden of proof for the plaintiff, the court held that ''since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden.''[72]

After simply identifying the plaintiffs' evidence—a geologist's opinion that all the properties were ''similarly contaminated with arsenic and lead at levels above'' the regulatory guidelines, an economist's testimony the homes will suffer a ''loss of value,'' and the need to disclose the contamination to potential buyers when they sell the property—the court skipped through the class certification requirements. In a very thinly analyzed decision, the court observed that ''[p]laintiffs seek to redress a common legal grievance on behalf of the similarly situated property owners.''[73] With that finding, the class was certified. In its decision, the court did not mention *Dukes*, nor does this decision appear to comport with the rigorous analysis required to certify a class.

Take-Aways

While bright-line rules for class certification remain elusive, the following conclusions seem clear from the environmental class action cases decided since *Dukes*:

1. Environmental Contamination Cases Generally Not Amenable to Certification

As recognized by the United States District Court for the Southern District of New York, ''the overwhelming majority of state and federal courts have denied certification of environmental mass tort classes, even in single source cases,'' and even where only property damage claims and no personal injury claims were present.[74] The cases decided since *Dukes* further this trend.[75]

Doubtless a factual record might be developed in an environmental case that warrants class certification. However, class certification in the environmental context remains the exception not the rule, *e.g.*, a discrete mass disaster, leading to a one-time release of a regulated substance, at concentrations presenting established harm, for a defined spatial area, and a discrete period of time—all supported by *Daubert*-compliant evidence. By comparison, a record replete with facts such as decades of general emissions, perhaps legally permitted, or from numerous sources, or over a number of years during which regulatory and equipment changes occur, or over a diffuse area—and without evidence that any release or exposure affects the entire class—is unlikely to warrant class certification.

The environmental cases issued since *Dukes* fall well within this general pattern. As in *Price*, purported class actions that rely on allegations of emissions from industrial facilities, which have operated for years, with numerous changes in operation and varying regulatory requirements, are unlikely to be certified as a class.

*2. Post-*Dukes*, Commonality and Predominance Are Key Considerations*

The commonality requirement in class actions remains a significant hurdle in environmental cases, no doubt heightened as a result of *Dukes*. Some courts, like the Louisiana Supreme Court in *Price* or the Third Circuit in *Rohm and Haas* faithfully followed the *Dukes* rule on commonality. The point in *Dukes* was that commonality cannot be met just because a plaintiff says that a potential group has issues in common. Rather, as made clear by the environmental cases, courts are not focusing intensely on the mere existence of common proof, but rather the quality and specificity of factual and expert evidence geared towards a determination that will resolve an issue that is central to the validity of each one of the plaintiffs' claims in one stroke.

While some courts fail to appreciate the importance of the *Dukes* commonality rule, they still can reach a legally ''correct'' result. For example, *Frontier Gas* fails to give voice to the Supreme Court's analysis of commonality in *Dukes*, but the court nevertheless reached a correct decision and rejected class certification. *Frontier Gas* never explained why the one-mile radius made any sense as a matter of commonality—there was no discussion of the distance, and why one-mile was a better distance than 5 miles. Unlike what appears to be the leading doctrinal approach, the *Frontier Gas* court rejected class certification under a predominance prong when it should have denied class certification as a commonality failure. The decision does reflect however that predominance, like commonality, should not be given short shrift by any court addressing class certification after *Dukes*.

As might be expected, some courts just skim over commonality and its legal cousin, predominance. No better example of this is the *Walsh* decision, in which the court certified the class for no other reason than an allegation that ''common issues'' existed. The lack of detailed consideration reflects an era of legal analysis of class certification now not considered the standard and lacking in rigorous analysis.

3. In Pondering Certification, Courts Engage in Fact-by-Fact Consideration of Merits

Disavowing an allegedly contrary suggestion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1975), the case which suggests that the merits cannot be considered in evaluating class certification, *Dukes* emphasized that

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[70] *Johnson v. Walsh*, No. 2012 (C.P. of Phila. Cnty. Dec. 2, 2011).

[71] *Id.* at *9-10.

[72] *Id.* at *10.

[73] *Id.* at *14.

[74] *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 347-48 (S.D.N.Y. 2002).

[75] Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L. J. 187 (1997). *See, e.g., LaBauve v. Olin Corp.*, 231 F.R.D. 632 (S.D. Ala. 2005) (class certification denied for property devaluation resulting from mercury exposure); *Church v. Gen. Elec. Co.*, 138 F. Supp. 2d 169 (D. Mass. 2001) (declining to certify class of landowners alleging nuisance and trespass as a result of PCB contamination); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (''[w]hile there are undoubtedly common issues of law and fact, such as whether [defendant] released TCE into the groundwater, the individual issues of causation and damage so overshadow those in numerosity and complexity to render a class action unhelpful.'').

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district courts are required to resolve any ''merits question(s)'' bearing on class certification, even if the plaintiffs ''will surely have to prove [those issues] again at trial in order to make out their case on the merits.''[76]

While the rule is still evolving, the days of keeping the elements of class certification separate from an analysis of the merits largely appears to be an outdated concept. For virtually every court considering class actions today, the idea that any aspect of the merits cannot be considered is now history.[77] No better example of this concept is the Third Circuit's decision in *Rohm and Haas*. There the court engaged in a detailed, thoughtful analysis of the proof establishing commonality—or rather, the improper proof of commonality. For the Louisiana Supreme Court in *Price*, it was the evidence on the varying factual issues, combined with the increased rigor mandated by *Dukes*, which dictated a denial of class certification. For the Western District of Kentucky in *Tosh*, the evidence tying the hog odors to a single defendant was critical in certifying the class, even with the increased focus on commonality mandated by *Dukes*. In other words, considering the merits is now part of the class action calculus.

Two of the environmental class action cases issued since *Dukes* take a more traditional path in certifying the class. Both *Unocal* and *Walsh* represent a minority view of class certification involving environmental contamination. Their refusal to consider the merits in certifying an environmental class action represents what appears to be an outdated legal view of class certification, clearly contrary to the holding in *Dukes*.

The error evident in *Unocal* and *Walsh* may soon be rectified. On June 25, 2012, the Supreme Court granted certiorari in *Comcast v. Behrend* to specifically address whether a trial court is required to resolve expert disputes as part of the class certification process.[78] Ultimately, if the court decides that a *Daubert*-type analysis is required to evaluate expert testimony establishing the commonality or predominance requirements, courts considering environmental disputes may find even fewer putative classes being certified.

Conclusion

The legacy of *Dukes* may go well beyond its increased focus on commonality and its unstated requirement to resolve fundamental evidentiary issues at the certification stage.

The true bottom line in *Dukes* is the required *rigorous analysis* for each element of class certification. In environmental cases, the rule appears to be the more rigorous the analysis of the class certification requirements, the fewer environmental class actions which ultimately are certified.

And given the gatekeeper role that a trial court must play after both *Daubert* and *Dukes*, rigorous analysis is a good thing for the legal system.

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[76] 131 S. Ct. at 2552 n.6, 180 L. Ed. 2d at 391 n.6.

[77] Although the merits may be considered in the class certification process, this practice should not be read to postpone consideration of class issues until the merits are fully developed in the record, nor to subvert the fairly common practice of utilizing distinct procedures for class and merits discovery.

[78] *Comcast Corp. v. Behrend*, No. 11-864, 2012 BL 157527 (U.S. June 25, 2012).