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Dukes May Have Doomed Toxic Tort Class Certification

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It is increasingly difficult to envision a class of toxic tort plaintiffs that can meet the stringent standards for class certification set by the U.S. Supreme Court in Wal-Mart Stores Inc. v. Dukes. Both state and federal courts have followed the Supreme Court's lead and raised the bar for commonality, evidence of injury and causation and expert testimony in support of class certification. The implications for toxic tort class certification have been profound.

In Dukes, the Supreme Court explained that plaintiffs must affirmatively demonstrate that they meet the requirements for class action certification set out in Federal Rule of Civil Procedure 23.[1] The primary stumbling block in Dukes, and the focus of the court's decision, is Rule 23(a)'s commonality requirement. The Supreme Court held that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[2] Plaintiffs' claims must depend on a "common contention ... 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. ... [What is required is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."[3]

Citing this language, both federal and state courts have refused to certify classes in toxic tort cases. In so doing, certain trends have emerged. First, courts are reluctant to certify classes in toxic tort cases due to the individualized nature of exposure, causation and damages. Second, embracing the Supreme Court's mandate to rigorously analyze the facts supporting certification, courts are rejecting unsubstantiated assumptions or anecdotal evidence of injury or causation at the class certification stage. Third, courts are increasingly willing to scrutinize the substance of expert testimony at the class certification stage.

Individual Exposure, Individual Causation and Individual Damages

As one post-Dukes court observed, "Individualized issues can become overwhelming in actions involving long-term mass torts."[4] Indeed, it is difficult for plaintiffs to establish that purportedly common contentions are "capable of classwide resolution" in toxic tort litigation because such claims almost always raise highly individualized issues of exposure, causation and damages.

Most recently, in Georgia-Pacific Consumer Products LP v. Ratner, the Georgia Supreme Court decertified a class of plaintiffs alleging property damages arising from allegations of hydrogen sulfide gas releases from sludge fields.[5] Relying heavily on Dukes, the court held that the plaintiffs had failed to provide sufficient evidence of commonality to proceed as a class. While the plaintiffs had articulated a "common contention ... that their properties were contaminated with hydrogen sulfide gas released from the sludge fields," they failed to prove that this contention is "'capable of classwide resolution.'"[6] In particular, the Ratner Court found that commonality was lacking because there was no record evidence "by which plaintiffs might be able to prove on a classwide basis that the entire area by which the class was defined, in fact, was contaminated with hydrogen sulfide gas from the sludge fields."[7] The court specifically noted plaintiffs' lack of fate and transport evidence for hydrogen sulfide, observing that there was "no scientific evidence of the amounts of gas released from the sludge fields, no evidence of the rate of release, no evidence of the extent to which the amounts released and rates of release varied over time and no evidence of exactly how the gas would be expected to move through the air upon its release."[8]

Applying almost identical logic, the Eastern District of Arkansas rejected a proposed class alleging injury from a natural gas compressor facility in Ginardi v. Frontier Gas Services. That court explained that plaintiffs' "causes of action would require a detailed look at each plaintiffs' individualized damages — including ... the amount of gases present, and any level of contamination in the air, groundwater or soil."[9] "Each class member would be required to present highly individualized evidence regarding damages and causation. This makes full resolution of the entire class difficult."[10]

In Price v. Martin, the Louisiana Supreme Court found that the individual issues associated with a liability determination precluded class certification. In that case, the plaintiffs attempted to certify a class alleging property damage "caused from 1944 to the present by the emission of toxic chemicals from operations at the wood treating facility."[11] The plaintiffs argued the commonality requirement was satisfied by the existence of a single factual issue common to all defendants: "whether defendants' off-site emissions caused property damage to the residences in the area surrounding the plant."[12]

The court rejected this argument and held that plaintiffs were required to prove not only that emissions occurred, but "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."[13] Reviewing the factual record, the court observed that the facility had three successive owners during the relevant time period (i.e., 1944 to the present). Those owners had "engaged in independent and varying operations throughout the approximately 66-year period of emissions."[14] And, "throughout the years, the legal standards applying to the operations of the wood-treating facility ha[d] changed."[15] Given these facts, the court ruled that "[t]he issue of breach will thus turn on different conduct, by different defendants, at different times, under different legal standards."[16] Consequently, the issue of breach was not amenable to classwide resolution because "the same emissions or conduct by defendants were not shown to touch and concern all members of the class."[17]

One notable case bucking this trend is Powell v. Tosh. In that case, the district court confronted a purported class of property owners claiming that their properties were devalued as a result of recurring noxious odors from the Ron Davis Hog Barn.[18] Distinguishing Dukes, the court observed that plaintiffs have "assert[ed] a common contention that the operation of the [hog barn] has caused noxious odors and decreased property values."[19] By contrast, "In Dukes, the potential class members sought to sue about millions of employment decisions at once. There, there was no glue holding the reasons for those employment decisions together. Here, the potential plaintiffs assert that the defendants' course of

conduct at a single hog barn caused them the same injury."[20] While the court recognized that "the frequency and intensity of the effects" of the odors may differ among the proposed class, it concluded that there are "common questions of law and fact capable of classwide resolution in regards to liability."[21] The Powell Court's decision to disregard the individualized exposure and individualized damages claimed by members of the purported class appears to be a departure from the holdings of Dukes, Ratner and Ginardi.

Unsubstantiated Assumptions and Anecdotal Evidence are Insufficient

In Dukes, the Supreme Court established that "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 law or fact, etc."[22] Applying this holding, the Dukes Court rejected the plaintiffs' expert testimony as well as anecdotal evidence of injury. Lower courts are following this lead and applying more "rigorous analysis" to determine if plaintiffs have established facts sufficient to satisfy the prerequisites of Rule 23.

In Ratner, the Georgia Supreme Court applied these standards to the plaintiffs' anecdotal evidence of injury and exposure to hydrogen sulfide gas. The record contained evidence of complaints made to defendants about the "corrosion of air-conditioning units in the vicinity of the mill."[23] However, the court found that these complaints either (1) did not originate within the area defining the class or (2) originated in a small, compact portion of the class area.[24] Such limited evidence failed to show "that the class area as a whole was contaminated by hydrogen sulfide gas."[25] The Ratner Court also rejected the testimony of air-conditioning technicians who "observed corrosion in a number of air-conditioning units" near the mill, calling the technicians' testimony that the observed corrosion was the result of hydrogen sulfide exposure "nothing more than conjecture."[26] Lastly, the court rejected evidence from the named plaintiffs about noxious odors at their homes, finding that it failed to show that the class area as a whole was exposed to hydrogen sulfide gas. The court ruled that "this anecdotal evidence is not enough to satisfy a rigorous analysis with respect to the commonality of the particular class that the trial court certified."[27]

Similarly, in Parko v. Shell Oil Co., the Seventh Circuit reversed the U.S. District Court for the Southern District of Illinois' certification of a class of property owners alleging that an oil refinery had leaked benzene and other contaminants into the groundwater under the class members' homes, thereby diminishing their property value.[28] The Seventh Circuit held that class counsel's "mere assertion ... that common issues predominate is not enough."[29] In so holding, the Seventh Circuit was particularly critical of the district court's reliance on plaintiffs' unsubstantiated assumptions on injury and damage:

[The lower court] thought it was enough at this stage that the plaintiffs intend to rely on common evidence and a single methodology to prove both injury and damage. ... But if intentions (hopes, in other words) are enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window. Nothing is simpler than to make an unsubstantiated allegation. ... The judge should have investigated the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments, and to that end should have taken evidence.[30]

The Seventh Circuit reversed the certification order and ordered the district court to engage those evidentiary issues to determine whether to certify a class.[31]

Courts Will Scrutinize the Substance of Expert Testimony

Even where plaintiffs attempt to support their allegations of commonality with expert testimony, courts are scrutinizing the substance of that testimony post-Dukes to determine whether it supports class certification.

In Parko, plaintiffs asserted that benzene contamination of groundwater beneath plaintiffs' properties was a common cause for decreased property values.[32] In support of this contention, plaintiffs' expert — a hydrogeologist — proposed to "measure contamination by the benzene levels in the groundwater beneath the class members' property."[33] The Seventh Circuit found this proposed expert testimony unconvincing, explaining that plaintiffs' water supply came from an uncontaminated aquifer and not from the groundwater would be analyzed by the expert.[34] The Seventh Circuit held that there was no evidence that groundwater contamination — even if plaintiffs' hydrogeology testimony was taken at face value — had caused a decline in real property value.[35] The court then observed that the lower court had failed to grapple with this question in erroneously certifying the class.

In Powell, plaintiffs relied on an expert to establish that plaintiffs in the vicinity of the Ron Davis Hog Barns suffered from common injuries from a single source.[36] The expert relied upon meteorlogical data, chemical data related to the specific hog barn, and sensory data gathered by independent observers to measure the presence of odors in the vicinity of the barn.[37] The report "use[d] wind speed and wind direction data to indicate how the odor plumes disperse from their source."[38] While the report was subject to debate, the court concluded that it was "sufficient to meet the commonality requirement."[39]

The court, however, refused to accept the same expert's conclusion that the class could include plaintiffs who were in the vicinity of other hog barns. The court found that the expert had not conducted the same scientific studies with respect to the other barns.[40] Instead, he had merely extrapolated his data based on similarities in the weather patterns at the Ron Davis Hog Barn and other barns.[41] The court found that the expert had "done nothing to verify that what appears to be similar weather results in similar scent conditions" at all of the barns.[42] Consequently, this extrapolated evidence was "insufficient to show that all potential class members ... in the proposed class have suffered the same injury."[43]

Conclusion

The heightened focus on commonality and the other Rule 23 prerequisites post-Dukes has been a tremendous hurdle for toxic tort class action plaintiffs, and rightly so. Courts faithfully applying the Dukes decision have rejected classes based on the individual nature of exposure, causation and damages, the failure of plaintiffs to bear their burden to provide evidence of commonality and the insufficiency of expert testimony. These same individuality and proof issues should arise in most, if not all, toxic tort cases. There is no question that courts in the future will have to grapple with increasingly nuanced certification questions, but the standards set by Dukes are stringent enough that class treatment of toxic tort plaintiffs should be the isolated exception, and not the rule.

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[1] 131 S.Ct. 2541 (2011).

[2] Id. at 2551.

[3] Id. (emphasis added).

[4] Ginardi v. Frontier Gas Services, No. 4:11-CV-00420, 2012 WL 1377052 (E.D. Ark. Apr. 19, 2012).

[5] No. S13G1723, 2014 WL 3396519 (Ga. 2014).

[6] Id. at *3.

[7] Id.

[8] Id.

[9] Ginardi, 2012 WL 1377052, at *5.

[10] Id.

[11] 79 So.3d 960, 969 (La. 2011).

[12] Id.

[13] Id. at 970.

[14] Id.

[15] Id.

[16] Id. at 971.

[17] Id. (emphasis added).

[18] 280 F.R.D. 296 (W.D. Ky. Mar. 2, 2012)

[19] Id. at 306.

[20] Id. (emphasis added).

[21] Id.

[22] 131 S.Ct. at 2551.

[23] Ratner, 2014 WL 3396519, *3.

[24] Id.

[25] Id. (emphasis added).

[26] Id.

[27] Id.

[28] 739 F.3d 1083, 1083-86 (7th Cir. 2014).

[29] Id. at 1085.

[30] Id. at 1086.

[31] Id. at 1087.

[32] Parko, 739 F.3d at 1086.

[33] Id.

[34] Id.

[35] Id.

[36] 280 F.R.D. at 305.

[37] Id.

[38] Id. at 306.

[39] Id.

[40] Id. at 307.

[41] Id.

[42] Id.

[43] Id.
