

Environmental Law

No Class: Tougher Certification Standards In Environmental Mass-Tort Cases

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The United States Supreme Court opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 U.S. 2541 (2011), significantly heightened the standard for putative class action plaintiffs to meet the commonality element of class certification. Although *Wal-Mart* was an employment discrimination case, two recent opinions suggest that its exacting standards will be applied in environmental mass-tort matters as well. Both opinions, relying at least in part on the heightened certification standards articulated in *Wal-Mart*, focused on deficiencies in the commonality element to deny certification.

Rule 23(a)(2) of the Federal Rules of Civil Procedure requires class representatives to show that their claims share a common question of law or fact with the members of the proposed class whom they seek to represent. Prior to the decision in *Wal-Mart*, courts typically treated the Rule 23(a)(2) commonality requirement as a low hurdle that could be overcome

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with a single common question of law or fact among the members of the proposed class. In environmental matters, for example, this standard could be met by showing the existence of such common questions as whether the defendant emitted contaminants from its facility, causing damages, or whether the defendant violated a particular statute.

In *Wal-Mart*, the Court increased this burden significantly by holding that:

Commonality 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.

Wal-Mart, thus, requires that class members not only share a significant common question, but also that the common question be capable of class-wide

resolution.

Henry, et al. v. Dow Chemical Co., No. 03-47775-NZ, Saginaw County Circuit Court, Michigan (July 18, 2011), was one of the first cases to apply this heightened Rule 23(a)(2) commonality requirement. The court in *Henry* considered certification of a class of more than 2,000 property owners claiming that dioxin contamination had damaged the value of their properties. In 2005, the court found that the plaintiffs had satisfied Michigan's certification requirements, including Michigan's equivalent of the Rule 23(a)(2) commonality requirement, and certified the class. However, on remand on a different issue, the court decided to reconsider its commonality ruling in light of *Wal-Mart*.

Relying on *Wal-Mart*, the court reversed its initial decision and denied certification, based on the plaintiffs' "failure to establish the commonality prerequisite," citing "the absence of a 'glue' to hold all of the plaintiffs' claims together." The court held that, even assuming the defendant had contaminated the plaintiffs' properties, the nature of individual plaintiffs' injuries involved "highly individualized factual inquiries" for each property, including levels of contamination, the different remediation requirements and different stages of remediation, and the fact that some of the properties had been sold.

The court also extended this reasoning to the plaintiffs' nuisance claims, finding that these also required an "individualized factual inquiry" into whether each plaintiff suffered an interference with the use and enjoyment of his or her prop-

erty. In light of the individualized factual inquiries, the court ruled that the plaintiffs could not demonstrate the existence of a “common contention that is capable of class-wide resolution.”

In addition to meeting the prerequisites of Rule 23(a), a prospective class must also qualify under one of the categories of Rule 23(b), which include their own requirements with respect to commonality. Rule 23(b)(2) applies to classes seeking injunctive or declaratory relief and requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate *respecting the class as a whole*.”

Because all Rule 23(b)(2) class members will be bound by a single judgment, such a class must be cohesive and share a strong commonality of interests. *Wal-Mart*, 131 U.S. at 2558. Predominance is a similar concept to commonality under Rule 23(a)(2) and is required for classes certified under Rule 23(b)(3). The predominance requirement is satisfied if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.”

In *Gates v. Rohm & Haas Co.*, 2011 WL 3715817 (3d Cir. Aug. 25, 2011), the plaintiffs alleged that vinylidene chloride contained in wastewater discharged by the defendants degraded into vinyl chloride that later evaporated and drifted over the town over the course of several years. The plaintiffs sought certification under Rule 23(b)(2) or 23(b)(3) of a medical monitoring class consisting of present and former town residents who were exposed to vinyl

chloride but not diagnosed with injuries. The United States Court of Appeals for the Third Circuit, relying in part on *Wal-Mart*, upheld the district court’s denial of class certification.

In denying certification, the district court had found that the medical monitoring class lacked the cohesiveness necessary to certify a class under Rule 23(b)(2), because individual issues predominated over common issues with respect to at least three elements of the medical monitoring claim: (1) proof of exposure to vinyl chloride greater than background levels; (2) proof of a significantly increased risk of contracting a latent disease; and (3) proof that a medical monitoring regime was necessary.

For example, with respect to exposure, the court found statistical modeling to estimate the dispersion of vinyl chloride over the town to be insufficient to reflect the exposure of any actual class member, thus rendering it unsuitable as common proof. According to the court, the model does “not reflect that different persons may have different levels of exposure based on biological factors or individual activities over the class period.” The court further held that “[t]he evidence here is not ‘common’ because it is not shared by all (possibly even most) individuals in the class.”

The court of appeals also affirmed the district court’s rejection of the plaintiffs’ claims that they could prove the need for medical monitoring on a class-wide basis, holding that medical necessity could not be proven “without further individual proceedings to consider class members’ individual characteristics and medical histories and to weigh the benefits and safety

of a monitoring program.” As a result, the plaintiffs could not demonstrate the cohesiveness required for certification.

In affirming the denial of certification, the court applied *Wal-Mart*’s focus on the importance of cohesiveness in evaluating a Rule 23(b)(2) class, to the plaintiffs’ proposed medical monitoring class. The court noted *Wal-Mart*’s clarification that “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class,” and further highlighted the importance of cohesiveness since “all class members will be bound by a single judgment.” In applying these principles to the plaintiffs’ proposed medical-monitoring class, the court in *Gates* found that questions of causation, exposure and medical necessity required consideration of plaintiffs’ individual characteristics and individual proof, which would prevent any single judgment from providing relief to all members of the proposed class. The “common” proof put forth by the plaintiffs failed to account for such individual characteristics and, thus, failed to satisfy *Wal-Mart*’s cohesiveness requirement.

As the above cases demonstrate, the Supreme Court’s decision in *Wal-Mart* raises the bar for class certification in environmental mass tort cases. The decision in *Henry* calls into question whether a property-damage class can ever be certified where the basis for the claim is dissemination of hazardous substances over a large number of properties. Similarly, the decision in *Gates* suggests that certification of medical monitoring classes based on widespread exposure to hazardous substances will be much more difficult in the post-*Wal-Mart* world. ■