

State Supreme Court Applies Lessons of *Dukes* to Toxic Tort Class Action

December 14, 2011 by [Sean Wajert](#)

Louisiana's Supreme Court last week reversed the certification of a class action brought by property owners over the alleged release of contaminants from a wood-treating site. See [Price, et al. v. Martin, et al.](#), No. 2011-C-0853 (La. 2011). What should catch readers' eyes is the court's reliance on the U.S. Supreme Court's [Wal-Mart v. Dukes](#) decision in this mass tort case. We have been following the [lower courts' treatment](#) of that decision, and this case represents a sensible application of the Court's commonality analysis.

Several individuals residing in the vicinity of the Dura-Wood Treating Company filed a proposed class action on behalf of persons who allegedly suffered damages as a result of operations at the wood-treating facility. The petition alleged that the Dura-Wood facility was primarily engaged in the production of creosote-treated railroad ties. Plaintiffs alleged that various environmentally unsound practices caused a significant amount of hazardous and toxic chemicals to be released into the environment, including the air, soil, and water, of the communities in which plaintiffs resided. For example, according to the petition, from 1940 to mid-1950, significant quantities of creosote sludge were deposited into area canals and ponds. According to plaintiffs, the allegedly negligent releases increased their risk of disease, caused property damage, and diminished property values. Plaintiffs also alleged that defendants' activities constituted a nuisance.

Plaintiffs filed a Motion for Class Certification, asserting that more than 3,000 persons, firms, and entities had been damaged by defendants' conduct and that the issues common to the class -- generally liability issues -- predominated over individual issues. The trial court granted plaintiffs' motion, certifying a class defined as "property owners who owned property within the class area at the time the property was damaged during the years of 1944 through the present." The court of appeals affirmed and the state supreme court granted cert.

The court began by noting that the class 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 law or fact, etc. citing *Dukes*, 131 S.Ct. at 2551. That a class can be decertified or later amended does not excuse a failure to take a rigorous look at prerequisites. Taking that careful look, the supreme court found that lower court erred in ruling that the commonality prerequisite was met and, further, in determining that the requirements that common issues predominate over individual issues and that the class device be superior were also satisfied.

The requirement that there be questions of law or fact common to the class (in La. C.C.P. art. 591(A)(2) and in federal Rule 23(a)) is in language that is "easy to misread" since any competently crafted class complaint literally raises common questions. *Dukes*, 131 S.Ct. at 2551, quoting [Nagareda](#), Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-32 (2009). The mere existence of common questions, however, will 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 class-wide 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. *Dukes*, 131 S.Ct. at 2551. In the context of mass tort litigation, said the court, each member of the class must be able to prove individual causation based on the same set of operative facts and law that would be used by any other class member to prove causation.

Here, thousands of property owners sued for alleged damage caused from 1944 to the present by the alleged emission of toxic chemicals from operations at the wood treating facility. The essence of the causes of action was that the named defendants conducted activities which harmed the class members by depositing polycyclic aromatic hydrocarbons and dioxins in the attic dust of their residential and commercial properties. Plaintiffs argued this presented common questions, as they alleged that injury could be shown not by examining individual residences, but by showing that elevated toxin levels emanated from the defendants' facility "on an area-wide basis," and that this issue, when decided for one class member, would thus be decided for all.

This represented a misinterpretation of the law and of plaintiffs' burden of proof. To establish the "common issue" they posited, plaintiffs would be required to present evidence not simply that emissions occurred, but that the emissions resulted in the deposit of unreasonably elevated levels of chemicals on each plaintiff's property. And this issues must be capable of common resolution for all class members based on common evidence. Moreover, the proof of commonality must be "significant."

The court then proceeded to list some of the many reasons why the issues were not common. The facility had three owners in the span (although only two were sued). These owners engaged in independent and varying operations throughout the approximately 66-year period of alleged emissions. The specific operations that plaintiffs alleged resulted in off-site emissions were varied –such as overflow, runoff, and the burning of wood -- and occurred at varied and unspecified times during the period in question. Moreover, the facility's operations changed over time. For example, certain burning processes ceased in or around 1982. Also, the chemicals used at the facility changed over time.

In an important, but often overlooked point, the court noted that the legal standards applying to the operations of the wood-treating facility have changed over time. For example, whether principles of strict liability or negligence would govern the conduct of defendants depended on the year the damaging emission occurred. Likewise, exemplary damages were not available for some years, by statute. The applicable standards for air emissions varied also, with the enactment of the Clean Air Act decades after the class period began, and various amendments to it over time. Time raised another individual issue: while the attic dust from various properties was tested for contaminants, there was no attempt to determine when contaminants were deposited in the attics of the buildings that were tested. Finally, over time there were varying alternative sources of the contaminants, including myriad area-wide and property-specific alternative sources of PAHs and dioxins in the defined class area.

For class certification to be appropriate, there must be some common thread which holds the claims together. With regard to causation and injury, plaintiffs thus failed to present sufficient evidence to prove the existence of that common thread.

For many of the same reasons, common issues did not predominate, and the class was not a superior method of resolving the dispute. The court also noted the existence of potential conflicts between current owners and prior owners of the respective properties. Also militating against class certification was the fact that several class members had already brought individual claims against these same defendants for personal injuries and property damage allegedly caused by the same facility emissions.

Class certification reversed.