The International Comparative Legal Guide to:

Class & Group Actions 2012

A practical cross-border insight into class and group actions work

ICLG

Published by Global Legal Group, in association with CDR, with contributions from:

Allen & Overy LLP
Anderson Mōri & Tomotsune
Arnold & Porter (UK) LLP
August & Debouzy
Brasil, Pereira Neto, Galdino, Macedo Advogados
Bulló – Tassi - Estebenet – Lipera – Torassa – Abogados
Carroll, Burdick & McDonough
Clayton Utz
De Brauw Blackstone Westbroek N.V.
Dechert Russia LLC
Fiebinger Polak Leon & Partner Rechtsanwälte GmbH
Frank Advokatbyrå AB
Gianni, Origoni, Grippo & Partners
J. Sagar Associates
Linklaters LLP
Pachiu & Associates
Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera, S.C.
Shook, Hardy & Bacon L.L.P.
Smith & Partners
Stikeman Elliott LLP
University of Oxford
Uría Menéndez

CDR
Commercial Dispute Resolution

The International Comparative Legal Guide to: Class & Group Actions 2012

GLG
Global Legal Group

Contributing Editors
Ian Dodds-Smith & Alison Brown, Arnold & Porter (UK) LLP

Account Managers
Monica Fuertes, Dror Levy, Florjan Osmani, Oliver Smith, Rory Smith, Toni Wyatt

Sub Editors
Suzie Kidd
Jodie Mablin

Senior Editor
Penny Smale

Managing Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
October 2011

Copyright © 2011
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-908070-10-4
ISSN 1757-2797

General Chapters:

1	**EU Developments in Relation to Cross-border Actions for Collective Redress** – Alison Brown, Arnold & Porter (UK) LLP	1
2	**International Class Action Settlements in the Netherlands since *Converium*** – Ruud Hermans & Jan de Bie Leuveling Tjeenk, De Brauw Blackstone Westbroek N.V.	5
3	**Has the U.S. Class Action Well Run Dry? Evaluating the Impact of Recent Supreme Court Opinions on Toxic Tort Litigation** – Jennifer L. Brown & Ina D. Chang, Shook, Hardy & Bacon L.L.P.	11
4	**Opt-out is Hardly an Option** – Werner Eyskens & Nanyi Kaluma, Allen & Overy LLP	17

Country Chapters:

5	**Argentina**	Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados: Gustavo J. Torassa & Mariano E. de Estrada	20
6	**Australia**	Clayton Utz: Colin Loveday & Andrew Morrison	26
7	**Austria**	Fiebinger Polak Leon & Partner Rechtsanwälte GmbH: DDr. Karina Hellbert	34
8	**Belgium**	Linklaters LLP: Joost Verlinden & Stijn Sabbe	40
9	**Brazil**	Brasil, Pereira Neto, Galdino, Macedo Advogados: Flavio Galdino	45
10	**Canada**	Stikeman Elliott LLP: David R. Byers & Adrian C. Lang	51
11	**China**	Smith & Partners in affiliation with Carroll, Burdick & McDonough: Terence Lee & Lilian Chye	59
12	**England & Wales**	Arnold & Porter (UK) LLP: Alison Brown & Ian Dodds-Smith	65
13	**France**	August & Debouzy: Dominique de Combles de Nayves & Benoît Javaux	75
14	**Germany**	Carroll, Burdick & McDonough: Daniel Schulz & Michael B. Hixson	85
15	**Hong Kong**	Smith & Partners in affiliation with Carroll, Burdick & McDonough: Terence Lee & Lilian Chye	91
16	**India**	J. Sagar Associates: Amar Gupta & Ananya Kumar	97
17	**Italy**	Gianni, Origoni, Grippo & Partners: GianBattista Origoni & Daniele Vecchi	103
18	**Japan**	Anderson Mōri & Tomotsune: Nobuhito Sawasaki & Toshishige Fujiwara	109
19	**Mexico**	Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera, S.C.: Ricardo Ríos-Ferrer & Julio Gutiérrez Morales	116
20	**Poland**	University of Oxford: Dr Magdalena Tulibacka	122
21	**Romania**	Pachiu & Associates: Corina Radu & Ioana Gherman	127
22	**Russia**	Dechert Russia LLC: Ivan Marisin & Vasily Kuznetsov	136
23	**Spain**	Uría Menéndez: Alejandro Ferreres Comella & Cristina Ayo Ferrándiz	142
24	**Sweden**	Frank Advokatbyrå AB: Marcus Axelryd & Barin Özmen	148
25	**USA**	Shook, Hardy & Bacon L.L.P.: Holly Pauling Smith & Madeleine M. McDonough	154

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to give comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Has the U.S. Class Action Well Run Dry? - Evaluating the Impact of Recent Supreme Court Opinions on Toxic Tort Litigation

Jennifer L. Brown

Ina D. Chang

Shook, Hardy & Bacon L.L.P.

The last term for the United States Supreme Court inspired some commentators to predict the end of the class action. There is no question that the Supreme Court addressed a number of class action issues in its recent wave of opinions. One which garnered considerable attention was *Dukes v. Wal-Mart* [see Endnote 1], as its impact will likely be felt in every class action considered in federal courts.

In *Dukes*, the Supreme Court reversed certification in a massive employment class action involving 1.5 million women claiming sex discrimination against Wal-Mart. The opinion raised the bar on what facts must be demonstrated to satisfy the commonality requirement of the federal class action rule (Federal Rules of Civil Procedure 23(a)), cleared up any confusion as to whether courts could consider issues on the merits in resolving class certification if they overlap with certification considerations, and defined the scope of claims for which class certification pursuant to Rule 23(b)(2) is appropriate.

While there has been no shortage of dire predictions for class actions in the wake of the recent Supreme Court term, creative plaintiffs' class action lawyers may well find their way around these rulings. How will the lower courts apply the new precedent? How will plaintiffs' lawyers plead complaints to try to immunise their cases against *Dukes*? And will the volume of class action filings dwindle as a result? Only time will tell. This article uses a hypothetical toxic tort class action to try to demonstrate how last term's Supreme Court decisions might play out in the coming year.

I. Class Certification in the Aftermath of *Dukes*

Imagine a putative class action is filed in a federal court alleging trace levels of chemicals have been detected in a community's drinking water. The complaint also alleges that low-level residues of these chemicals have shown up in fish tissue, further exposing individuals who consume the fish. While these chemicals are not generally considered harmful to humans, plaintiffs allege that there is a substantial impact on human cells from decades of persistent exposure.

Plaintiffs allege that these chemicals reach the waterways and water supply through multiple sources implicating a wide spectrum of potential defendants. Plaintiffs' possible remedies could include personal injury damages, property damages, medical monitoring to determine the extent of exposure and to evaluate their health over time, nuisance and injunctive relief.

In such a case, one of the first questions confronting a plaintiff's lawyer seeking class certification is which provision of the class action rule to invoke. While all class actions must satisfy the requirements of Rule 23(a), in the past, these requirements often were treated as nothing more than speed bumps along the way. More often than not, it was the provision of 23(b) under which certification was analysed that determined whether the case would proceed as a class action.

Rule 23(b)(1) permits certification of a mandatory, non-opt-out class when adjudication of the class representatives' claims are likely to be dispositive of the rights of all class members. This most often arises in the case of a limited fund, making (b)(1) probably the least-utilised provision of Rule 23. An environmental case, such as that described by our hypothetical case, would rarely, if ever, qualify for 23(b)(1) certification.

Rule 23(b)(2) authorises certification of a class where the party opposing the class has acted, or refused to act, on grounds that apply generally to the class, making injunctive or declaratory relief appropriate. This type of class is also mandatory and neither class notice nor an opportunity for class members to opt out is required. As the number and scope of class action filings have increased in volume through the years, so has the popularity of (b)(2) as a vehicle for class certification. One needs look no further than the requirements of Rule 23(b)(3) to appreciate why.

Rule 23(b)(3) requires the class action proponent to prove that common issues predominate and that the class device is superior to other forms of adjudication for resolving the claims. The predominance requirement has posed a significant stumbling block for parties seeking class certification because it serves to bar certification where elements of plaintiff's claims and defendant's affirmative defences turn on individualised facts. Seeking to avoid it, many creative lawyers have crafted innovative arguments for shoehorning their cases into 23(b)(2). *Dukes* undoubtedly will change all of that.

A. *Dukes* in a Nutshell

In *Dukes*, the Supreme Court confronted the certification of a nationwide class of 1.5 million female Wal-Mart employees who allegedly were discriminated based on their gender. Specifically, the class representatives claimed that Wal-Mart's practice of vesting local supervisors with the discretion to set pay and give promotions favoured men and had an unlawful disparate impact on women in the company. The class was certified pursuant to Rule 23(b)(2). While plaintiffs did seek monetary relief in the form of back pay, the lower courts reasoned that because it was not the predominant relief sought and was equitable in nature, the monetary damages claim did not take the class out of the purview of 23(b)(2). The Supreme Court disagreed and reversed.

A majority of the Supreme Court held that 23(a)'s commonality requirement – the requirement that "there are questions of law or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

fact common to the class" -- compelled greater scrutiny than it was given below. For many courts, the bar for satisfying commonality was very low. As long as the litigation posed any common question of fact or law, commonality was established. The Supreme Court in *Dukes*, however, held that to establish commonality, the class proponent must prove not only that there is a common question but that it will generate a common *answer* that will "resolve an issue that is central to the validity of each one of the claims in one stroke". [See Endnote 2.] The Court found no such common questions in the *Dukes* case.

After determining that plaintiffs' class failed to satisfy the 23(a) requirements, the Court turned to the question of whether the class certification was properly analysed pursuant to Rule 23(b)(2). On that point, the Supreme Court returned to the plain language of Rule 23(b)(2), which permits certification of classes seeking injunctive or declaratory relief. While proponents and some courts had expanded the reach of 23(b)(2) to any case in which the predominant relief sought was equitable in nature, the Supreme Court pointed out that (b)(2) says nothing about equitable relief or the certification of claims for monetary relief, even when incidental to the primary relief sought. Ultimately, a unanimous Supreme Court in *Dukes* rejected the propriety of (b)(2) certification where money damages (albeit in the form of back pay) were to be determined for each class member.

In addition to raising the bar on commonality and narrowing the field encompassed by 23(b)(2), the Supreme Court also took the opportunity in *Dukes* to confirm again that Rule 23 compels a "rigorous analysis" of the facts to determine if the claims and defences are truly susceptible to classwide proof. This requires probing behind the pleadings and will inevitably entail some overlap with the underlying merits of the claims. The Court observed that there was nothing unusual about that consequence: "The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation." [see Endnote 3].

The Supreme Court rejected the notion that its prior precedent had compelled avoidance of a merits inquiry at the class certification stage. The Court noted that the statement in *Eisen v. Carlisle & Jacquelin* [see Endnote 4] that "nothing . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action" was made in the context of addressing whether the merits of case could be taken into account in preliminarily shifting the costs of class notice. To the extent the statement is read beyond that, the Supreme Court called it "the purest dictum". [See Endnote 5.]

B. Applying the Lessons of *Dukes*

Turning back to the hypothetical, let us consider how class certification might be analysed in the wake of *Dukes*.

1. Analysing the Rule 23(a) requirements

Class certification starts with the requirements of Rule 23(a): numerosity; commonality; typicality; and adequacy. Plaintiffs bringing claims pursuant to our hypothetical fact pattern would likely define a class that "is so numerous that joinder of all members is impractical", thus satisfying the numerosity requirement of 23(a)(1).

Commonality, however, would pose a far greater challenge. There are any number of ways that plaintiffs might frame a question of law or fact common to the class. For example, whether defendants in fact released chemicals into the water supply or whether exposure to the level of chemicals found in the water increases people's risk of disease might be posed as common questions. In the past, neither the parties nor the court would have focused on analysing commonality, since it was routinely held that even a single common question satisfied the requirement. After *Dukes*, however, the only common question that will put a plaintiff over the commonality hurdle is one whose answer will be common to the class and is central to resolving the class's claims. This determination will require greater scrutiny of the theories underpinning the plaintiff's claims and the proofs likely to be adduced in support of them.

With no well-developed body of scientific and medical evidence to rely upon to establish that the presence of certain chemicals in drinking water has been causally linked to human disease, plaintiffs' experts likely would be breaking new ground. In addition, with levels of exposure likely varying among individual members of the class, it is not hard to imagine plaintiffs offering experts to propose creative alternatives to individualised adjudication of each class member's claim, such as through modeling or statistical sampling. While some courts have been loathed to weigh and resolve competing expert opinions at the class certification stage, *Dukes* makes clear that the expert offerings should be scrutinised to determine the likelihood that questions central to the claims are susceptible to class-wide determination. This may require consideration of the reliability of an expert's opinions. Indeed, while not squarely addressing the issue, the Supreme Court telegraphed [see Endnote 6] that experts offered in support of class certification may well have to survive a full-blown challenge to the reliability and admissibility of the experts' opinions pursuant to *Daubert v. Merrell Dow Pharm. Inc*, [see Endnote 7] which sets forth the test for admission of expert testimony in federal courts. Whether *Daubert* applied at the class certification stage had been an open question on which some federal courts have differed. [See Endnote 8.]

Assuming plaintiffs' putative class action survives the commonality analysis, plaintiffs must satisfy both the typicality and adequacy requirements. The test for typicality is not usually a demanding one, and a plaintiff able to satisfy the commonality requirement as clarified by *Dukes* likely will be able to establish typicality. Assuming the experience and qualification of class counsel, and as long as there are no conflicts of interest between the class representatives and the class, the adequacy requirement is also likely to be met. Difficulties may arise, however, if in an effort to get the class certified, plaintiffs have shed potentially valuable claims and remedies.

Given the Supreme Court's holding that class actions seeking individualised recoveries cannot be certified under Rule 23(b)(2), the incentive to avoid seeking damages for personal injury or property damage claims is increased. Doing so, however, risks waiving these claims for class members [see Endnote 9], which may make the interests of the class representatives antagonistic to those of absent class members and render them inadequate under the Rule. [See Endnote 10.] Moreover, class representatives willing to forgo money damages may have claims atypical of class members, undermining their efforts to satisfy the typicality requirement.

2. Analysing certification pursuant to Rule 23(b)

Given the often insurmountable challenge posed by the predominance requirement of Rule 23(b)(3), it is likely that plaintiffs would seek to certify the case pursuant to 23(b)(2). Since (b)(2) permits the certification of a class seeking injunctive or declaratory relief, plaintiffs would argue that their requests for an injunction and medical monitoring (which they characterise as equitable relief) fall within the bounds of the rule. Plaintiffs likely would also argue that any money damages they seek are subordinate to the other relief and thus should pose no obstacle to

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(b)(2) certification. Prior to *Dukes*, these arguments may well have carried the day. After *Dukes*, however, a claim for individual damages for personal injury and loss of property value would eliminate the possibility of 23(b)(2) certification.

What about plaintiffs' claim for medical monitoring – future medical screening for diseases caused by the alleged exposure? In the past, many plaintiffs have argued that medical monitoring was equitable in nature and thus certifiable pursuant to Rule 23(b)(2). *Dukes*, however, rejects the notion that equitable relief falls within the purview of 23(b)(2), which speaks only in terms of injunctive or declaratory relief. [See Endnote 11.] Indeed, the back pay claim plaintiffs asserted in *Dukes* was labeled equitable relief and yet was deemed to render the (b)(2) provision inapplicable. In order to be considered for 23(b)(2) certification, one option for plaintiffs may be to try to persuade the Court that medical monitoring is injunctive relief. [See Endnote 12.]

While that alone may be a formidable task, it also is not clear that medical monitoring presents the type of classwide relief envisioned by the Supreme Court. In many states, medical monitoring, if recognised as a claim at all, is only appropriate where plaintiffs can establish that the exposure puts them at an increased risk of disease and necessitates monitoring beyond that which would be recommended for them in the absence of the exposure. [See Endnote 13.] In our hypothetical case, this claim alone would require fact-specific inquiries for each class member into his or her level of exposure (imagine a scenario where the individual consumes mainly bottled water and other beverages), whether such exposure puts him or her at an increased risk of disease and whether the exposure, rather than an alternative source of increased risk, necessitates monitoring. Given these variables, medical monitoring arguably takes on the character of the individualised relief the Supreme Court found inconsistent with certification under 23(b)(2). [See Endnote 14.]

Class certification pursuant to Rule 23(b)(3) remains an option, but plaintiffs will struggle to satisfy the predominance requirement for many of the reasons discussed above. These individual issues would not only frustrate plaintiffs' efforts to establish predominance of common issues, but undermine claims of manageability. Rule 23(b)(3) requires that plaintiffs prove the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy". In analysing that issue, the Rule expressly requires analysis of the "likely difficulties in managing a class action". Having a multitude of individual issues to adjudicate after a common issues trial poses a substantial difficulty.

To the extent that plaintiffs propose a shortcut for resolution of these individual issues, perhaps through sampling (despite its inherent difficulties), the Supreme Court addressed that in *Dukes* as well. There plaintiffs proposed that back pay could be determined for the class based on a sample of class member's claims. In no uncertain terms, the Supreme Court "disapprove[d] that novel project". [See Endnote 15.] Echoing prior precedent, the Court held that the Rules Enabling Act did not permit Rule 23 to "abridge, enlarge or modify any substantive right" and Wal-Mart could not be deprived of the ability to litigate its defences to the claims of each class member. [See Endnote 16.]

One possibility is that *Dukes* will drive more plaintiffs and courts to explore class certification of discrete issues pursuant to Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues". There has been a split in the federal appellate courts about the appropriate role of 23(c)(4). Some hold that it is merely a management tool for trying class actions after they have been certified [see Endnote 17], while others have approved its use in analysing class certification in the first instance, permitting plaintiffs to use "issue certification" to narrow the scope of the dispute before the Rule 23(a) and (b) criteria are applied. [See Endnote 18.] The Supreme Court has yet to address this issue.

The defendant in our hypothetical case may argue that 23(c)(4), if used at all, should only be used as a management tool after the case as a whole has satisfied the requirements of Rule 23(a) and (b). The defendant may counter the plaintiffs' request to first narrow the case to a small number of issues before applying the class certification criteria by explaining that, in the end, such treatment will not advance the case as a whole because what will remain is the need to ultimately apply the finding in hundreds or thousands of follow-on trials of individualised liability issues. [See Endnote 19.] As one court recognised: "While a narrowly crafted issues class might well be manageable, the tens, hundreds, or perhaps thousands of trials thereafter would pose considerable difficulties on the courts. When the litigation is considered as a whole, manageability is a significant concern." [See Endnote 20.]

The Seventh Amendment to the United States Constitution may also pose a significant obstacle to certification of an issue class in our hypothetical case. "The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." [See Endnote 21.] "Of particular relevance here, the judge must not divide the issues between separate trials in such a way that the same issue is reexamined by different juries." [See Endnote 22.] The common issues so often identified by plaintiffs are issues of defendant's conduct. These issues, however, are often interrelated and not cleanly severable from the elements of plaintiffs' claims or defendant's affirmative defences that require individualised proofs. [See Endnote 23.]

C. State Court May Offer a Second Chance at Class Certification

For those who view the last term as evidence that the Supreme Court is hostile to the class action, it is worth noting that not all cases were decided in favour of the class action opponent. While the Class Action Fairness Act makes keeping a mass action in state court more difficult, assuming the plaintiff can plead around it, the Supreme Court held in *Smith v. Bayer* [see Endnote 24] that the denial of class certification by a federal court does not bar an attempt to certify a similar class in state court with a different class representative.

In *Bayer*, a consumer named George McCollins brought a class action in West Virginia state court against the manufacturer for consumer protection claims related to its cholesterol-lowering medication Baycol. A month later, in a different part of West Virginia, Keith Smith and another plaintiff filed a similar class action against Bayer based on the same state law claims. Bayer removed *McCollins* to federal court and it was ultimately transferred to the District Court of Minnesota to be consolidated with other similar cases under an order from the Judicial Panel on Multidistrict Litigation. [See Endnote 25.] However, Bayer could not remove *Smith* as it included several West Virginia defendants and lacked the complete diversity of parties that was required at the time. [See Endnote 26.]

The Minnesota federal district court declined to certify McCollins' proposed class under Rule 23, finding a lack of predominance of common issues. Then, at Bayer's urging, the federal district court enjoined the state court from hearing Smith's motion to certify a West Virginia class on the ground that the classes were nearly identical and thus the federal district court's opinion should control. The Eighth Circuit Court of Appeals affirmed, noting that while the Anti-Injunction Act generally prohibits federal courts from

© Published and reproduced with kind permission by Global Legal Group Ltd, London

enjoining state court proceedings, the Act's re-litigation exception authorised the injunction because ordinary rules of issue preclusion barred *Smith* from attempting to certify the class. [See Endnote 27.]

The Supreme Court reversed. The Court determined that for the re-litigation exception to apply: (1) the issue decided by the federal court must be the same as the one presented in the state court; and (2) Smith must have been a party to the federal suit or fall into a discrete exception to the rule binding non-parties. [See Endnote 28.] First, the Court ruled that the issue the federal court decided was not the same as the one presented in the state court because West Virginia's class action rule differed from the federal rule. Second, the injunction was improper because Smith was not a party to the federal suit and was not covered by any exception to the rule against nonparty preclusion. The Court ruled that the exception to bind non-named members of a "properly conducted class action" could not apply because class certification had been denied in *McCollins*. [See Endnote 29.]

The Supreme Court rejected Bayer's argument that the ruling would permit class counsel to try repeatedly to certify the same class simply by changing plaintiffs. The Court noted that principles of *stare decisis* and comity among courts generally suffice to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. [See Endnote 30.]

II. Supreme Court Casts Doubt on Regulation by Litigation

While this article does not purport to evaluate the range of defences at a defendant's disposal for challenging the hypothetical case, another opinion issued by the Supreme Court this term is worthy of note. *American Electric Power (AEP)* [see Endnote 31] may provide an argument in some cases that the Environmental Protection Agency's ability to take action based on the Clean Water Act to address plaintiffs' complaints "displaces" attempts to regulate by litigation. In *AEP*, eight state attorney generals, New York City, and three non-profit land trusts sued several electric companies for nuisance and sought an injunction to compel them to reduce greenhouse gases. Plaintiffs argued that the defendants were the five largest emitters of carbon dioxide in the U.S. and that by contributing to global warming, defendants created a substantial and unreasonable interference with public rights in violation of the federal common law of interstate nuisance and state tort law. All plaintiffs sought injunctive relief requiring each defendant to cap its carbon dioxide emissions and reduce them by a specific percentage for at least a decade. [See Endnote 32.]

The district court dismissed the suits as presenting non-justiciable political questions, but the Second Circuit reversed and held that all plaintiffs had stated a claim under federal common law nuisance. The Second Circuit Panel found that the Clean Air Act did not "displace" federal common law because, at the time, the EPA had not yet promulgated any rule regulating greenhouse gases, a fact that the court found to be dispositive. [See Endnote 33.]

In a unanimous decision, the Supreme Court held that the EPA's jurisdiction over greenhouse gases displaced the courts from deciding greenhouse gas climate change issues. If the EPA failed to act properly, the remedy for the plaintiffs was not to bring a separate tort suit, but to sue the EPA for its failure to act. [See Endnote 34.]

As with the Court's ruling on greenhouse gases, the EPA's jurisdiction over water quality could displace the judiciary from deciding the issue presented by our hypothetical case. [See Endnote 35.] As Justice Ginsberg noted:

> "[H]ere, EPA [is] best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions…Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present." [See Endnote 36.]

Similarly, EPA's regulatory power under the Clean Water Act would displace attempts to regulate water quality through litigation in certain cases. Even if plaintiffs in the hypothetical case argue that the EPA has not regulated the defendants' conduct of discharging trace amounts of certain chemicals into public waters, the Supreme Court held that whether the EPA had fully exercised its rulemaking capabilities was not dispositive. "If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court." [See Endnote 37.]

III. Conclusion

In applying this year's Supreme Court rulings to the hypothetical case, it is clear that the road to class certification contains not only a few bumps, but some major hurdles for plaintiffs. Undoubtedly, *Dukes* changed the class certification landscape in numerous ways, including raising the bar on commonality and narrowing the opportunity for class certification pursuant to Rule 23(b)(2). Moreover, the Court's ruling in *AEP* casts doubt on the judiciary's role in addressing similar environmental claims.

While the Supreme Court rulings last term may have been a blow to class action proponents, dire predictions of the end of the class action in the United States are premature at best. Creative lawyers inevitably will navigate their way around the pitfalls and discover the well is far from dry.

Endnotes

1 *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (2011). Another opinion which received considerable attention was *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) in which the Supreme Court in a 5-4 decision held that a California rule that classified most class-arbitration waivers in consumer contracts as unconscionable and therefore unenforceable, is preempted by the Federal Arbitration Act because it stands as an obstacle to the enforcement of arbitration agreements according to their terms and the promotion of arbitration generally.

2 *Dukes*, 131 S. Ct. at 2551.

3 *Id*. at 2552.

4 417 U.S. 156, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974).

5 *Dukes*, 131 S. Ct. at 2252 n.6. *But see Erica P. John Fund v. Halliburton*, 131 S. Ct. 2179 (2011) (holding that court should only consider the merits when doing so is necessary to a full consideration of the class certification requirements).

6 *Dukes*, 131 S. Ct. at 2554.

7 *Daubert v. Merrell Dow Pharm Inc*., 509 U.S. 579 (1993).

8 *See, e.g., Amer. Honda Motor Co Inc. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) ("[T]he district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."); *but see In re Zurn Pex Plumbing Prods. Liab. Lit*., 644 F.3d 604, 612 (8th Cir. 2011) (citing *Dukes* but declining to find error where district court conducted less than a full *Daubert* analysis at the class certification stage).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

9 Splitting a cause of action is generally prohibited by the doctrine of *res judicata*, which bars parties to a prior action from raising any claim in a subsequent action that could have been adjudicated in the prior one. See Rest. Jmts. 2d Sec. 24.

10 *See, e.g., In re MTBE Prods. Liab. Lit.,* 209 F.R.D. 323, 339-340 (S.D.N.Y. 2002) (finding adequacy requirement not satisfied where class representative abandoned personal injury and property damage claims to seek only injunctive relief); *Thompson v. American Tob. Co*., 189 F.R.D. 544, 550-51 (D. Minn. 1999).

11 *Dukes*, 131 S. Ct. at 2560.

12 *See Gates v. Rohm and Haas Co.,* No. 10-2108, 2011 WL 3715817, *5 (3rd Cir. Aug. 25, 2011) (acknowledging that medical monitoring "cannot be easily categorized as injunctive or monetary relief."). Some courts have described medical monitoring as damages or future medical expenses. *See, e.g. Buckley v. Metro N. Commuter R.R*., 79 F.3d 696, 715 (2d Cir. 2004).

13 *See, e.g., Barnes v. American Tob. Co.,* 161 F.3d 127, 138-140 (3rd Cir. 1998) (reviewing medical monitoring criteria under Pennsylvania law).

14 *Gates*, 2011WL 3715817, at *6 (citing *Dukes* in affirming denial of 23(b)(2) class certification where medical monitoring requirements compelled individual inquires and would have required individualised relief).

15 *Dukes*, 131 S. Ct. at 2561.

16 *Id*.

17 *Castano v. Amer. Tob. Co.,* 84 F.3d 734, 745 n.21 (5th Cir. 1996).

18 *See In r: Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006).

19 *See Gates*, 2011WL 3715817, at *15 (holding that regardless of how 23(c)(4) is viewed, class certification under any provision is inappropriate where a multitude of individual issues must be determined); *McLaughlin v. Amer. Tob. Co*., 522 F.3d 215, 234 (2d. Cir. 2008) *In re MTBE Prods. Liab. Lit*., 209 F.R.D. 323, 352-53 (S.D.N.Y. 2002); *Rink v. Cheminova, Inc.,* 203 F.R.D. 648, 670-71 (M.D. Fla. 2001), *cert. denied*, 126 S. Ct. 419 (2005).

20 *Rink*, 203 F.R.D. at 672.

21 *Castano*, 84 F.3d at 750.

22 *In re Rhone-Poulenc Rorer Inc*., 51 F.3d 1293, 1303 (7th Cir. 1995).

23 *See Pryor v. NCAA*, No. 00-3242, 2004 WL 1207642, *4 (E.D. Pa. March 4, 2004); *MTBE*, 209 F.R.D. at 352; Rink, 203 F.R.D.at 672.

24 *Smith v. Bayer Corp*., 131 S. Ct. 2368 (2011).

25 *Id*. at 2373.

26 *Id*. at 2373-74. CAFA subsequently altered the standard for diversity jurisdiction in class action cases so that only minimal diversity is required. Had *Smith* been filed after CAFA, it most likely would have been removed to federal court.

27 *Id*. at 2374.

28 *Id*. at 2376.

29 *Id*. at 2379- 2380.

30 *Id*. at 2381.

31 *Am. Elec. Power Co., Inc. v. Conn*., 131 S. Ct. 2527, 2532 (2011).

32 *Id.* at 2533-34.

33 *Id*. at 2534-35.

34 *Id*. at 2537-38.

35 *See Milwaukee v. Illinois*, 452 U.S. 304, 316-319 (1981) (the Supreme Court held that Federal Water Pollution Act Amendments of 1972 displaced federal common law, at least with respect to the claims brought by Illinois, and federal common law could not be used to impose more stringent effluent standards than those set forth under the Act and the attendant regulations).

36 *Am. Elec. Power Co. Inc.,* 131 S. Ct. at 2539-40.

37 *Id.* at 2530.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Jennifer L. Brown

Shook, Hardy & Bacon L.L.P.
One Montgomery Tower, Suite 2700
San Francisco, California 94104-4505
USA

Tel: +1 415 544 1900
Fax: +1 415 391 0281
Email: jbrown@shb.com
URL: www.shb.com

Jenny has more than 15 years of litigation and trial experience in the areas of product liability, tort and class actions. As a partner in SHB's Class Action and Complex Litigation and Global Product Liability practice groups, Jenny has successfully defended claims on behalf of some of the country's largest corporations. From products liability to consumer fraud, medical monitoring and ERISA, Jenny has represented defendants in class actions around the country and distinguished herself as a creative, yet practical, litigator who can deliver results. In the vast majority of these cases, class certification has been denied or reversed on appeal. She has also authored amicus briefs on significant class action questions before the United States Supreme Court and the U.S. Court of Appeals for the Ninth Circuit.

Ina D. Chang

Shook, Hardy & Bacon L.L.P.
One Montgomery Tower, Suite 2700
San Francisco, California 94104-4505
USA

Tel: +1 415 544 1900
Fax: +1 415 391 0281
Email: ichang@shb.com
URL: www.shb.com

Ina is an associate in SHB's Global Product Liability Group. She joined the firm's San Francisco office in 2006 after graduating from U.C. Davis School of Law and works primarily on products liability, class actions, and consumer-protection cases. With extensive experience in case coordination, expert development, discovery and motion practice, and fact investigation, Ina has been an integral part of numerous defence teams that have successfully defended consumer goods manufacturers, car rental companies, pharmaceutical manufacturers, and tobacco companies.

Shook, Hardy & Bacon L.L.P. (SHB) is an international law firm with more than 500 attorneys representing clients from nine offices across Europe and the United States.

SHB is renowned for successful results in all types of litigation matters, including worldwide mass tort and complex class actions involving various industries. The firm maintains substantial litigation practices in products liability, intellectual property, environmental, toxic torts, employment, commercial, and corporate transactions.

In 2010, *The American Lawyer* named SHB a finalist in its Product Liability Litigation Department of the Year competition. This followed the firm's 2008 recognition as winner in the Product Liability category. Many SHB attorneys are regularly honoured for their individual outstanding professional skills and abilities.

For more information, contact:
Madeleine M. McDonough
Partner, Shook, Hardy & Bacon L.L.P.
1155 F Street, N.W., Suite 200, Washington, D.C. 20004-1305
Tel: +1 202 783 8400
Fax: +1 202 783 4211
Email: mmcdonough@shb.com
URL: www.shb.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The International Comparative Legal Guide to:

Class and Group Actions 2012

Other titles in the ICLG series include:

- Business Crime
- Cartels & Leniency
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Gas Regulation
- Insurance & Reinsurance
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Telecommunication Laws and Regulations
- Trademarks

To order a copy of a publication, please contact:

Global Legal Group
59 Tanner Street
London SE1 3PL
United Kingdom
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.ICLG.co.uk