A Less Attractive Investment for the Plaintiffs' Bar

Has *Dukes* Killed Medical Monitoring?

By Jennifer Quinn-Barabanov

The practical impact on the certification of these class actions is so unfavorable that it seems unlikely that these claims can recover their past status as potent threats.

From a corporate defendant's perspective, a medical monitoring class action, which can aggregate the claims of thousands of plaintiffs seeking decades worth of extensive medical testing costs, presents one of the most serious litigation risks in the product liability and toxic tort arena. While much ink has been spilled about the impact of the recent United States Supreme Court decision in *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541 (2011), on employment litigation, far less attention has been paid to the consequences of the *Dukes* decision for medical monitoring claims in the federal courts.

In fact, *Dukes* represents a potentially fatal blow to medical monitoring class actions because it raises substantial legal and practical obstacles to certification of those claims. Most importantly, *Dukes* creates serious doubt that courts can ever properly certify medical monitoring claims under Federal Rule of Civil Procedure 23(b)(2), which plaintiffs' attorneys have traditionally relied on to aggregate the maximum number of claims in a mandatory class without complying with the predominance, superiority, and notice requirements triggered by Federal of Rule of Civil Procedure 23(b)(3). In addition, *Dukes* raises the bar for all class plaintiffs under either rule, Federal Rule 23(b)(2) or Federal Rule 23(b)(3), to demonstrate commonality to support certification. Lastly, *Dukes*, in dicta, endorses *Daubert* scrutiny of expert testimony offered during the class certification stage—a more rigorous approach than previously adopted by several courts of appeal.

By substantially diminishing certification chances, reducing the potential advantages of medical monitoring class actions, and increasing litigation costs, *Dukes* makes medical monitoring claims much less attractive investments for the plaintiffs' bar. While *Dukes* has not killed medical monitoring class actions entirely, as a practical matter, it has left them on life support.

The Attractiveness of Medical Monitoring Classes

Medical monitoring, recognized in more than a dozen states, allows a plaintiff to recover the costs associated with medical

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testing that he or she claims has become medically necessary to monitor his or her health as a result of exposure to a hazardous substance caused by a defendant's wrongful conduct. Although the requirements vary somewhat from state to state, a plaintiff seeking medical monitoring generally must prove a significant exposure to a hazardous substance as a result of a defendant's tortious conduct, which has proximately caused a significantly increased risk that the plaintiff will contract a serious, latent disease and made it reasonably necessary for the plaintiff to undergo regular, diagnostic medical testing that would not have been necessary without the exposure to the hazardous substance. *See Ayers v. Jackson Tp.*, 525 A.2d 287, 312, 106 N.J. 557, 606 (N.J. 1987); *Bower v. Westinghouse*, 522 S.E. 2d 424, 432–33, 206 W.Va. 133, 141–42 (W. Va. 1999); *Potter v. Firestone*, 863 P.2d 795, 824–25, 25 Cal. Rptr. 2d 550, 579–80 (Cal. 1993); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993).

As *Dukes* makes "pellucidly clear," a requested remedy's equitable nature does not render a claim certifiable under Federal Rule 23(b)(2); a proposed class must also request some injunctive or declaratory relief.

Medical monitoring claims are expensive to litigate. They typically depend on complex scientific proof and expert testimony. At the same time, the medical testing costs that a single plaintiff can recover typically are not much. As a result, it usually only makes economic sense for plaintiffs who are not otherwise injured to pursue aggregated medical monitoring claims, for example, on behalf of a class. In aggregate, medical monitoring claims can have enormous benefits for plaintiffs. Settlements and verdicts in medical monitoring cases brought by large classes have reached into the hundreds of millions of dollars.

From the plaintiffs' bar's perspective, medical monitoring claims' attractiveness has depended significantly on having the ability to secure certification for them as mandatory class actions for injunctive relief under Federal Rule of Civil Procedure 23(b)(2). Federal Rule 23(b)(2) applies when "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." According to the advisory committee note, "this [Federal Rule 23] subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

Certifying a class under Federal Rule 23(b)(2) forms a "mandatory" class, meaning that class members do not routinely have an opportunity to opt out, which in turn, means that plaintiffs avoid the costs associated with providing notice to potential class members as required under Federal Rule 23(b)(3). Federal Rule of Civil Procedure 23(b)(2) thus permits plaintiffs' attorneys to aggregate the maximum number of potential claims for the minimum level of investment. In addition, Federal Rule 23(b)(2) does not require plaintiffs to demonstrate predominance of common, as opposed to individualized, issues, or that a class action is superior to other possible methods of resolving the claims. The predominance requirement of Federal Rule 23(b)(3) is more demanding than the commonality requirement that applies to all class actions. *See* advisory committee's note to 1966 Am. to Fed. R. Civ. P. 23. Manageability also plays a greater role when a court evaluates whether to certify a Federal Rule of Civil Procedure 23(b)(3) class than when a court evaluates whether to certify a Federal Rule 23(b)(2) class. *See* Fed. R. Civ. P. 23(b)(3)(D).

In a Federal Rule 23(b)(3) class, moreover, members of the proposed class must receive notice of the action and an opportunity to opt out, for example, to pursue their own individual claims. The notice must be "the best notice that is practicable under the circumstances, including individual notice to class members who can be identified with reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). And, as mentioned, plaintiffs ordinarily bear the costs associated with fulfilling the class notice requirement; the sometimes substantial costs can deter plaintiffs from filing a proposed class action. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 167–68 (1974).

Medical Monitoring Was Already Sick

Even before the Supreme Court issued a ruling in *Dukes*, plaintiffs seeking class certification of medical monitoring claims already faced an uphill battle.

The Class Action Fairness Act (CAFA) expanded the federal courts' diversity jurisdiction to cover, with limited exceptions, most class actions against nonresident defendants worth more than $5 million. 28 U.S.C. §1332(d). As a result, CAFA forced many plaintiffs seeking medical monitoring into the federal courts instead of state courts, which have traditionally applied class action requirements more leniently. *See In re Welding Fume Prod. Liab. Litig.*, 245 F.R.D. 279, 306, 308 (N.D. Ohio 2007) (analyzing state and federal cases involving identical "mass torts" and concluding that state courts, even those applying rules identical to Fed. R. Civ. P. 23, have been far more willing to certify medical monitoring classes).

Although several federal district courts have certified medical monitoring classes, *every* federal appellate court that has examined a proposed medical monitoring class has refused certification. *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 (4th Cir. 2004); *In re St Jude Med., Inc.*, 422 F.3d 1116, 1120 (8th Cir. 2005); *In re St Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008), *reh'g denied*, 522 F.3d 836 (8th Cir. 2008); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1196, *amended*, 273 F.3d 1266 (9th Cir. 2001); *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995).

With the addition of Federal Rule of Civil Procedure 23(f) in 1998, the threat of appellate review became more potent. Federal Rule 23(f) authorizes parties to petition for immediate appellate review of a certification decision without leave of

the district court. Although such appellate review is discretionary, Federal Rule 23(f) provides an automatic opportunity to seek appellate review without litigating a case to a final judgment, which rarely happens anyway, since class certification typically prompts settlement.

In addition, plaintiffs seeking medical monitoring have found themselves on the wrong side of several recent federal legal trends that have made it more difficult to obtain class certification generally in the federal courts. These trends among federal courts include increased willingness to resolve factual disputes that overlap with the merits of plaintiffs' claims at the certification stage, tightened standards requiring judicial findings to support courts' determinations that plaintiffs have met Federal Rule 23 requirements, clarification of the applicable burden of proof for satisfying Federal Rule 23, and increased scrutiny of expert opinions offered during the certification stage. The Supreme Court *Dukes* decision, in several ways, represents a culmination of these unfavorable federal court trends for plaintiffs seeking class treatment of medical monitoring claims.

Injunctive Relief or Money Damages?

Before the Supreme Court decision in *Dukes*, whether a court should categorize medical monitoring as a claim for injunctive relief, which a court could properly certify under Federal Rule 23(b)(2), or money damages, potentially certifiable under Federal Rule 23(b)(3), was an issue that the plaintiffs' bar appeared to have won. *Dukes* cast this long-standing and wrongly decided line of authority into significant doubt. By clarifying that Federal Rule 23(b)(2) classes must seek injunctive, rather than simply "equitable" relief, *Dukes* reopens the debate about whether a court can ever certify medical monitoring claims to form a mandatory Federal Rule 23(b)(2) class. Moreover, by rejecting the traditional analytical framework for determining whether classes seeking elements of monetary relief can properly receive certification under Federal Rule 23(b)(2), the Supreme Court has created the conditions for lower courts to reexamine this question afresh.

In *Dukes*, a unanimous Supreme Court rejected the plaintiffs' contention that a court could certify back-pay claims along with a request for prospective injunctive relief under Federal Rule 23(b)(2) because the back-pay claims were "equitable in nature." 131 S. Ct. at 2560. The Court characterized the equitable nature of the relief as "irrelevant" because "[t]he Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither." *Id.* Thus, as *Dukes* makes "pellucidly clear," a requested remedy's equitable nature does not render a claim certifiable under Federal Rule 23(b)(2); a proposed class must also request some injunctive or declaratory relief. *Id.*

While the Supreme Court declined to decide whether or not Federal Rule 23(b)(2) "applies *only* to requests for such declaratory or injunctive relief and does not authorize certification of monetary claims at all," it rejected a traditional analytical framework that permitted certification of damage claims as long as they did not predominate over requests for injunctive or declaratory relief. *Id.* at 2557, 2557–58. The Supreme Court left open the question "whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause." *Id.* at 2561 (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)).

By holding that an equitable remedy cannot support a Federal Rule 23(b)(2) class, *Dukes* undermines plaintiffs' ability to obtain Federal Rule 23(b)(2) certification by recasting claims for monetary relief as "equitable." Reexamining the origins of medical monitoring demonstrates that it is precisely the kind of claim that courts and plaintiffs' attorneys have mischaracterized in this way to qualify improperly for Federal Rule 23 (b)(2) certification.

In *Ayers*, the landmark decision recognizing medical monitoring, the New Jersey Supreme Court held "that the cost of medical surveillance is a compensable item of *damages*." *Ayers*, 106 N.J. at 606, 525 A.2d at 312 (emphasis added). *See also Potter*, 25 Cal. Rptr. 2d at 579, 863 P.2d at 824 ("[T]he cost of medical monitoring is a compensable item of damages…."); *Bower*, 206 W.Va. at 138–39, 522 S.E. 2d at 429–30 ("As the Fourth Circuit correctly surmised, a claim for medical monitoring is essentially 'a claim for future damages.'" (quoting *Ball v. Joy Techs.*, 958 F.2d 36, 39 (4th Cir. 1991)); *Hansen*, 858 P.2d at 976–79.

Medical monitoring costs remain damages whether a defendant pays them as a lump sum or through a court-supervised monitoring fund. *Ayers*, the first court to endorse using such funds, characterized them as "a highly appropriate exercise of the court's *equitable* powers" that encouraged plaintiffs to be monitored and ensured that defendants only paid for the costs of tests that plaintiffs received. 525 A. 2d at 609–610, 106 N.J. at 314–15 (emphasis added). *See also Hansen*, 858 P.2d at 982 ("[W]e do not mandate a trust fund, leaving it to the trial court to fashion a suitable *equitable* remedy….") (emphasis added). Even if a court-administered fund can properly be characterized as an equitable remedy, it does not transform medical monitoring into injunctive relief.

Under *Dukes*, the distinction between an equitable remedy and an injunctive one is crucial. In medical monitoring cases, however, many courts have made the same mistake as the *Dukes* plaintiffs' attorneys, improperly equating an equitable remedy with an injunctive one potentially certifiable under Federal Rule 23(b)(2). The leading case typically relied on by plaintiffs' attorneys to support Federal Rule 23 (b)(2) certification, *Day v. NLO, Inc.*, evidences this mistake. 144 F.R.D. 330, 335–36 (S.D. Ohio 1992), *rev'd on other grounds*, 5 F.3d 154 (6th Cir.1993). *Day* cites *Ayers* and *Hansen* as endorsing medical monitoring funds as a "use of the Court's injunctive powers," when in fact they characterized such funds as an exercise of the each court's *equitable* powers. *Id.* (citations omitted). The game of telephone continued from there, with many district courts following *Day* and its incorrect reasoning. *E.g.*, *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Ariz. 1993); *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 406 (M.D. Tenn. 1996) (citing cases).

With some notable exceptions, *e.g.*, *Zinser*, 253 F.3d at 1196 and *Boughton*, 65 F.3d at 827, most courts characterized proposed medical monitoring funds as injunctive remedies that courts could potentially certify under Federal Rule 23(b)(2). Some courts' certification decisions turned on the intricacies of the wording of the request for relief, specifically, if the request sought

a program, which was potentially certifiable under Federal Rule 23(b)(2), or a fund that resembled a payment of money damages, which was not. *E.g.*, *Zinzer*, 253 F.3d at 1195–95. One court described the distinction between a medical monitoring claim certifiable under Federal Rule 23(b)(2) and one that was not as follows:

> A court-administered fund which goes beyond payment of the costs of monitoring an individual plaintiffs' health to establish the pooled resources for the early detection and advances in the treatment of the disease is injunctive in nature rather than "predominantly money damages" and therefore is properly certified under Rule 23(b)(2).

Gibbs v. E.I. DuPont de Nemours, 876 F. Supp. 475, 481 (W.D. N.Y. 1995). Applying this rationale, plaintiffs' attorneys packaged medical monitoring with other forms of injunctive relief—medical exams, studies, data collection, dissemination of health-related information and the like—to bolster their argument that the claims were appropriate for Federal Rule 23(b)(2) certification because any monetary relief was incidental and did not "predominate."

Medical monitoring costs remain damages whether a defendant pays them as a lump sum or through a court-supervised monitoring fund.

By eliminating the "predominance" test in *Dukes*, the Supreme Court has created the conditions for courts to revisit classifying medical monitoring as injunctive or monetary relief in a meaningful way. The rationale in cases such as *Gibbs*, and there are many of them, is simply invalid after *Dukes*.

In fact, the Third Circuit, in the first decision involving a proposed medical monitoring class after *Dukes*, observed that "Medical monitoring cannot be easily categorized as injunctive or monetary relief." *Gates v. Rohm & Haas Co.*, ___ F. 3d ___ (3d Cir. 2011), 2011 WL 3715817, at *5 (Aug. 25, 2011). The Third Circuit declined to resolve the issue but appeared to acknowledge that medical monitoring incorporates at least some aspects of monetary relief. *Id.* ("[W]e need not determine whether the monetary aspects of plaintiffs' medical monitoring claims are incidental to the grant of injunctive or declaratory relief."). As a result, the Third Circuit expressed skepticism about the viability of mandatory medical monitoring classes, noting that "[i]n light of the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*… we question whether the kind of medical monitoring sought here can be certified under Rule 23(b)(2) but we do not reach the issue." *Id.* (internal citation omitted).

Although the Supreme Court in *Dukes* did not decide that Federal Rule 23(b)(2) precludes certification of all claims for monetary relief, it suggested that other courts should take this argument seriously. 131 S. Ct. at 2557. A defense attorney should make this argument and, in doing so, disaggregate the elements of plaintiffs' proposed monitoring program into individual components, most notably including a fund. If *Dukes* precludes any request for monetary relief by a Federal Rule 23(b)(2) class, then a court will need to determine whether some relief requested by the class is monetary. A defense attorney should argue that medical monitoring is a claim for damages that has often been equitably administered by the courts. Contrary to significant precedent, it is not, properly understood, a claim for injunctive relief. Courts do not typically order defendants to conduct medical testing. Defendants just pay for it. From a defendant's perspective, there is no meaningful difference between a court order to fund a medical monitoring program and an order to pay money damages, except that a defendant sometimes can make payments to a monitoring fund in phases over time.

Even if the lower courts ultimately apply the "incidental" monetary damages test, referenced but not adopted in *Dukes*, which would permit them to certify some monetary damages claims under Federal Rule 23(b)(2), *Dukes* has created an opportunity for defendants to win on the issue of whether courts should certify mandatory medical monitoring classes at all, whereas in the past, they have typically lost this issue. *See* 131 S. Ct. at 2560,

This is not to say that plaintiffs' attorneys cannot close this window of opportunity for defendants. In addition to relying on previous cases that went their way and distinguishing *Dukes* as an employment case, plaintiffs' attorneys can take practical steps to try to preserve Federal Rule of Civil Procedure 23(b)(2) certification. Since appropriately characterizing medical monitoring relief arguably depends on state law, plaintiffs' attorneys may pursue favorable state court decisions characterizing medical monitoring as injunctive relief that they can later rely on to support their efforts to obtain Federal Rule 23(b)(2) certification in federal cases. *See Gates*, 2011 WL 3715817, at *5 (discussing whether medical monitoring is a monetary or injunctive remedy under state law and Pennsylvania law in particular). Plaintiffs' attorneys could also craft proposed monitoring programs to require more defendant involvement to bolster their characterization of the relief as injunctive.

Even if plaintiffs' attorneys can convince a court that medical monitoring is injunctive relief, one likely practical consequence of *Dukes* is that it will limit plaintiffs' attorneys' ability to combine medical monitoring claims with other claims seeking monetary relief, even arguably equitable ones such as restitution, because including these additional claims should significantly diminish the chance that a court would certify a mandatory class under Federal Rule of Civil Procedure 23(b)(2).

Medical Monitoring—An Indivisible Remedy?

Even if *Dukes* does not preclude Federal Rule of Civil Procedure 23(b)(2) certification of all medical monitoring claims, it should preclude mandatory certification of the kind of relief requested by most plaintiffs seeking medical monitoring today. A court-supervised monitoring program that includes a broad range of tests and is tailored to individual needs during the implementation phase fails to satisfy the Supreme Court's requirement that a Federal Rule 23(b)(2) class must seek an "indivisible" injunctive remedy. *See* 131 S. Ct. at 2557. The Third Circuit's recent *Gates* decision

confirms that this argument is a powerful weapon against certification of medical monitoring claims. 2011 WL 3715817, at *5.

To succeed on a claim for medical monitoring, plaintiffs must prove that, as a result of exposure to a hazardous substance or product, class members require diagnostic testing that would not have been medically necessary without the exposure. *Bower*, 522 S.E. 2d at 432, 206 W.Va. at 142; *Ayers*, 525 A.2d at 312, 106 N.J. at 606; *Potter*, 863 P.2d at 795, 824 25 Cal. Rptr. 2d at 579; *Hansen*, 858 P.2d at 980 (citation omitted).

Plaintiffs' attorneys typically concede, as they must, that some class members would require the requested testing even if they had not been exposed to a hazardous substance or product, because of their individual characteristics (*e.g.*, age, gender) and risk factors (*e.g.*, smoking, obesity, family history). In general, larger classes seeking more expansive monitoring regimens are particularly susceptible to this problem. Of course, from the perspective of a plaintiffs' lawyer, a medical monitoring claim's value depends on the size of the class and the number of costly medical procedures covered by the proposed monitoring program. As a result, in practice, this variable remedy issue arises in the vast majority of cases.

Even before *Dukes*, demonstrating that plaintiffs needed testing because of an exposure to a hazardous substance or product, as opposed to some other reason, presented the most serious obstacle to class certification. The Third Circuit, for example, has questioned whether courts could ever determine that plaintiffs need medical testing on a classwide basis, reasoning that

> each class member must prove that the monitoring program he requires is different from that normally recommended in the absence of exposure. To satisfy this requirement, each plaintiff must prove the monitoring program that is prescribed for the general public and the monitoring program that would be prescribed for him. Although the general public's monitoring program can be proved on a classwide basis, an individual's monitoring program *by definition* cannot.

Barnes, 163. F.3d at 141 (emphasis added). Accord *Gates*, 2011 WL 3715817, at *11 ("Plaintiffs' proposed common evidence and trial plan would not be able to prove the medical necessity of plaintiffs' proposed monitoring regime without further individual proceedings to consider class members' individual characteristics and medical histories and to weigh the benefits and safety of a monitoring program."). Several other courts have rejected class certification of medical monitoring claims on these grounds, finding that resolving whether plaintiffs need medical monitoring because of an exposure requires individualized inquiries. *E.g.*, *In re St Jude Med., Inc.*, 425 F.3d at 1120 (overturning the district court's certification for reasons including that "each plaintiff's need (or lack of need) for medical monitoring is highly individualized."); *Rhodes v. E.I. DuPont de Nemours & Co.*, 253 F.R.D. 365, 380 (S.D. W.Va. 2008) ("[I]ndividual inquiries into the need for medical monitoring… would destroy the cohesiveness of the class."), *aff'd*, 636 F.3d 88 (4th Cir. 2011); *In Re Rezulin Prod. Liab. Litig.*, 210 F.R.D. 61, 75 (S.D.N.Y.2002). *See also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (citation and quotation omitted) (affirming the Third Circuit's reversal of a Fed. R. Civ. P. 23(b)(3) settlement class, noting that the plaintiffs "will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.").

Typically, whether a plaintiffs' attorney could avoid this result has depended on his or her ability to convince a court that a medical monitoring program can be tailored to individual needs without running afoul of Federal Rule 23(b)(2). A program, a plaintiffs' attorney would argue, permits each class member to consult with a doctor who can identify the court-ordered tests that are appropriate to each individual's needs.

Dukes eviscerates this argument. The Supreme Court made it absolutely clear that

> claims for *individualized* relief… do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive… remedy warranted… Rule 23(b)(2) applies only when a single injunction… would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction… against the defendant.

131 S. Ct. at 2557.

A defense attorney has a strong argument that unless a requested medical monitoring regime applies to every class member, a court cannot certify the claim under Federal Rule 23(b)(2). If some class members would need testing even if exposure to a hazardous substance or product had not occurred, a court cannot determine a defendant's liability for the testing "as to all the class members or as to none of them." *Id.* (internal quotation and citation omitted). A plaintiffs' attorney in this situation has not met the "indivisible" injunction requirement for Federal Rule 23(b)(2) certification. In *Gates*, the Third Circuit affirmed denial of class certification for medical monitoring on precisely this basis, holding that "'[a] single injunction or declaratory judgment'" cannot "'provide relief to each member of the class' proposed here." 2011 WL 3715817, at *5 (citing *Dukes*, 131 S. Ct. at 2557).

By eliminating the "predominance" test in *Dukes*, the Supreme Court has created the conditions for courts to revisit classifying medical monitoring as injunctive or monetary relief in a meaningful way.

The "indivisible" injunction requirement will not necessarily disqualify every medical monitoring claim from Federal Rule 23(b)(2) certification. Plaintiffs' attorneys could potentially craft narrowly defined proposed classes that would exclude individuals with existing risk factors and propose fewer diagnostic tests to minimize the need for individual customization. For example, seeking mammograms for a class of women under 40 who do not have a family history of breast cancer would put plaintiffs on stronger footing than seeking that test as part of a proposed medical monitor-

ing program for an entire community that included men.

While plaintiffs' attorneys have always had to choose between pursuing a broad class seeking substantial relief and a narrower class seeking more limited relief that a court would more likely certify, *Dukes* substantially ratchets up the pressure on attorneys asking courts to certify medical monitoring classes to narrow the scope of both the proposed classes and the requested relief. Such approaches may improve the chances of certification somewhat, but they also potentially reduce the value of claims dramatically.

A defense attorney should argue that medical monitoring is a claim for damages that has often been equitably administered by the courts.

New Challenges for All Classes

Moreover, plaintiffs cannot rely on Federal Rule 23(b)(3) to avoid the negative consequences of *Dukes*. The Supreme Court's decision raises substantial obstacles to certifying medical monitoring classes whether plaintiffs' attorneys pursue a Federal Rule 23(b)(2) mandatory class or a Federal Rule 23(b)(3) opt-out class. And these obstacles are not unique to medical monitoring claims.

Heightened Commonality Requirements Apply

To obtain certification, all class plaintiffs must satisfy the Federal Rule of Civil Procedure 23(a)(2) requirement "that there are questions of law or fact common to the class." In *Dukes*, a majority of a divided court substantially raised the bar for satisfying this requirement, making it more difficult for all plaintiffs, including those seeking medical monitoring, to obtain class certification.

Before *Dukes*, many courts analyzed commonality perfunctorily, interpreting the requirement as "easily met." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (citing 1 Newberg on Class Actions §3-10, at 3-50). Commonality was "satisfied if the named plaintiffs share[d] at least one question of fact or law" with the prospective class. *E.g.*, *id.*

The *Dukes* majority rejected this liberal approach. It held that the relevant inquiry for determining if commonality is met is not the existence of common questions, "but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 2551 (quotation omitted).

Under the relaxed, pre-*Dukes* standard, attorneys pursuing medical monitoring classes often satisfied commonality by focusing on the common issues related to a defendant's conduct and whether it was wrongful. *See*, *e.g.*, *Day*, 851 F. Supp. at 7884 ("The focus of the case at bar is the behavior of the defendants."). As long as attorneys could demonstrate that those common issues existed, potential differences among the class members, such as differences in product usage, chemical dose, and the like, did not defeat commonality. After *Dukes*, plaintiffs' attorneys will need to demonstrate that despite potential differences among plaintiffs belonging to a proposed class, their individual claims "depend upon a common contention… [which 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." 131 S. Ct. at 2551.

Most importantly, in *Dukes* the Supreme Court signaled that courts should tolerate less variation among class members in future classes than in the past. Commonality and typicality, both required by Federal Rule 23(a), "tend to merge." *Gen. Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13 (1982). Before *Dukes*, most courts found that "[e]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Barnes*, 163 F.3d at 141 (quoting *Baby Neal*, 43 F.3d at 58 and citing 1 Newberg on Class Actions §3.15, at 3-78 ("[f]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.")). Rather than focus on whether plaintiffs' claims are based on the same legal theory, *Dukes* emphasizes that "[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." 131 S. Ct. at 2551 (citing *Falcon*, 457 U.S. at 157) (emphasis added).

Whether framed in terms of commonality or typicality, the focus in *Dukes* on a common injury as a prerequisite to certifying a class is a positive development for defendants confronted with medical monitoring claims because it is plaintiffs' greatest weakness. The injury at issue in a medical monitoring claim is the cost of diagnostic testing that would not have been medically indicated without exposure to a hazardous substance or product. And, this is precisely the issue that many courts have found requires individualized determinations that prevent certification under Federal Rule 23 (b)(2) and (b)(3). *E.g.*, *In re St Jude Med., Inc.*, 425 F.3d at 1120 (reversing certification of Fed. R. Civ. P. 23(b)(2) class); *In re St Jude Med., Inc.*, 522 F.3d at 840 (affirming denial of class certification under Fed. R. Civ. P. 23(b)(3)). Relying on *Dukes*, defense attorneys can now plague plaintiffs' attorneys seeking medical monitoring with this objection in the context of a court's commonality determination as well.

Experts Subject to *Daubert* Scrutiny at the Certification Stage

After *Dukes*, plaintiffs seeking medical monitoring face an increased risk that defense attorneys will successfully challenge and exclude expert testimony offered in support of class certification under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–93 (1993) (holding that expert testimony must be relevant and reliable to be admissible).

In recent years, parties have litigated vigorously the level of scrutiny that courts should apply to expert opinions offered during the class certification stage. While recently courts have tended to scrutinize class-related experts more rigorously under

Daubert's relevance and reliability criteria, some courts of appeal have permitted more lenient review at the certification stage than at trial. *Compare American Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010) ("[W]hen an expert's report or testimony is critical to class certification… a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, a district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."); *Sher v. Raytheon*, 2011 WL 814379, at *3 (11th Cir.) (March 9, 2009) (unpublished) ("[I]f the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class.") *with Blades v. Monsanto*, 400 F.3d 562, 575 (8th Cir. 2005) (holding that "findings as to the experts' disputes were properly limited to whether, if appellants' basic allegations were true, common evidence could suffice, given the factual setting of the case, to show classwide injury."); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (holding that "when a Rule 23 requirement relies upon a novel or complex theory as to injury… the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for that theory to succeed.").

In *Dukes*, the Supreme Court in dicta addressed the emerging circuit conflict and apparently endorsed full-blown *Daubert* scrutiny of expert opinions during the class certification stage. The Supreme Court noted: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so." 131 S. Ct. at 2553–54 (internal citation omitted).

The *Dukes* opinion seemed to suggest that defendants were destined to prevail on this issue in the future, but not so. Only two weeks later the Eighth Circuit held that an "exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011). As an alternative, the Eighth Circuit affirmed the district court's "focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Id.* The "focused *Daubert* analysis" approved by the Eighth Circuit apparently requires a court to apply *Daubert* criteria in evaluating expert testimony during the class certification stage, but it does not require, and in some circumstances, may not permit, a definitive ruling on its admissibility, for instance, if merits discovery has not concluded. *Id.* As Judge Gruender's dissent observed, *Dukes* disapproved of the standard adopted by the *Zurn* majority. *Id.*

While the precise parameters of scrutiny applied to expert testimony during class certification remain unresolved, *Dukes* can fairly be characterized, at a minimum, as moving the poles of the debate. In light of *Dukes*, a court should not uncritically accept expert testimony challenged in connection with class certification. A court should conduct some review, based upon *Daubert* criteria, of the relevance and reliability of that expert testimony.

Since plaintiffs bear the burden of showing that they have met the Federal Rule of Civil Procedure 23 requirements, the burden of increased scrutiny of expert testimony falls primarily on them. Plaintiffs asserting medical monitoring claims will especially feel the impact because virtually every element of a medical monitoring claim—hazardous substance, significant exposure, increased risk of disease, medical monitoring necessity—depends on expert testimony. For these reasons, plaintiffs' attorneys seeking medical monitoring through class actions typically rely heavily on expert testimony in their efforts to satisfy Federal Rule 23.

Precertification *Daubert* motions challenging plaintiffs' experts are now likely to become a ubiquitous feature of medical monitoring litigation, to the extent that litigation survives. Such motions practice will increase the already substantial costs and uncertainties of medical monitoring class actions, making them less attractive investments to the plaintiffs' bar.

Conclusion

The Supreme Court's *Dukes* decision has made an already challenging legal environment for plaintiffs seeking medical monitoring even more difficult. If any medical monitoring claims are certified in federal court, they will likely be opt-out classes under Federal Rule 23(b)(3), and will involve smaller classes seeking narrower relief than in the past. The diminished potential value of medical monitoring claims, combined with the increased risk that plaintiffs' experts' testimony will be excluded and that certification will ultimately be denied, will likely result in fewer medical monitoring class actions being filed in the federal courts in the future.

Whether the plaintiffs' bar can revive medical monitoring class actions in more liberal state courts remains to be seen. Another aspect of *Dukes* detrimental to plaintiffs is that it lays the groundwork for defense attorneys to challenge mandatory classes certified in state courts on due process grounds. *See* 131 S. Ct. at 2559.

While the plaintiffs' bar has demonstrated resilience in the face of past challenges, the current legal environment and its practical impact on medical monitoring classes is so unfavorable that it seems unlikely medical monitoring class actions, at least in the federal courts and in the near-term, can recover their past status as potent threats. FD