

## Dukes Applied to Reconsideration of Class Certification

July 25, 2011 by [Sean Wajert](#)

A state court recently denied the motion of a group of Michigan residents to certify a class action regarding their dioxin claims against Dow Chemical Co. See [Henry v. Dow Chemical Co.](#), No. 03-47775-NZ (Saginaw County, Mich., Cir. Ct., 7/18/11).

Here at *MassTortDefense* we typically focus on appellate decisions, but we thought it interesting that this court relied heavily on the Supreme Court's decision in *Dukes v. Wal-Mart* to re-analyze the prerequisites for class certification under state law.

Plaintiffs live in an area along the Tittabawassee River near Dow's plant in Midland, and allege their properties were contaminated by dioxin from the plant.

The trial court originally certified a class, and on appeal the Michigan Supreme Court vacated the decision and remanded the issue in 2009, calling for the trial court to clarify its evaluative framework, particularly for the general prerequisites of typicality, adequacy, and commonality.

On remand, the court concluded that *Dukes* has "far-reaching implications for certification of class action lawsuits, including the present case." Accordingly the court "must reanalyze whether the commonality prerequisite to class certification was satisfied in this case."

Relying on the Supreme Court [analysis](#) in *Dukes*, the court changed its mind and denied certification based on a failure by plaintiffs to establish the commonality element, because of the absence of a "glue" to hold all of the plaintiffs' claims together. The only common issue, said the court, was whether the defendant negligently released the chemical, so whether and how each class member was injured involved a highly individualized inquiry regarding issues such as the level and type of contamination allegedly on the specific properties, the different remediation needs of the properties, and the varying stages of ongoing remediation.

Similarly, even under the nuisance claim, it was clear that individual plaintiffs used and enjoyed their properties in different ways. "Whether plaintiffs have suffered an interference with or loss of use and enjoyment of their property requires an individualized factual inquiry into each plaintiff's use and enjoyment of their property."

The court rejected plaintiffs' argument that the allegation of "one defendant" with a supposedly singular act of pollution in "one discrete geographic area" distinguished this case from the Supreme Court's commonality concerns in the discrimination context.

In light of the commonality failing, the court did not reach the reconsideration of the other factors, such as typicality and adequacy.