

*Muddying the Waters: The Downstream Implications of  
Wal-Mart v. Dukes for Medical Monitoring Class Actions in  
Missouri*

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**ABSTRACT**

*In 2011, in Wal-Mart Stores, Inc. v. Dukes, the United States Supreme Court heightened scrutiny of class certification under Federal Rule of Civil Procedure (FRCP) 23(a)(2)'s commonality requirement and imposed a strict injunctive standard for relief sought under FRCP Rule 23(b)(2). In 2007, the Missouri Supreme Court followed several other states in acknowledging that claimants tortiously exposed to toxins may seek medical monitoring for latent disease in a class action. Although state courts are not bound by federal procedural rules, class actions increasingly invoke federal jurisdiction, and this Article attempts to analyze the likely implications of Dukes for toxic exposure class actions. Further, using Missouri as a benchmark, this Article provides suggestions for bolstering the chances of recovery for toxic exposure claimants facing removal to federal courts.*

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## I. INTRODUCTION

Medical monitoring is theoretically simple: a defendant that exposes persons to harmful substances must pay for periodic medical treatment to detect and mitigate latent diseases potentially caused by the exposure.<sup>1</sup> Yet, after nearly thirty years of decisions,<sup>2</sup> medical monitoring remains amorphous and unsettled.<sup>3</sup> As medical monitoring claims are most often brought in the context of mass exposure to toxins and harmful products, sometimes involving thousands of claimants, they inevitably intersect with procedural rules governing class actions. Although state courts are not bound by federal procedural rules, many states have class action rules nearly identical to Federal Rule of Civil Procedure 23 (Rule 23).<sup>4</sup> Because medical monitoring claims often involve defendants operating in different jurisdictions from the claimants they expose, diversity of citizenship implicates federal jurisdiction. Rule 23's procedural requirements will apply to medical monitoring claims based on state law. This is especially true after enactment of the Class Action Fairness Act of 2005 (CAFA), which significantly federalized class action suits.<sup>5</sup>

This paper considers the effect of federal procedural law on state medical monitoring class actions, focusing specifically on toxic exposure in Missouri. Part II introduces policy arguments for and against medical monitoring and describes how medical monitoring fits within the legal landscape. Part III describes Rule 23 and how medical monitoring operates under Rule 23. Further, it details the Missouri Supreme Court's analysis of Rule 23 and recognition of medical monitoring in a 2007 class action, *Meyer*

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<sup>1</sup> See *infra* notes 14–15 and accompanying text.

<sup>2</sup> See *infra* note 6.

<sup>3</sup> See discussion *infra* Part II.B.

<sup>4</sup> FED. R. CIV. P. 23. See *infra* notes 57–58 and accompanying text.

<sup>5</sup> See *infra* notes 75–76 and accompanying text.

*ex rel. Coplin v. Fluor Corp.*<sup>6</sup> Part IV describes the class certification analysis outlined in the Supreme Court's 2011 decision of *Wal-Mart Stores, Inc. v. Dukes*,<sup>7</sup> which heightened the scrutiny of class certification under the commonality requirement of Rule 23(a)(2).<sup>8</sup> The Court also imposed a strict injunctive standard to relief sought under Rule 23(b), with reservation on whether monetary claims "incidental" to injunctive claims should be allowed.<sup>9</sup>

The stringent analysis in *Dukes* is likely to impose significant barriers to class certification in federal courts. These barriers will be especially difficult to surmount for medical monitoring claimants who must navigate complicated causation issues in toxic torts,<sup>10</sup> and likely have no statutory remedy.<sup>11</sup> Part IV also discusses how *Dukes* has already affected the certification of a putative medical monitoring class in the Third Circuit and considers other outcomes for medical monitoring post-*Dukes*. Finally, Part V offers suggestions for how Missouri courts, litigants, and legislators should respond to *Dukes* to preserve medical monitoring for victims of toxic exposure in class actions in federal courts.

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<sup>6</sup> *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. 2007). In *Meyer*, the court overturned denial of class certification for a proposed class of children seeking medical monitoring following exposure to lead from a local smelter, determining common issues sufficiently predominated over individual issues to satisfy Missouri's version of Rule 23(b)(3). *See infra* notes 100–07 and accompanying text.

<sup>7</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>8</sup> *See infra* notes 116–20 and accompanying text.

<sup>9</sup> *See infra* notes 125–31 and accompanying text.

<sup>10</sup> *See infra* notes 19–24 and accompanying text.

<sup>11</sup> *See infra* notes 16–18 and accompanying text.

## II. MEDICAL MONITORING: POLICY AND LEGAL FOUNDATIONS

Anchored in tort law, medical monitoring most often arises in the context of mass exposure to toxins or harmful products, often in class action litigation.<sup>12</sup> At its core, medical monitoring allows plaintiffs exposed to toxic substances to recover the costs to detect, and thereby prevent or mitigate, latent diseases through ongoing medical testing and examination.<sup>13</sup> Thus, medical monitoring claims "are akin to [tort] claims for enhanced risks of future injury, except that they seek to recover the expected cost of preventative medical treatment necessitated by another's wrongful conduct rather than a percentage of the value of the ultimate harm expected to flow from [it]."<sup>14</sup> Medical monitoring is necessarily tied to complex causation issues in toxic torts, and after nearly thirty years of case law,<sup>15</sup> courts remain

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<sup>12</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1702–03 (2002).

<sup>13</sup> See Daniel L. Martens & Ernest J. Getto, *Medical Monitoring and Class Actions*, 17 NAT. RESOURCES & ENV'T 225, 225 (2003); Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712, 716 (Mo. 2007) (citing Ayers v. Jackson Township, 525 A.2d 287, 308 (N.J. 1987)); Pankaz Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659, 1659 (2002) (explaining that a core justification for medical monitoring is that "uninsured plaintiffs ought not have to pay out of their own pockets").

<sup>14</sup> Goldberg & Zipursky, *supra* note 12, at 1702. See *In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 850 (3d Cir. 1990).

<sup>15</sup> The first medical monitoring case was initially filed in 1975. See *Friends for All Children v. Lockheed Aircraft Corp.*, 87 F.R.D. 560, 562 (D.D.C. 1980). *Friends for All Children* involved 150 Vietnamese orphans who survived a military transport plane crash and later sought medical surveillance to determine if cabin depressurization could cause brain damage. *Id.* at 561–62. Analogizing to a car crash where the plaintiff could recover the expenses associated with post-crash diagnostic examination, the court held monitoring was necessary despite the lack of present physical injury. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984).

in conflict over its place in the law. In various courts, medical monitoring has been allowed or denied, premised on present physical injury or not, categorized as a claim or a remedy, and as legal or equitable. This section will attempt to explain this amorphous and complex legal issue.

#### A. MEDICAL MONITORING POLICY

Medical monitoring is anchored in tort law and the reason is simple: statutory remedies are often lacking for toxic exposure. The environmental regulatory regime in the United States is strong, but not all encompassing. For example, the Resource Conservation and Recovery Act may help *prevent* toxic exposure through enhanced management and disposal oversight of solid and hazardous wastes.<sup>16</sup> And the Comprehensive Environmental Response, Compensation, and Liability Act establishes federal liability to ensure the prompt *cleanup* of hazardous waste once contamination has occurred.<sup>17</sup> Yet, these statutes leave the social costs of hazardous waste and toxic exposure unaddressed, forcing injured and exposed plaintiffs to seek redress in state tort law.<sup>18</sup> This is perhaps the strongest argument for allowing medical monitoring.

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<sup>16</sup> RCRA requires that "the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible," and all waste generated "should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b) (2006).

<sup>17</sup> See 42 U.S.C. §§ 9601–9675 (2006).

<sup>18</sup> See Beko Reblitz-Richardson, *Lockheed Martin and California's Limits on Class Treatment for Medical Monitoring Claims*, 31 *ECOLOGY L.Q.* 615, 616–17 & nn.1–2, 6–7 (2004); ROBIN KUNDIS CRAIG ET AL., *TOXIC AND ENVIRONMENTAL TORTS: CASES AND MATERIALS* 8–9 (2011) (listing various public laws and noting that tort law plays an important role in filling regulatory gaps).

However, toxic exposure is an extraordinarily complex area of tort law, particularly on the element of causation.<sup>19</sup> The plaintiff's exposure may have been caused by multiple, and sometimes indeterminate or defunct, defendants.<sup>20</sup> Plaintiffs may have widely varied durations and dosages of exposure. Some plaintiffs may be presently injured, while others are only at risk of future injury from exposure-related diseases with long latency periods.<sup>21</sup> Further, the risk of disease may depend on other environmental and individual issues, such as the synergistic effect of other chemicals, or a plaintiff's medical and genetic history.<sup>22</sup> Many of these issues are complicated

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<sup>19</sup> See, e.g., CRAIG ET AL., *supra* note 18, at 159. Historically, causation issues were not a large concern, but as toxic torts arose in the last half of the 1900s, "proof of causation has become one of the most complex and controversial aspects of tort liability." *Id.* Causation issues include:

the division of the causal question into questions of specific and general causation, the relevance of the temporal order on the question of causation, the need for statistical evidence of the relationship between substance and disease . . . the existence of multiple defendants exposing plaintiff to the same substance, the long latency period between exposure and disease, the fact that the causes of many diseases are unknown, and the role of probabilistic evidence as proof of causation.

*Id.* at 165.

<sup>20</sup> *Id.* at 230. With characteristic toxic torts like asbestos, claimants are often exposed to multiple defendants' products, exacerbating already complex causation issues. *Id.* As toxic injuries with long latency periods have increased, so have problems of identifying defendants, and the corresponding need to shift the causal burden to defendants when plaintiffs cannot determine which particular defendant caused the exposure at issue. *Id.* at 261.

<sup>21</sup> See *id.* at 228–29 (discussing latency as a barrier to establishing causation); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) (noting the risk of conflict between asbestos claimants with present or future injury).

<sup>22</sup> See FEDERAL JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 430 (2d ed. 2000) (listing factors affecting individual exposure

by rules governing the admissibility of expert testimony,<sup>23</sup> and judicially imposed thresholds for the relative risk of disease a plaintiff must demonstrate to establish causation.<sup>24</sup>

Given these causation issues, concerns of fundamental fairness, based in part on perceived conflicts between presently and latently injured plaintiffs, have fueled criticism of medical monitoring. Critics argue that a permissive medical monitoring policy may risk bankrupting defendants who are forced to pay for a costly, long-term medical monitoring program to detect future injuries, placing plaintiffs with present injury at a disadvantage and possibly leaving them without redress.<sup>25</sup> They further caution that due to the

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such as activity level, age, sex, and genetic make-up); CRAIG ET AL., *supra* note 18, at 219 ("Traditionally, unless a disease is a 'signature disease,' i.e., a disease known to be caused almost exclusively by exposure to a particular substance, there has been no way to distinguish between the causes of an ailment based on the ailment itself. . . . The emerging field of genomics offers hope" for linking the disease to particular toxins); *Dafler v. Raymark Industries, Inc.*, 611 A.2d 136, 140 (N.J. Super. 1992) (discussing epidemiological evidence of "multiplicative or synergistic," as opposed to merely "additive," effects of asbestos and smoking on the relative risk of lung cancer).

<sup>23</sup> See CRAIG ET AL., *supra* note 18, at 291 ("[T]oxic tort cases often turn on complicated testimony from expert witnesses. . . . [L]awyers often expend significant resources litigating the admissibility of such testimony.").

<sup>24</sup> See *id.* at 202 (Many courts hold that "[A] plaintiff can prove specific causation by a preponderance of the evidence by providing epidemiological evidence that finds a causal relationship with a relative risk greater than 2.0; that is, people exposed to the substance suffer injuries at least more than twice as frequently as those not exposed.").

<sup>25</sup> See, e.g., Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUBL. L. REV. 135, 148-49 (2007); Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 369 (2005).

abundance of chemicals to which all Americans are exposed, medical monitoring risks opening the floodgates to litigation.<sup>26</sup> They warn that medical monitoring litigation, coupled with the inherent difficulties of managing a medical monitoring program, may unduly and unnecessarily burden an already overtaxed judiciary.<sup>27</sup>

To address these concerns, some critics have proposed various limiting principles that should apply to medical monitoring. Critics urge that lump sum awards, which allow successful plaintiffs to do with their money what they choose, should be denied entirely.<sup>28</sup> Further, they argue courts should avoid double recovery in cases where an employer-provided or private insurance plan could pay for the necessary monitoring.<sup>29</sup> Moreover, critics contend plaintiffs should be required to demonstrate that a monitoring procedure actually *exists* which could detect latent injury, that the diagnostics and treatment are generally accepted in the medical community, and that monitoring beyond general preventative care is warranted given the relative risk of developing disease.<sup>30</sup> Critics have further posited that the disease for which monitoring is sought should be "serious," and there must be "demonstrated clinical value in the early detection and diagnosis of the disease."<sup>31</sup> In other words, if there is no treatment or cure, there can be no benefit from detection and diagnosis, thus rendering monitoring

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<sup>26</sup> Behrens & Appel, *supra* note 25, at 147, 151–52.

<sup>27</sup> *Id.* at 144, 149.

<sup>28</sup> *Id.* at 154–56 (noting that, in some cases, successful claimants have not used lump sums awards for medical monitoring); Schwartz et al., *supra* note 25, at 369–71.

<sup>29</sup> Behrens & Appel, *supra* note 25, at 156.

<sup>30</sup> *Id.* at 157–58.

<sup>31</sup> *Id.* at 158.

unnecessary.<sup>32</sup> Finally, they argue that courts should apply a cost-benefit analysis to determine if monitoring is appropriate.<sup>33</sup>

Many of these criticisms are well founded, and several courts have established criteria similar to those listed above.<sup>34</sup> Yet critics often fail to acknowledge that defendants who expose the public to toxins are not realizing the *true* costs of the environmental externalities they create.<sup>35</sup>

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<sup>32</sup> *See id.* This argument does not account for advancements in medicine: although a disease may be untreatable or incurable at the time of exposure, a treatment or cure may later develop, potentially denying persons exposed a cure where early diagnosis and treatment could mitigate the disease.

<sup>33</sup> *Id.* at 159.

<sup>34</sup> *See In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990). Some other factors include whether

(1) the disease in question progressive asymptotically following toxic exposure; (2) a diagnostic test with high sensitivity exists; (3) the exposed population has a relatively high prevalence of disease; (4) the diagnostic test therefore has a high predictive value; (5) the test is relatively low-cost; (6) medical monitoring could be integrated into standard clinical follow-up of those with disease; (7) monitoring could lead to early preventative care; and (8) monitoring allows for the appropriate timing of definitive treatment.

Behrens & Appel, *supra* note 25, at 159 (citing *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042 (E.D. Pa. 2000), *reh'g denied*, 2000 WL 1599259 (E.D. Pa. 2000)).

<sup>35</sup> *E.g.*, Richard W. Caperton & Adam Hersh, *Putting America Back to Work with Clean Energy: Productivity, Economic Efficiency, and the Promise of Green Jobs*, CTR. FOR AM. PROGRESS (Mar. 17, 2011), available at [http://www.americanprogress.org/issues/2011/03/green\\_jobs.html](http://www.americanprogress.org/issues/2011/03/green_jobs.html) (noting that, though the costs of emissions are not included in utilities' bottom line, the public pays for environmental externalities through, for instance, higher incidences of disease, lost work days, and premature death). Externalities from coal-fired electricity alone cost the United States between \$175 and \$523 billion per year. Epstein et al., *Full Cost Accounting for the Life Cycle*

Ultimately, the policy debate depends upon the societal choice of whether to place the burden of these costs on the defendants, or on the public as a whole, and the corresponding consequences of that choice to economy and health. This is a question perhaps better suited for the legislature than the courts. However, modern courts have taken on the challenge to a greater or lesser degree, creating a varied and interesting body of medical monitoring law in just a few decades.

#### B. MEDICAL MONITORING IN THE JURISDICTIONAL LANDSCAPE

Medical monitoring is extremely amorphous. Some jurisdictions do not recognize it at all.<sup>36</sup> Where medical monitoring is recognized, some courts impose a fairly uniform set of limits on its availability by requiring plaintiffs to prove the significance of the exposure and the necessity of medical monitoring.<sup>37</sup> Whether medical monitoring is an independent cause of action

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*of Coal*, 1219 ANNALS N.Y. ACAD. SCI. 73, 93 (Feb. 2011), available at [http://solar.gwu.edu/index\\_files/Resources\\_files/epstein\\_full%20cost%20of%20coal.pdf](http://solar.gwu.edu/index_files/Resources_files/epstein_full%20cost%20of%20coal.pdf) (last visited Jan. 14, 2013). See also Michael Martina, *Apple Criticized for China Supply Chain*, REUTERS.COM (Aug. 31, 2011), available at <http://www.reuters.com/article/2011/08/31/us-apple-china-idUSTRE77U4M620110831> (discussing allegations of toxic discharges from suspected Apple suppliers, resulting from Apple's effort "grab super profits" by using loopholes in developing countries' environmental laws) (last visited Mar. 11, 2012); Margaret Tortorella, *Will the Commerce Clause "Pull the Plug" on Minnesota's Quantification of the Environmental Externalities of Electricity Production?*, 79 MINN. L. REV. 1547, 1547 (1995).

<sup>36</sup> See, e.g., *Trimble v. Asarco, Inc.*, 83 F. Supp. 2d 1034, 1041 (D. Neb. 1999), *aff'd* 232 F.3d 946 (8th Cir. 2000). See Martens & Getto, *supra* note 13, at 226 (listing jurisdictions refusing to recognize medical monitoring); Venugopal, *supra* note 13, at 1660.

<sup>37</sup> See *In re Paoli R. Yard PCB Litigation*, 916 F.2d at 852 (requiring plaintiffs alleging a medical monitoring *cause of action* to prove that: "1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant. 2. As a proximate result of exposure,

or merely a remedy is sometimes difficult to distinguish, and judicial analysis is often unclear.<sup>38</sup> In some jurisdictions, medical monitoring resembles an independent cause of action, with the anticipated costs of medical monitoring as the legally cognizable injury.<sup>39</sup> Consequently, in these "cause of action" jurisdictions, there need not be present physical injury.<sup>40</sup> Other jurisdictions refuse to recognize medical monitoring as a cause of action, but allow it as a remedy.<sup>41</sup> Where framed as a remedy, medical monitoring is most commonly

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plaintiff suffers a significantly increased risk of contracting a serious latent disease. 3. That increased risk makes periodic diagnostic medical examinations reasonably necessary. 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. These factors would, of course, be proven by competent expert testimony." *In re Paoli* has been cited and applied by, e.g., *Arch v. Am. Tobacco Co., Inc.*, 175 F.R.D. 469, 481 (E.D. Penn. 1997), and *In re Marine Asbestos Cases v. Am. Hawaii Cruises, Inc.*, 265 F.3d 861, 866 (9th Cir. 2001). *But see* *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 441 (Nev. 2001) (collecting cases that disagree on the elements required to establish a medical monitoring cause of action); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 718 (Mo. 2007); *Ayers v. Jackson Township*, 525 A.2d 287, 312–13 (N.J. 1987).

<sup>38</sup> *Goldberg & Zipursky, supra* note 12, at 1707–08 (discussing the "apparent conflation of right and remedy" by the majority in *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997)).

<sup>39</sup> *See id.* at 1702. *See, e.g., In re Paoli*, 916 F.2d at 850–52. *But see* *Goldberg & Zipursky, supra* note 12, at 1706 (noting that, to be viable, medical monitoring should not be categorized as a claim for purely economic loss, because "[n]o jurisdiction recognizes a general duty to take care to avoid causing economic loss to others").

<sup>40</sup> *See, e.g., Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1476–77 (D. Colo. 1991); *Bougeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355, 359 (La. 1998); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977 (Utah 1993); *Petito v. A.H. Robins*, 750 So. 2d 103, 105 (Fla. App. 2000).

<sup>41</sup> *See, e.g., Badillo*, 16 P.3d at 440 (noting that more cases recognize medical monitoring as a remedy than as a cause of action); *Ayers*, 525 A.2d at 308, 312.

tied to an underlying negligence cause of action;<sup>42</sup> the remedy is merely "parasitic" on the underlying tort.<sup>43</sup> Within these "medical monitoring as remedy" jurisdictions, there is a split. Although seemingly antithetical to the preventative purpose of medical monitoring, some jurisdictions require present physical injury,<sup>44</sup> while others do not.<sup>45</sup> Because traditional tort law provides recovery for future medical expenses, labeling such relief "medical monitoring" is a misnomer.<sup>46</sup> It is not the "true" medical monitoring at the heart of legal debate, and will not be discussed further in this note.<sup>47</sup>

The nature of the medical monitoring remedy may be legal or equitable. Some jurisdictions categorize medical monitoring as monetary, while others

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<sup>42</sup> *Badillo*, 16 P.3d at 440 (citing Amy B. Blumenberg, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 671–72 (1992)).

<sup>43</sup> *Goldberg & Zipursky*, *supra* note 12, at 1702. *See, e.g.*, *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. 2007).

<sup>44</sup> *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991); *Witherspoon v. Phillip Morris, Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 853–54 (Ky. 2002); *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 831–32 (Ala. 2001).

<sup>45</sup> *Meyer*, 220 S.W.3d at 718; *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993).

<sup>46</sup> *See* RESTATEMENT (SECOND) OF TORTS § 924(c) (1979) (stating parties tortiously injured are entitled to recover damages for prospective "reasonable medical and other expenses").

<sup>47</sup> *See Venugopal*, *supra* note 13, at 1660 n.4 (noting that "states that require actual, present injury for recognition of a medical monitoring claim do not actually recognize the claim").

categorize it as injunctive.<sup>48</sup> The nature of the remedy depends primarily on how the plaintiff frames the request for relief. In *Day v. NLO, Inc.*<sup>49</sup> the District Court summarized three distinct forms of medical monitoring relief and their corresponding remedial categorization:

First, a court may simply order a defendant to pay a plaintiff a certain [lump] sum of money. The plaintiff may or may not choose to use that money to have his medical condition monitored. Second, a court may order the defendants to pay the plaintiffs' medical expenses directly so that a plaintiff may be monitored by the physician of his choice. Neither of these . . . constitute injunctive relief . . . .

However, a court may also establish an elaborate medical monitoring program of its own, managed by court-appointed court-supervised trustees, pursuant to which a plaintiff is monitored by particular physicians and the medical data produced utilized for group studies. In this situation, a defendant, of course, would finance the program as well as being required by the court to address issues as they develop during program administration. Under these circumstances, the relief constitutes injunctive relief . . . .<sup>50</sup>

Courts have framed medical monitoring within each of these structures.<sup>51</sup> However, the lump sum is disfavored and garners severe criticism as

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<sup>48</sup> *Id.* at 1660. Compare, e.g., *Meyer*, 220 S.W.3d at 717, with *Cook v. Rockwell Int'l Corp.*, 778 F. Supp. 512, 515 (D. Colo. 1991) (holding claim was not ripe, but noting medical monitoring could be injunctive relief).

<sup>49</sup> *Day et al. v. NLO, Inc.*, 144 F.R.D. 330 (S.D. Ohio 1992), *vacated sub nom. In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993).

<sup>50</sup> *Id.* at 335–36.

<sup>51</sup> See *Ayers v. Jackson Township*, 525 A.2d 287, 314–15 (N.J. 1987) (affirming a lump-sum jury verdict of \$8,204,500 to plaintiffs exposed to toxins in well water, but cautioning that policy concerns weigh in favor of

ineffective and undermining of the policies in favor of medical monitoring.<sup>52</sup> For example, in *Metro-North Commuter R. Co. v. Buckley*,<sup>53</sup> a railroad employee sought a lump sum for medical monitoring after asbestos exposure, but the Supreme Court held that the common law did not support a "full-blown, traditional, tort law cause of action" for "unqualified" lump sum damages awards.<sup>54</sup> Thus, this note focuses on claims for either legal or equitable relief in the form of a defendant or court-supervised monitoring program for toxic exposure.<sup>55</sup>

### III. MEDICAL MONITORING UNDER RULE 23 AND MISSOURI'S FORMULATION IN *MEYER*

Toxic exposure can affect a multitude of diverse claimants, some of whom may seek medical monitoring in a class action suit. Federal courts interpret Rule 23 to require plaintiffs to demonstrate that a proposed class satisfies three implied threshold requirements, four express prerequisites, and fits within one of four class categories. Many states' procedural rules mimic

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court-supervised programs); *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 284–87 (S.D. Ohio 1997) (certifying class where FDA-approved, defendant-supervised monitoring program already in place); *Cook*, 778 F. Supp. at 515.

<sup>52</sup> See Behrens & Appel, *supra* note 25, at 154–56; Schwartz et al., *supra* note 25, at 369–73. See also Reblitz-Richardson, *supra* note 18, at 620–21 (noting the advantages of coordinated medical monitoring programs).

<sup>53</sup> *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

<sup>54</sup> *Id.* at 444. The Court did not fully explain which qualifications, if any, would render lump sum awards acceptable, and remanded the case, seemingly implying that the plaintiff could replead for non-lump sum relief. See *id.* at 455–56 (Ginsburg, J., dissenting).

<sup>55</sup> Medical monitoring is also relevant to products (especially pharmaceutical) liability; the author limits this discussion to toxins primarily because of developments in Missouri's medical monitoring law. See Part III.C.

the Federal Rules of Civil Procedure,<sup>56</sup> and except for minor variations, Missouri's Rule 52.08 is virtually identical to Rule 23.<sup>57</sup>

The preliminary showing plaintiffs must make to certify a class under Rule 23 or state rules may act as barriers to medical monitoring class action suits. This Part discusses Rule 23, the general operation of medical monitoring within class action rules, and *Meyer ex rel. Coplin v. Fluor Corp.*, Missouri's first medical monitoring class action.

#### A. CLASS CERTIFICATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

Courts apply a "rigorous analysis" to Rule 23. If any element is unsatisfied, the class may not be certified.<sup>58</sup> Courts have articulated three threshold requirements into Rule 23: 1) the class must be definable; 2) the representative must be a class member; and 3) the controversy must be live, not moot.<sup>59</sup> Once these thresholds are met, the proposed class must then satisfy four prerequisites under Rule 23(a): 1) the class must have "numerosity," such that joinder is impracticable; 2) the legal or factual questions must have "commonality"; 3) the claims or defenses of the class representatives must show "typicality" of those of the class; and 4) the class representatives and counsel must "fairly and adequately protect the interests of the class."<sup>60</sup> Thus, Rule 23(a)(1) and (a)(2) focus on judicial economy and

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<sup>56</sup> See, e.g., Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 922 n.181 (2011) (discussing virtual "in toto" adoption of the Federal Rules by many state courts, and noting that "the basic vision of the Federal Rules . . . has exercised an influence even on those states that did not adopt the Rules").

<sup>57</sup> Compare MO. SUP. CT. R. 52.08, with FED. R. CIV. P. 23.

<sup>58</sup> Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982).

<sup>59</sup> KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 37 (3d ed. 2012).

<sup>60</sup> FED. R. CIV. P. 23(a)(1)–(4).

the class as a whole, while (a)(3) and (a)(4) focus on the class representatives, counsel and due process for unnamed class members.<sup>61</sup>

After satisfying the four prerequisites, the proposed class must fit within one of four categories in Rule 23(b). First, (b)(1)(A) allows certification if individual litigation would risk inconsistent judgments, resulting in "incompatible standards of conduct for the party opposing the class."<sup>62</sup> Second, (b)(1)(B) allows certification if individual litigation would prevent proposed class members not party to the litigation from pursuing, or adequately protecting, their interests.<sup>63</sup> Third, (b)(2) allows certification where the class opponent "acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate" for the whole class.<sup>64</sup> Subdivision (b)(2) was established with a goal of opening the door to civil rights class actions and expressly excludes claims for purely monetary relief.<sup>65</sup> Yet, a (b)(2) class may still be certified if monetary claims are merely incidental to claims for injunctive or declaratory relief.<sup>66</sup> Also, some courts imply a "cohesiveness" requirement on

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<sup>61</sup> See KLONOFF ET AL., *supra* note 59, at 61.

<sup>62</sup> See FED. R. CIV. P. 23(b)(1)(A). This circumstance may arise when two individuals seek varying injunctive relief, making it impossible for the defendant to comply with both judgments.

<sup>63</sup> *Id.* at 23(b)(1)(B). This situation often arises in "limited fund" lawsuits, where a large judgment against the defendant would leave it insolvent, thus precluding late-coming plaintiffs from relief. KLONOFF ET AL., *supra* note 59, at 171. See Martens & Getto, *supra* note 13, at 227; Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

<sup>64</sup> FED. R. CIV. P. 23(b)(2).

<sup>65</sup> See KLONOFF ET AL., *supra* note 59, at 191 (noting that "[t]he drafters [of (b)(2)] envisioned that the subdivision would be used heavily in civil rights cases"); Martens & Getto, *supra* note 13, at 227.

<sup>66</sup> See Martens & Getto, *supra* note 13, at 227; Allison, 151 F.3d at 415. *But see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (holding backpay claims were not "incidental" to injunctive relief, and

putative (b)(2) classes.<sup>67</sup> Fourth, a class may be certified under Section (b)(3) if common issues "predominate" over individual issues, and a class action is "superior" to other adjudicative mechanisms.<sup>68</sup> Section (b)(3) provides four factors for assessing predominance and superiority, with an emphasis on judicial economy.<sup>69</sup> Section (b)(3) allows for monetary relief; so to ensure due process, Rule 23(c) requires unnamed class members to receive notice and a chance to "opt out" of the class, in order to avoid preclusion of their individual money damages claims.<sup>70</sup> As Rule 23(c) does not provide a similar opt-out procedure for (b)(1) and (b)(2) classes, they are "mandatory," and individual claimants cannot generally escape class membership.<sup>71</sup>

#### **B. MEDICAL MONITORING AND CLASS CERTIFICATION GENERALLY**

Medical monitoring claims are often brought as class actions, particularly in toxic exposure cases.<sup>72</sup> These claims are often removed to federal courts under federal diversity jurisdiction in part because of the nature

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expressing reservation whether any types of monetary relief could be "incidental" to injunctive or declaratory relief).

<sup>67</sup> See, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (stating that the "cohesiveness" inquiry may be more restrictive than predominance under (b)(3)). *But see* *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (rejecting cohesiveness).

<sup>68</sup> FED. R. CIV. P. 23(b)(3).

<sup>69</sup> *Id.* at 23(b)(3)(A)–(D). These factors include the proposed class members' interests in individual litigation, the existence of ongoing litigation, the desirability of the particular forum, and the manageability of the proposed class.

<sup>70</sup> See *Martens & Getto*, *supra* note 13, at 227.

<sup>71</sup> *Id.*

<sup>72</sup> *Goldberg & Zipursky*, *supra* note 12, at 1703.

of the parties in toxic exposure cases,<sup>73</sup> and in part because the Class Action Fairness Act<sup>74</sup> significantly federalized class actions in 2005.<sup>75</sup> However, "case law regarding the appropriateness of class treatment in pollution cases is 'sparse and divided.'"<sup>76</sup> Although several courts and commentators have posited that medical monitoring claims are "ideally situated" for class treatment because diagnostics and examinations are "essentially standardized,"<sup>77</sup> some courts are more skeptical. These courts have denied certification under Rule 23(b).<sup>78</sup> The extraordinarily complex individual causation issues in toxic exposure cases can preclude certification particularly because the "rigorous analysis" required for class certification "will entail

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<sup>73</sup> Although some toxics cases involve geographically-limited contamination as in *Meyer*, many implicate diversity jurisdiction because of out-of-state defendant-manufacturers or nationwide distribution, as with asbestos or tobacco. *See, e.g., Barnes*, 161 F.3d at 130–31 (suit by Pennsylvania residents against all "the major American tobacco companies," initially filed in Pennsylvania court and removed to the Eastern District of Pennsylvania by defendants on grounds of diversity of citizenship. *Id.* at 138).

<sup>74</sup> 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006).

<sup>75</sup> The Act federalized class actions primarily by expanding federal district courts' original jurisdiction over class and "mass" actions, and liberalizing removal from state to federal court. *See KLONOFF ET AL.*, *supra* note 59, at 467–70.

<sup>76</sup> *Reblitz-Richardson*, *supra* note 18, at 623 (quoting *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 910 (7th Cir. 2003)).

<sup>77</sup> *E.g., Martens & Getto*, *supra* note 13, at 272 (noting at least 15 federal and 11 state cases have adopted similar reasoning and quoting Patrick J. Hagan, *Medical Monitoring: Will Buckley Have an Effect?*, 17 FED'N OF INS. & CORP. COUNS. Q. 225 (1998)).

<sup>78</sup> *Id.* *See, e.g., Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 94 (W.D. Mo. 1997) (where neither commonality nor predominance satisfied for tobacco injuries); *Thomas v. FAG Bearings Corp., Inc.*, 846 F. Supp. 1400, 1403–04 (W.D. Mo. 1994) (finding that predominance was not met for TCE contamination).

some overlap with the merits of the plaintiff's underlying claim."<sup>79</sup> Certification has been denied under both the implied "cohesiveness" requirement of (b)(2) classes,<sup>80</sup> as well as the "predominance" inquiry for (b)(3) classes.<sup>81</sup>

Additionally, at least until *Dukes*, the tripartite recovery regime described in *Day* had obvious implications for class certification. Under the first and second *Day* categories, where plaintiffs request lump sums or defendant-supervised programs, the proposed class might be certified under (b)(3).<sup>82</sup> Under the third *Day* category, where plaintiffs seek an injunctive court-supervised program, the proposed class might be certified under

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<sup>79</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982)). Merits inquiry into class status can frontload discovery, raising issues of expert witness admissibility and other evidentiary battles. See Rebecca Justice Lazarus, *Discovery Prior to Class Certification: New Considerations and Challenges*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS 6 (Jan. 7, 2010), available at <http://www.gibsondunn.com/publications/Documents/Lazarus-DiscoveryPriorToClassCertification.pdf>.

<sup>80</sup> See *Martens & Getto*, *supra* note 13, at 273 (citing *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 253 (Md. 2000) for the proposition that the "cohesiveness" requirement is "even more demanding and difficult to satisfy" than the (b)(3) predominance inquiry. *Id.*). But see *Venugopal*, *supra* note 13, at 1681–94 (arguing a stringent cohesiveness requirement is unnecessary for most medical monitoring claims).

<sup>81</sup> See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

<sup>82</sup> See *Ayers v. Jackson Township*, 525 A.2d 287, 314–15 (N.J. 1987) (lump sum), *In re Teletronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prod. Liab. Litig.*, 172 F.R.D. 271, 284–87 (S.D. Ohio 1997) (certifying a defendant-supervised program under (b)(1)(A), and stating the class also met (b)(3), and possibly (b)(1)(B), but not (b)(2)).

(b)(2).<sup>83</sup> Similarly, a proposed class might be certified under (b)(1)(A), when, for example, multiple plaintiffs bring individual claims seeking inconsistent medical monitoring programs, thus placing the defendant at risk of incompatible standards.<sup>84</sup> Finally, although (b)(1)(B) would seem to be available when there are a large number of plaintiffs and the medical monitoring would be costly, creating a potential "limited fund,"<sup>85</sup> recent Supreme Court jurisprudence has restricted this avenue.<sup>86</sup>

### C. THE MISSOURI SUPREME COURT'S FORMULATION OF MEDICAL MONITORING IN *MEYER*

The Missouri Supreme Court adopted medical monitoring in *Meyer ex rel. Coplin v. Fluor Corp.*<sup>87</sup> in 2007. In *Meyer*, the defendants were involved

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<sup>83</sup> FED. R. CIV. P. 23(b)(2) (allowing certification where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

<sup>84</sup> See, e.g., *In re Telectronics* at 284–85 (certifying products liability medical monitoring class under (b)(1)(A) where over 400 individual suits were pending in multi-district litigation, risking "multiple and conflicting orders rendered from different courts regarding the scope and necessity of a medical monitoring program which may also conflict with FDA imposed requirements."). But see *O'Connor v. Boeing N. Am., Inc.*, 180 F.R.D. 359, 377 n.22 (C.D. Cal. 1997) (denying certification of a proposed (b)(1)(A) class seeking monitoring for nuclear exposure, distinguishing that, in *In re Telectronics*, medical monitoring was a cause of action instead of a remedy, and the defendant had created its own monitoring program so that any court order would affect the whole class).

<sup>85</sup> The "limited fund" is particularly relevant where many plaintiffs suffer present physical injury in addition to those at risk of latent, future injury, creating a risk of inadequate representation by named plaintiffs or class counsel whose interests in representing one group may inherently conflict with the other group. See *Amchem*, 521 U.S. at 625–27.

<sup>86</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 850–61 (1999).

<sup>87</sup> *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007).

in operating a lead smelter in Herculaneum, Missouri.<sup>88</sup> The smelter annually emitted large quantities of lead and other chemical by-products, thereby increasing the risk of lead and toxin related medical problems, which are especially harmful to children.<sup>89</sup> The plaintiff proposed a (b)(3) class of over 200 children,<sup>90</sup> alleging negligence, strict liability, private nuisance, and trespass as theories of liability. As to recovery, the plaintiff sought compensatory damages to establish a medical monitoring program for ongoing diagnostic testing to detect lead and other toxin related injuries or illnesses.<sup>91</sup>

*Meyer* reached the Missouri Supreme Court after the District Court held, and the Court of Appeals affirmed, that the proposed class could not be certified because individual issues would predominate over common issues.<sup>92</sup> On appeal, the plaintiff alleged the Court of Appeals erred because "its class

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<sup>88</sup> *Id.* at 714.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The proposed class included all minors who lived in, or attended school or day care in, the "Class Geographic Area" for at least 12 months while under 6 years of age, and all minors born to mothers who lived in the Area for more than seven months of pregnancy, with eligibility capped at 168 months (14 years) of age.

<sup>91</sup> *Id.* The plaintiffs sought medical monitoring even though, at the time the suit was filed, persons in the Herculaneum area could avail themselves of free blood testing to screen for lead. *Meyer ex rel. v. Fluor Corp.*, 2006 WL 996540, at 1 (Mo. Ct. App. 2006) ("*Meyer I*"). Although blood testing can quantify the amount of lead in the bloodstream, it does not reveal lead stored in tissues and other organs. *See, e.g.*, OSHA, *Substance Data Sheet for Occupational Exposure to Lead*, 29 C.F.R. § 1910.1025 App. A(ii.)B(3) (2012).

<sup>92</sup> *Meyer*, 220 S.W.3d at 714. Interestingly, although the trial court found the class satisfied numerosity, neither the trial court nor the Court of Appeals ruled on commonality or typicality, thus skipping two 23(a) elements typically viewed as prerequisites to the 23(b) analysis. *See Meyer I*, 2006 WL at 1; *Meyer*, 220 S.W.3d at 719–20.

action analysis assumed incorrectly that a present physical injury is a necessary element of a medical monitoring claim," and the individualized issues the court addressed were relevant to personal injury actions, but not medical monitoring for class-wide toxic exposure to future injury.<sup>93</sup> The Court of Appeals purported to assume, without deciding, that a medical monitoring claim *could* proceed without present physical injury, yet it held otherwise.<sup>94</sup> In affirming the trial court's denial of class certification for lack of predominance, the Court of Appeals expressed its overriding concern that certifying a medical monitoring class without requiring present physical injury would prove too much, allowing generic causation to be determined without regard to the individual connection between causation and exposure.<sup>95</sup> The Court of Appeals identified nine individual issues<sup>96</sup> and determined that the "evidence would perforce need to be individual rather than common."<sup>97</sup>

The Missouri Supreme Court reversed. The Court noted that "'well-accepted' principles of Missouri law entitle plaintiffs to recover for the prospective consequences of a defendant's tortious conduct if the injury is

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<sup>93</sup> *Meyer*, 220 S.W.3d at 715.

<sup>94</sup> *Meyer I*, 2006 WL at 4–5. The plaintiff also alleged "actual injury" from the smelter's by-products. *Id.* at 1.

<sup>95</sup> *Id.* at 6.

<sup>96</sup> *Meyer*, 220 S.W.3d at 719 (quoting *Meyer I* at 1). The issues the Court of Appeals identified included:

the age at which exposure occurred, the nature of the exposure, the time period over which the exposure occurred, the blood lead level, the existence of other sources such as lead paint for any presence of lead, whether the individuals are presently suffering from any lead related injuries, whether the individuals are still being exposed or whether such exposure terminated, if the exposure to lead in Herculaneum has terminated how long ago it terminated, and whether there is any need for a particular individual to be monitored.

<sup>97</sup> *Meyer I*, 2006 WL at 4.

reasonably certain to occur."<sup>98</sup> Guided by these principles, the Court determined that medical monitoring is not a new tort, but is "simply a compensable item of damage when liability is established under traditional tort theories of recovery."<sup>99</sup> Thus, under this formulation, medical monitoring in Missouri is not a cause of action, but a remedy "parasitic" on an underlying tort claim, and the remedy is monetary, not equitable.<sup>100</sup> However, the Court stated, "the theory of recovery for medical monitoring damages is that the plaintiff is entitled, upon proper proof, to obtain compensation for an injury to the legally protected interest in avoiding the cost of reasonably necessary medical monitoring occasioned by the defendant's actions."<sup>101</sup> This statement seems to conflict with the Court's notion that medical monitoring is a "parasitic" remedy, and instead resembles those jurisdictions where medical monitoring is an independent cause of action with economic injury as the legally cognizable harm.<sup>102</sup>

Given its formulation of medical monitoring, the Court held that no present injury was required because "a physical injury requirement essentially extinguishes the claim and bars the plaintiff from a full recovery."<sup>103</sup> Thus, the Court of Appeals erred by applying factors "primarily relevant to a

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<sup>98</sup> *Meyer*, 220 S.W.3d at 717.

<sup>99</sup> *Id.*

<sup>100</sup> The Court of Appeals specifically noted that the plaintiffs sought monetary damages, "but not equitable relief." *Meyer I*, 2006 WL at 1. This is despite the fact that the plaintiffs sought to establish a medical monitoring program, *Meyer*, 220 S.W.3d at 714, and as elaborated in *Day*, the program can either be injunctive or monetary, depending on whether it is court- or defendant-supervised. *Day v. NLO, Inc.*, 144 F.R.D. 330, 335–36 (S.D. Ohio 1992).

<sup>101</sup> *Meyer*, 220 S.W.3d at 718 (citing *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424, 429–30 (W. Va. 1999)).

<sup>102</sup> See discussion at Part V.A. (This economic injury basis for medical monitoring is problematic, as it conflicts with the economic loss rule.)

<sup>103</sup> *Meyer*, 220 S.W.3d at 718.

personal injury action."<sup>104</sup> The Court then established a two-part test for analyzing predominance: first, a plaintiff must show "a significantly increased risk" of exposure-related disease, and second, that the "medical monitoring is, to a reasonable degree of medical certainty, necessary" for detection and diagnosis of the disease.<sup>105</sup> Because the "common and overriding issue" in *Meyer* was "the common exposure to a set of toxins from a single source," the Court held the plaintiffs had satisfied the predominance requirement.<sup>106</sup>

The only court to analyze a medical monitoring claim in Missouri post-*Meyer* strictly construed its holding. In *Ratliff v. Mentor Corp.*,<sup>107</sup> a products liability case, a federal district court held that, because *Meyer* was the only Missouri case addressing medical monitoring, and because "[f]ederal courts should not expand liability in diversity cases if the legal theory is 'not well established,'" *Meyer* only allowed medical monitoring in toxic exposure cases.<sup>108</sup> In *Ratliff*, as in *Meyer*, the named plaintiff alleged several underlying tort causes of action and sought medical monitoring as a remedy for the increased risk of "vaginal mesh" injuries from a product implanted in the pelvis to treat urinary stress incontinence.<sup>109</sup> As the issue was a defective

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<sup>104</sup> *Id.* at 719.

<sup>105</sup> *Id.* at 718 (citing *Bower*, 522 S.E.2d at 433, 431).

<sup>106</sup> *Id.* at 719.

<sup>107</sup> *Ratliff v. Mentor Corp.*, 569 F. Supp. 2d 926 (W.D. Mo. 2008).

<sup>108</sup> *Id.* at 929 (quoting *Tucker v. Paxcon Mach. Co.*, 645 F.2d 620, 624 (9th Cir. 1981)).

<sup>109</sup> *Id.* at 927–28. The plaintiff's primary tort theory was products liability. Interestingly, neither plaintiff nor the court categorized the medical monitoring remedy as damages; rather, the plaintiff sought "medical monitoring as an equitable remedy" and a declaratory judgment, and requested the court to "invoke equity to set up a notification, research, and medical monitoring fund. . . ." *Id.* at 928.

product instead of toxic exposure, the court dismissed with prejudice the medical monitoring claim.<sup>110</sup>

#### IV. THE DOWNSTREAM EFFECTS OF *WAL-MART V. DUKES* ON RULE 23 ANALYSIS

In states like Missouri, medical monitoring is an important tool for plaintiffs who could not otherwise afford the diagnostics necessary to detect latent diseases caused by toxic exposure. Yet because many toxic exposures are mass torts, putative classes, which could be certified under state law, they may be decided in federal courts applying Rule 23. In *Dukes*, the majority of the Supreme Court conflated the previously "easily satisfied" commonality analysis under Rule 23(a)(2) with the more demanding "predominance" inquiry under Rule 23(b)(3) and applied a strict injunctive standard for (b)(2) classes. Part IV explains the Supreme Court's Rule 23 analysis in *Dukes*. Further, it briefly describes a recent Third Circuit case that denied certification for a putative medical monitoring class and relied in part on *Dukes*' holdings in the context of both (b)(2) and (b)(3). Finally, this Part provides an analysis of the likely downstream effects of *Dukes* on medical monitoring class actions generally, emphasizing the effects for Missouri.

##### A. *WAL-MART V. DUKES*: MUDDYING THE WATERS OF RULE 23 ANALYSIS

In a 2011 watershed decision, the United States Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*,<sup>111</sup> a massive employment discrimination class action case.<sup>112</sup> The proposed class sought certification under Rule 23(b)(2) and requested injunctive and declaratory relief, as well as punitive

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<sup>110</sup> *Ratliff*, 569 F. Supp. 2d at 929.

<sup>111</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>112</sup> *Id.* at 2547. The putative class included 1.5 million current and former Wal-Mart employees alleging sex discrimination regarding denial of equal pay or promotions.

damages and back-pay.<sup>113</sup> The Supreme Court held 5-4 that the putative class failed to satisfy the commonality prerequisite of Rule 23(a)(2)<sup>114</sup> and unanimously held that the class could not be certified under Rule 23(b)(2).<sup>115</sup>

As a preliminary matter, the majority stated that Rule 23 is not "a mere pleading standard."<sup>116</sup> Rather, satisfaction of the Rule's provisions is a factual matter to be determined under a "rigorous analysis" that frequently "entail[s] some overlap with the merits of the plaintiff's underlying claim."<sup>117</sup> In its Rule 23(a)(2) analysis, the majority declared that "commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and not merely a violation of the same law.<sup>118</sup> The majority further declared that the class members' claims "must depend upon a common contention" that "must be 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."<sup>119</sup> As the plaintiffs did not demonstrate a "biased testing procedure," or "significant proof" of a general policy of discrimination, the majority found commonality lacking.<sup>120</sup>

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<sup>113</sup> *Id.* at 2548. The Ninth Circuit affirmed the trial court's certification of the class, reasoning that individual backpay issues did not predominate over the request for declaratory and injunctive relief. *Id.* at 2550.

<sup>114</sup> *Id.* at 2556–57.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2551–52 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160–61 (1982)).

<sup>117</sup> *Id.*

<sup>118</sup> *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157).

<sup>119</sup> *Id.* (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

<sup>120</sup> *Id.* at 2553–56 (citing *Falcon*, 457 U.S. at 157–58, 159 n.15).

According to the dissent's argument, the majority's holding is discordant with the plain text of Rule 23(a)(2), which merely requires that the class as a whole have at least one question of law or fact in common.<sup>121</sup> The majority's holding essentially conflated the commonality prerequisite with the more rigorous predominance inquiry under (b)(3), thereby "elevat[ing] the (a)(2) inquiry so that it is no longer 'easily satisfied,'" as it should be.<sup>122</sup> By mimicking the predominance inquiry of subdivision Rule 23(b)(3) in its (b)(2) analysis, the majority left "no mission" for Rule 23(b)(3), which was designed to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."<sup>123</sup> Particularly concerning is the possibility that the stricter evaluation meant for (b)(3) classes may now tacitly

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<sup>121</sup> Justice Ginsburg, dissenting, wrote that "[t]he Rule 'does not require that all questions of law or fact raised in the litigation be common,' *id.* at 2562 (quoting 1 H. NEWBERG & A. CONTE, *NEWBERG ON CLASS ACTIONS* § 3.10, 348–49 (3d ed. 1992)), and "indeed, '[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement,'" so long as it "will advance the determination of the class members' claims." (quoting Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176 n.110 (2003)). Under the dissent's approach, the plaintiffs satisfied commonality, because resolution of their claims "would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart's stores," and "Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-certification, demands nothing further." *Dukes* at 2565.

<sup>122</sup> *Dukes*, 131 S. Ct. at 2565 (citing 5 J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 23.23[2] (3d ed. 2011)). Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038985](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985).

<sup>123</sup> *Dukes*, 131 S. Ct. at 2566 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

apply to (b)(1) and (b)(2) classes under the majority's commonality analysis as the prerequisites of Rule 23(a) apply to all (b) classes.<sup>124</sup>

Despite the majority's conflated commonality analysis, the Supreme Court unanimously held that the proposed class could not be certified under Rule 23(b)(2).<sup>125</sup> As a foundational matter, the Court emphasized the importance of the notice and opt-out provisions of Rule 23(b)(3) to due process when the relief sought is monetary instead of declaratory or injunctive.<sup>126</sup> The Court then dispensed with three different theories regarding the relationship between the claims for declaratory and injunctive relief, and back-pay. First, the Court found it irrelevant that the back-pay claims were not the "predominating request." The Court gave no weight to the Advisory Committee's statement that subdivision (b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively* or *predominantly* to money damages,"<sup>127</sup> and refused to allow (b)(2) certification where monetary claims are simply non-predominant or non-exclusive.<sup>128</sup> Second, the Court held that regardless of whether the claims to back-pay were "equitable" in nature, "[t]he Rule does not speak of 'equitable' remedies generally but of

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<sup>124</sup> *Id.* The dissent emphasized that, so long as Rule 23(a) is satisfied for (b)(1) and (b)(2) classes, "[g]eneralizations concerning such individually applicable evidence cannot serve as a justification for the denial of [injunctive] relief." *Id.* at 2567. This sentiment is likely driven by concern for civil rights claimants. See KLONOFF ET AL., *supra* note 59, at 191.

<sup>125</sup> *Dukes*, 131 S. Ct. at 2557.

<sup>126</sup> *Id.* at 2559.

<sup>127</sup> *Id.* (citing Advisory Committee's Note, 39 F.R.D. 69, 102 (1966)) (emphasis in opinion).

<sup>128</sup> *Id.* at 2559–60. The Court was concerned that the plaintiffs' "predominance" test may entirely preclude individual class members with backpay claims from recovery by collateral estoppel if the class failed on the merits. *Id.* at 2559.

injunctions and declaratory judgments."<sup>129</sup> Third, although the plaintiffs did not argue that back-pay was "incidental," the Court acknowledged that some courts have granted (b)(2) certification where monetary claims are merely "incidental" to declaratory or injunctive claims.<sup>130</sup> Although the Court did not decide whether any forms of "incidental" monetary relief are consistent with (b)(2) and due process, it held that the plaintiffs' back-pay claims could not satisfy the "incidental" standard in any case.<sup>131</sup>

**B. GATES V. ROHM & HAAS CO.: APPLYING *DUKES* TO  
MEDICAL MONITORING**

In 2011, only a month after *Dukes*, the Third Circuit decided *Gates v. Rohm & Haas Co.*,<sup>132</sup> a case involving alleged contamination of air and drinking water by vinyl chloride, a carcinogen.<sup>133</sup> The plaintiffs sought certification of a proposed medical monitoring class under both (b)(2) and (b)(3).<sup>134</sup> The Third Circuit reserved the decision on whether monetary aspects of medical monitoring were "incidental" to injunctive relief under

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<sup>129</sup> *Id.* at 2560. The Court also noted that Title VII, the anti-discrimination statute at issue, distinguished between backpay and declaratory and injunctive relief (citing 42 U.S.C. § 2000e 5(g)(2) (2006)).

<sup>130</sup> *Id.* (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), in which the Fifth Circuit defined "incidental" monetary relief as "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief," and stated that "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations").

<sup>131</sup> *Dukes*, 131 S. Ct at 2560.

<sup>132</sup> *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011).

<sup>133</sup> *Id.* at 258. The plaintiffs also alleged violations of CERCLA. *Id.* at 259.

<sup>134</sup> *Id.* at 262.

Rule 23(b)(2).<sup>135</sup> However, it declared that "a (b)(2) class may require more cohesiveness than a (b)(3) class," and "[b]ecause causation and medical necessity often require individual proof, medical monitoring classes may founder for lack of cohesion."<sup>136</sup> Citing *Dukes* for the proposition that the "rigorous" class certification analysis often overlaps with the merits and (b)(2) classes must have "strong commonality of interests," the Third Circuit upheld the district court's merits review of expert testimony on exposure.<sup>137</sup> The plaintiffs presented expert testimony averaging the exposure across the class to demonstrate that monitoring was "reasonably medically necessary," but the Third Circuit emphasized that "evidence of hypothetical, composite persons" was insufficient for establishing cohesion.<sup>138</sup> Since the average exposure evidence was insufficient, and because the proposed monitoring could be harmful to certain class members,<sup>139</sup> the Third Circuit determined

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<sup>135</sup> *Id.* at 263 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557, 2561 (2011)).

<sup>136</sup> *Id.* at 264 (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998), and citing, among other cases, *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005)).

<sup>137</sup> *Id.* at 264–65. This was despite the parties' stipulation that *Daubert* issues for expert witness testimony would not be addressed at the class certification stage. *Id.* at 265. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>138</sup> *Gates*, 655 F.3d at 266–68. The Third Circuit emphasized that averaged exposure evidence does "not reflect that different persons may have different levels of exposure based on biological factors or individual activities over the class period," citing activity level, age, sex, genetics, work, travel, and recreational habits, *id.* at 267, and rejected the plaintiffs' suggestion to base the relevant exposure level on EPA's regulatory thresholds because "[a]lthough the positions of regulatory policymakers are relevant, their risk assessments are not necessarily conclusive in determining what risk exposure presents to specified individuals." *Id.* at 268 (citing FEDERAL JUDICIAL CENTER, *supra* note 22, at 413).

<sup>139</sup> *Id.* at 268–69 (the evidence indicated MRI monitoring could be harmful to those with pre-existing kidney disease).

that a class-wide remedy could not be granted.<sup>140</sup> In the Third Circuit's view, individual proceedings would be required to assess the class members' medical histories and the "benefits and safety of a monitoring program."<sup>141</sup>

Regarding Rule 23(b)(3), the Third Circuit asserted that the predominance and superiority requirements of (b)(3) "are less stringent than the cohesiveness requirement of Rule 23(b)(2),"<sup>142</sup> but rejected the plaintiffs' attempts to redefine an alternative (b)(3) class with more specific, yearly exposure evidence.<sup>143</sup> In denying (b)(3) certification, the Third Circuit cited *Dukes'* command that Rule 23 is not "a mere pleading standard," and a plaintiff 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."<sup>144</sup>

### C. THE LIKELY DOWNSTREAM EFFECTS OF *DUKES* ON MEDICAL MONITORING GENERALLY

As *Gates* demonstrates, proposed medical monitoring classes may quickly feel the effects of *Dukes'* heightened scrutiny without a change in law. Although there are limitations on the effect of federal procedural rules on state substantive law,<sup>145</sup> and states are not bound by federal procedural

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<sup>140</sup> *Id.* at 269.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (citing *Barnes*, 161 F.3d at 143 and *In re St. Jude*, 425 F.3d at 1121).

<sup>143</sup> *Id.* at 270.

<sup>144</sup> *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

<sup>145</sup> See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (discussing limitations imposed by *Erie* and the Rules Enabling Act); discussion *infra* Part V.C.

rules, Rule 23 applies to state class actions in federal courts.<sup>146</sup> In cases like *Meyer*, where an in-state defendant causes relatively isolated toxic exposure, local plaintiffs can likely avoid federal diversity jurisdiction and increase the chances of surviving the class certification inquiry. Yet toxic exposure is often a mass tort involving toxins like asbestos, with nationwide distribution and out-of-state defendants that will likely seek federal diversity jurisdiction,<sup>147</sup> thereby likely implicating the new strictures on Rule 23 certification imposed by *Dukes*.

The consequences of *Dukes* for medical monitoring claims are undeniable. As a prerequisite of Rule 23(a), and as the dissenting Justices in *Dukes* feared, *Dukes*' commonality analysis is not easily avoided and may be interpreted to apply to all 23(b) classes.<sup>148</sup> As a general matter, *Dukes*' call for merits inquiry to determine if Rule 23's requirements are met and may force medical monitoring plaintiffs to demonstrate at the class certification stage complicated evidence regarding individual exposure, relative risk, and general and specific causation in order to satisfy commonality, thereby compounding the difficulties of proof relating to admissibility of expert testimony.<sup>149</sup> This frontloaded discovery is a costly and time-intensive

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<sup>146</sup> *See id.* at 1437–38.

<sup>147</sup> As of 2001, mass tort actions were "increasingly brought in state courts." Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93, 93 (2001). *See also* Stephen J. Carroll et al., *Asbestos Litigation*, RAND INSTITUTE FOR CIVIL JUSTICE 61 (2005), available at [http://www.rand.org/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf). However, the federalization of class actions has greatly increased since 2005. *See supra* notes 74–77 and accompanying text.

<sup>148</sup> *See Dukes*, 131 S. Ct. at 2565.

<sup>149</sup> *See Lazarus, supra* note 79, at 6.

impediment to certifying any medical monitoring class.<sup>150</sup> Further, what is merely an impediment to the proposed class could prove an insurmountable barrier to individual litigants, leaving plaintiffs tortiously exposed to toxins with no effective recovery for costly diagnostics to detect and treat latent disease.<sup>151</sup>

On the other hand, *Dukes* may not prove to be entirely the watershed case it initially appears to be. Under Rule 23(b)(2), it is possible that federal courts will carve out exceptions to *Dukes*' limitation on individual monetary claims "incidental" to injunctive relief, isolating that restriction to employment discrimination cases seeking individual back-pay claims.<sup>152</sup> Even if *Dukes*' strict injunctive standard is not construed as limited to employment cases, it will likely have little effect where medical monitoring is deemed injunctive. Yet it will still be relevant where, as in *Meyer*, the

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<sup>150</sup> See, e.g., Carroll et al., *supra* note 147, at xxvi (noting that, of \$70 billion spent in asbestos litigation from the 1960s through 2002, claimants had transaction costs of \$19 billion).

<sup>151</sup> Blue collar workers and low-income communities are disproportionately affected by toxins, and less able to pay for the intensive discovery required in individual toxic tort litigation, or the necessary costs of independent monitoring. The availability of a class remedy for medical monitoring is thus especially important to social justice. See generally Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371 (2008) (noting that, despite the 1987 publication of the United Church of Christ's Commission for Racial Justice's landmark report, *Toxic Wastes and Race in the United States*, which brought to light the problem of environmental injustice toward communities of color, "people of color and low-income communities are still the dumping grounds for all kinds of toxins." *Id.* at 372.). See also Elizabeth B. Forsyth, *Solving Widespread Toxic Chemical Exposure: A Taxing Job*, 29 VA. ENVTL. L.J. 115, 120 & n.41 (2011).

<sup>152</sup> See Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015 (discussing cases distinguishing *Dukes*' (b)(2) analysis).

plaintiff frames the request for relief as monetary.<sup>153</sup> Also, under Rule 23(b)(3), it is possible that federal courts applying *Dukes'* commonality analysis will in turn heighten their scrutiny of predominance in order to avoid leaving the requirement with "no mission."<sup>154</sup> However, it is more likely that putative (b)(3) medical monitoring classes will simply face the same hurdles they have historically, but just at an earlier time in the proceedings.<sup>155</sup>

#### V. CORRECTING FOR *DUKES*: LITIGATION STRATEGIES AND JUDICIAL AND LEGISLATIVE RESPONSES

Given *Dukes'* heightened scrutiny of Rule 23(a)(2) and (b)(2), and the likelihood that federal courts will be the ultimate adjudicators of state medical monitoring claims, Missouri may wish to reconsider and revise medical monitoring to buttress its citizens' chances of recovery. Part V discusses various approaches Missouri courts, litigants, and legislators should consider. First, the courts should reaffirm existing interpretations of predominance and commonality, and clarify the limits of medical monitoring. Second, where medical monitoring is a remedy, as in Missouri, litigants should frame their request for relief as injunctive rather than monetary and avoid vague "equitable" language. Litigants should also consider framing medical monitoring as an independent cause of action rather than a "parasitic" remedy. Third, the legislature should consider framing medical monitoring as a "substantive" right.

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<sup>153</sup> If, for example, the plaintiffs in *Meyer* sought to enjoin the lead smelter's operations, and also sought damages in the form of medical monitoring, the reviewing court may have to determine if the monitoring was sufficiently "incidental" to the injunctive relief to satisfy (b)(2).

<sup>154</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2566 (Ginsburg, J., dissenting).

<sup>155</sup> Klonoff, *supra* note 122.

**A. MISSOURI COURTS SHOULD REAFFIRM EXISTING  
INTERPRETATIONS OF RULE 52.08 AND CLARIFY THE LIMITS  
AND THEORY OF RECOVERY FOR MEDICAL MONITORING**

Despite similarities between state class action rules and Rule 23, state and federal courts may apply different interpretations. For example, some federal courts may take an all-or-nothing approach to the predominance inquiry in Rule 23 so a single individualized issue may prevent certification. To the contrary, states may take an "all-things-considered, balancing inquiry," where a single common issue may outweigh many individual questions.<sup>156</sup> Likewise, in Missouri "[t]he predominant issue need not be 'dispositive of the controversy or even be determinative of the liability issues involved.'"<sup>157</sup> This proposition contradicts *Dukes'* imperative that, for *commonality*, which should arguably be a lower bar than predominance, determination of a common issue must "resolve an issue that is central to the validity of each one of the claims in one stroke."<sup>158</sup>

Given the tensions between the federal and state class action inquiry, and the gaps left by the *Meyer* court, Missouri courts should take several steps to strike a balanced approach to medical monitoring. To protect

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<sup>156</sup> *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2378 (2011) (distinguishing the federal approach to 23(b)(3) from West Virginia's interpretation of predominance in *In re Rezulin Litigation*, 585 S.E.2d 52, 72 (W. Va. 2003)); see also Klonoff, *supra* note 122 (noting that federal courts in recent years have denied certification on predominance after finding individual issues "without carefully *weighing* those individualized issues against the common issues.") (emphasis in original); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715–16 (Mo. 2007) (describing Missouri's predominance inquiry as allowing class certification where one or more common issues predominate, "even though other important matters will have to be tried separately").

<sup>157</sup> *Meyer*, 220 S.W.3d at 716 (quoting ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 4:25, at 269 (4th ed. 2002)).

<sup>158</sup> *Dukes*, 131 S. Ct. at 2551.

plaintiffs in state court from defendants' likely arguments that *Dukes'* analysis should apply to Rule 52.08, Missouri's version of Rule 23, Missouri courts should reaffirm existing state law precedent for both commonality and predominance. Further, Missouri courts should affirmatively declare that *Meyer* was not limited to toxic exposure, as the federal district court in *Ratliff* presumed, but also applies to products.<sup>159</sup> On the other hand, to protect defendants from unfairly shouldering the burden of medical monitoring for plaintiffs who may never manifest injury, Missouri courts should go beyond the two-part test in *Meyer*, which requires a plaintiff to show "significantly increased risk" of disease and that monitoring is "to a reasonable degree of medical certainty, necessary."<sup>160</sup> In addition to these fundamental elements, the courts should impose some of the limits proposed by critics of medical monitoring and adopted in other jurisdictions, such as requiring that the treatments and diagnostics are generally accepted in the medical community.<sup>161</sup>

Moreover, *Meyer* arguably mischaracterized the legally cognizable harm as injury to the plaintiffs' *economic* interests.<sup>162</sup> This theory of recovery for medical monitoring is fundamentally at odds with the "economic loss rule,"

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<sup>159</sup> See discussion *supra* notes 108–11 and accompanying text. Products liability is even more appropriate for medical monitoring because many causal issues are avoided. All claimants have been exposed to the same product which is known to have a particular defect.

<sup>160</sup> *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 718 (Mo. 2007).

<sup>161</sup> See discussion *supra* Part II.A.

<sup>162</sup> *Meyer*, 220 S.W.3d at 718 (stating that the theory of recovery for medical monitoring is that "the plaintiff is entitled, upon proper proof, to obtain compensation for an injury to the *legally protected interest in avoiding the cost of reasonably necessary medical monitoring occasioned by the defendant's actions.*") (emphasis added).

which states that a defendant has no duty or liability for purely economic loss without corresponding physical damage.<sup>163</sup>

The Missouri Supreme Court is not alone in conflating the *remedy* of recovering the costs of medical monitoring with the *right* to recover due to a defendant's tortious conduct.<sup>164</sup> If Missouri courts continue characterizing medical monitoring as a remedy "parasitic" on an underlying tort, they should avoid describing the harm as economic in the future. A better approach is to elevate medical monitoring from a mere remedy to an independent cause of action based on an *affirmative duty* on the part of toxin manufacturers and distributors. Although tort law is generally reluctant to recognize affirmative duties,<sup>165</sup> toxic exposure is a prime area for an exception. Claims for medical monitoring should be no different than claims against defendants who have created a dangerous condition, giving rise to a corresponding duty to those harmed.<sup>166</sup> Manufacturers, distributors, and handlers of toxins who negligently create a danger of toxic exposure owe a corresponding duty to those they expose. Cast in this light, requiring defendants in toxic exposure cases to pay for the costs of medical monitoring merely "enjoin[s] performance of a *primary duty* rather than seeking compensation for a

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<sup>163</sup> See generally Goldberg & Zipursky, *supra* note 12, at 1707.

<sup>164</sup> Variation in whether medical monitoring is a remedy or a cause of action can be attributed to confusion in even the highest courts. See *id.* at 1707–08 (discussing the Supreme Court's "conflation of right and remedy" in its determination that medical monitoring is not viable as a cause of action if the remedy is a lump sum in *Metro-North Commuter R. Co. v. Buckley*, and Justice Ginsburg's dissenting view that whether medical monitoring is a viable cause of action is "wholly distinct from the question of how to structure the remedy,").

<sup>165</sup> *Id.* at 1710.

<sup>166</sup> *Id.* (providing an example of a store owner's duty to render aid to a customer injured by an instrumentality or employee of the store, or a drug dealer's duty to provide medical attention to a buyer as a result of the drugs).

completed wrong . . . ."<sup>167</sup> This formulation conforms with society's expectations of the duty of care for handlers of dangerous products, conveniently eliminates the conceptual difficulties of medical monitoring as right versus remedy, and may mitigate the effect of individual causation issues on the class certification decision.<sup>168</sup>

**B. LITIGANTS SHOULD FRAME MEDICAL MONITORING  
REQUESTS AS INJUNCTIVE RELIEF**

Since the proposed class in *Meyer* sought certification under 52.08(b)(3), the Missouri Supreme Court did not address whether medical monitoring could be deemed injunctive.<sup>169</sup> *Dukes* clarified that merely labeling the remedy "equitable" is insufficient for (b)(2) certification, as (b)(2) is limited to classes seeking injunctive or declaratory relief.<sup>170</sup> Yet in most cases, medical monitoring *is* injunctive. The defendant must pay for the *future* costs associated with diagnosing and potentially *preventing* or

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<sup>167</sup> *Id.* at 1711 (emphasis added). For a helpful discussion of the repercussions of establishing this affirmative duty, *see id.* at 1711–15.

<sup>168</sup> *See O'Connor v. Boeing N. Am., Inc.*, 180 F.R.D. 359, 377 n.22 (C.D. Cal. 1997) (noting that, where medical monitoring is an independent claim or cause of action, rather than a remedy, individual issues are avoided because "if the class prevailed on their claim, the defendant would necessarily be required to treat all class members alike, as all class members would then be eligible for the medical monitoring program by virtue of winning their medical monitoring claim").

<sup>169</sup> *See Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717–18 (Mo. 2007). However, the court's statement that the plaintiffs "sought compensatory damages to establish a medical monitoring program," *id.* at 714, seems to blur monetary and injunctive relief: compensatory damages are monetary, yet monitoring "programs" may be injunctive. *See Day v. NLO, Inc.*, 144 F.R.D. 330, 335–36 (S.D. Ohio 1992).

<sup>170</sup> *See Dukes*, 131 S. Ct. at 2560.

mitigating latent diseases.<sup>171</sup> Thus, medical monitoring is not *substitutionary*; it does not replace expenses already accrued or the estimated value of lost health, but rather provides *specific* relief for preventative medicine.<sup>172</sup> This specificity is a hallmark of injunctive remedies.<sup>173</sup>

On this point, there is no logical reason to distinguish, as did the *Day* court, between defendant-supervised monitoring programs as "monetary," and court-supervised monitoring programs as "injunctive."<sup>174</sup> In each case, the defendant is required to act affirmatively to defray the costs of monitoring required by its tortious conduct, possibly resulting in significant costs to the defendant.<sup>175</sup> In a typical, non-toxic torts case, whether the presiding court simply issues an injunction requiring a defendant to act, or retains jurisdiction to supervise the defendant's actions, the fact is that in either case the underlying remedy is injunctive. In fact, courts often do not retain jurisdiction to oversee completion of their injunctive orders.<sup>176</sup> For example, in the

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<sup>171</sup> See Venugopal, *supra* note 13, at 1668–70.

<sup>172</sup> See *id.* at 1667–68. Of course, the author does not consider lump sums in this analysis.

<sup>173</sup> See *id.* at 1666.

<sup>174</sup> See *supra* notes 49–50 and accompanying text.

<sup>175</sup> The mere fact that a remedy is costly to a defendant is irrelevant to the legal/equitable determination: injunctions often involve significant costs to defendants. In perhaps the most notorious example, the Supreme Court in *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978), affirmed an injunction of the construction of the Tellico Dam to prevent destruction of the endangered snail darter; when the case reached the district court, the Dam was 80% complete, and a permanent injunction would render unrecoverable \$53 of \$78 million TVA had already expended. *Id.* at 166.

<sup>176</sup> See, e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978 (8th Cir. 2011) (affirming a preliminary injunction halting further construction of part of a coal-fired power plant in Arkansas where the district court did not retain jurisdiction to oversee the project's halt); *Sierra Club v. Marsh*, 714 F. Supp. 539, 593 (D. Me. 1989).

"structural injunctions" used in educational reform and civil rights cases, courts retain jurisdiction to administer multi-phase injunctions where ongoing supervision is required.<sup>177</sup> In contrast, medical monitoring programs likely involve initial determinations as to the type of treatment and diagnostics, which may not need to be revised unless a drastic change in technology, medication, or understanding of the latent disease emerges.<sup>178</sup> There is no reason to believe that a defendant-supervised program could not fully serve the class' monitoring needs until such a change in circumstance arises, and allowing defendant-supervised programs as injunctions would avoid imposing the costs of administration on the courts.<sup>179</sup>

Future litigants should consider filing under Rule 23(b)(2) and framing the request for relief as injunctive.<sup>180</sup> The obvious benefit of labeling medical monitoring "injunctive" is that the proposed (b)(2) class could avoid the predominance inquiry. However, the implied "cohesiveness" requirement some courts apply to a (b)(2) analysis could be a potential barrier. Cohesiveness may be a stricter standard than even the predominance inquiry.<sup>181</sup> Yet the appropriateness of a cohesiveness requirement for

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<sup>177</sup> See John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1408, 1413 (2007).

<sup>178</sup> See *In re* Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prod. Liab. Litig., 172 F.R.D. 271, 284–87 (S.D. Ohio 1997) (certifying class where FDA-approved, defendant-supervised monitoring program already in place, primarily to review adequacy of program, not to take over administration).

<sup>179</sup> Shifting this cost from the courts to defendants would address some critics' concerns. See *supra* Part II.B.

<sup>180</sup> In fact, the plaintiffs in *Ratliff* filed under (b)(2), but were unsuccessful because the federal district court would not extend *Meyer* to products liability. See *Ratliff v. Mentor Corp.*, 569 F. Supp. 2d 926, 928 (W.D. Mo. 2008).

<sup>181</sup> See *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 269 (3d Cir. 2011).

injunctive medical monitoring claims is questionable.<sup>182</sup> Cohesiveness, as with predominance and superiority under Rule 23(b)(3), is meant to ensure fairness to unnamed class members and judicial economy.<sup>183</sup> Due process concerns for unnamed class members in mandatory (b)(2) classes are mitigated in the medical monitoring context because class members who develop actual, present injury will have their claims preserved and will be precluded from individual litigation *only as to medical monitoring*.<sup>184</sup> Further, although the occasional class member may require an individual determination as to the appropriateness of a particular medical monitoring regime,<sup>185</sup> monitoring programs are generally uniform in the diagnostics and examinations they incorporate.<sup>186</sup>

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<sup>182</sup> For a detailed analysis of cohesiveness in the context of medical monitoring, see Venugopal, *supra* note 13, at 1678–94.

<sup>183</sup> *See id.* at 1678.

<sup>184</sup> *See id.* at 1674–78 (noting that most courts addressing the issue of preclusion in the context of toxic torts have suspended the "single cause of action rule," which guards against impermissible claim-splitting, and critiquing objections). Courts can use their authority to issue orders limiting the preclusive effect of any negative judgment to medical monitoring, thereby preserving individual claims for actual injury. FED. R. CIV. P. 23(d), V.A.M.R. 52.08(d); *see* Klonoff, *supra* note 122 (noting that, where a plaintiff cannot adequately represent the class for all claims, courts can issue orders preserving claims not appropriate for class treatment. This would be the case if a medical monitoring class had both actually and latently injured members). Similarly, under Rule 23(c)(4) and Missouri's Rule 52.08(c)(4), litigants may bring a class action as to the "particular issue" of medical monitoring, thereby avoiding preclusion of individual claims for actual injury. FED. R. CIV. P. 23(c)(4), V.A.M.R. 52.08(c)(4).

<sup>185</sup> *See Gates*, 655 F.3d at 268–69 (discussing how claimants with pre-existing kidney disease could be harmed by proposed MRI screening).

<sup>186</sup> *See Martens & Getto*, *supra* note 13, at 272; Venugopal, *supra* note 13, at 1693 (noting that, "[m]onitoring programs may differ, if at all along a claimant's level or type of exposure to the same toxin, and in such a case, the

### C. POSSIBLE LEGISLATIVE RESPONSES

As a final matter, although improbable, the Missouri legislature could take steps to fortify the likelihood of medical monitoring class actions to be certified when removed to federal courts by drafting a statutory cause of action.<sup>187</sup> Federal judge-made rules cannot be interpreted to significantly affect the outcome of litigation based on state law,<sup>188</sup> and federal procedural rules "shall not abridge, enlarge or modify any substantive right."<sup>189</sup> Under a common law tort analysis, medical monitoring claimants inevitably face complicated causation and individual issues that may be preclusive to class certification by virtue of the commonality and predominance inquiry. However, if the legislature were to craft a statute imposing, for example, strict liability for medical monitoring on manufacturers that expose members of the public to particular doses of particular toxins, then as long as claimants demonstrate their exposure to the relevant dosage, certification might be

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relief will likely vary according to a simple formula"). These dosage-based differences could even be avoided if the legislature created a statutory cause of action based on particular dosage thresholds. *See supra* Part V.C.

<sup>187</sup> Although it is unlikely that the Missouri legislature would enact the type of legislation proposed here, the author merely points out that, if the legislature had the political will to support medical monitoring claims, it has the authority to do so, and this authority may correspond with more protection in federal courts.

<sup>188</sup> *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

<sup>189</sup> Rules Enabling Act of 1934, 28 U.S.C. § 2072(a)–(b) (2006); *Shady Grove*, 130 S. Ct. at 1442 (noting that the test for a procedural rule's validity "is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." (internal citations omitted)).

granted notwithstanding *Dukes*. This is because federal courts do not want to undermine "substantive" state law.<sup>190</sup>

## VI. CONCLUSION

*Dukes* has muddied the relationship between Rule 23(a)(2) and 23(b), with potential watershed effects for all class actions in federal courts. Medical monitoring, as a product of mass torts with complicated causation issues, has faced, and will continue to face, an uphill battle to certification of class actions. Yet at least for suits in state court, Missouri can fortify medical monitoring as a valuable tool of recovery for victims of toxic exposure by reaffirming current class action jurisprudence and clarifying the limits and the theory of recovery for medical monitoring. In both federal and Missouri courts, litigants should frame requests for medical monitoring as injunctive relief under Rule 23(b)(2) to avoid the heightened predominance inquiry of (b)(3). Further, to guard against *Dukes* when Missouri citizens are inevitably dragged into federal courts by the relaxed removal standards of the Class Action Fairness Act of 2005, the Missouri legislature could enact medical monitoring as a statutory cause of action, thereby providing a "substantive" right that cannot be undermined by federal procedural rules. Although these steps will not throw open the gates for certification of medical monitoring classes, they may at least preserve some viable claims from the downstream effects of *Dukes*, until Rule 23 is amended to once again clarify the distinction between commonality and predominance, or until environmental statutes are amended to acknowledge the social costs of pollution: neither of which are likely to happen soon.

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<sup>190</sup> *But see Shady Grove*, 130 S. Ct. at 1442 (noting that, under its test, the Supreme Court has rejected every statutory challenge to a Federal Rule that has come before it, and holding New York's prohibition on penalty class actions, arguably a substantive limitation, was irrelevant to a Rule 23 analysis in federal court. *Id.* at 1437–38.).