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NOTE

Widening the Power Gap: The Eighth Circuit's Stringent Requirements for Class Actions in Environmental Contamination Cases

Webb v. Exxon Mobil Corp., 856 F.3d 1150 (8th Cir. 2017)

Emily Holtzman*

I. INTRODUCTION

Pipeline construction is booming in the United States, yet it remains a polarizing topic for many because of environmental concerns. On the one hand, pipelines bring increased energy independence for the United States and are one of the safest ways to transport oil and gas.¹ At the same time, fears of environmental damage have led to a growing and fierce opposition to pipeline construction.² After the massive offshore rig spill in the Gulf of Mexico in 2010, resistance to new projects like the Keystone Pipeline has received widespread media coverage. The protests of the Dakota Access Pipeline on the Standing Rock Reservation, in particular, portrayed how high tensions have risen over pipeline construction.³ As quieter protests continue across the country against various new and old pipeline constructions and spills, questions about liability and accountability of the oil industry in the future of environmental degradation have largely been left unanswered.⁴

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1. See Charles Hughes, *America Needs More Pipelines*, U.S. NEWS (July 20, 2017), <https://www.usnews.com/opinion/economic-intelligence/articles/2017-07-20/america-needs-more-pipelines-to-transport-oil-and-gas-safely>.

2. See *id.*

3. See e.g., Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

4. Madeline Fitch, *The Quiet but Furious War Against Pipelines*, VICE (Oct. 11, 2018), https://www.vice.com/en_us/article/8xjen4/the-quiet-but-furious-nationwide-war-against-pipelines.

In 2013, a portion of the Pegasus Pipeline⁵ (the “Pipeline”) ruptured near Mayflower, Arkansas, spilling about 134,000 gallons of heavy crude oil and forcing nearby residents to evacuate their homes.⁶ The Environmental Protection Agency (“EPA”) classified the leak as a “major spill.”⁷ Twenty-two homes were evacuated, and nearby wildlife was majorly affected for years following the spill.⁸ Property owners with land subject to the easement contracts with Exxon (“Plaintiffs”) brought a class action lawsuit against Exxon Mobil Corporation, ExxonMobil Pipeline Company, and Mobil Pipe Line Company (collectively, “Exxon”) for breach of contract, alleging Exxon operated the Pipeline in an unsafe and defective condition.⁹ In 2014, the U.S. District Court for the Eastern District of Arkansas certified the class action; however, on reconsideration in 2015, the court decertified the class.¹⁰ The U.S. Court of Appeals for the Eighth Circuit affirmed this decision in 2017.¹¹

This Note argues this class should have been able to proceed to adjudicate its claims under either Rule 23(b)(2) or Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Eighth Circuit’s decision to decertify the class in *Webb v. Exxon Mobil Corp.* will deprive property owners of control and agency over their land when faced with environmental contamination or disaster resulting from the conduct of a large and powerful corporation. In light of the massively uneven power dynamic that exists between pipeline operators and individual property owners across the country, removing class adjudication as a possibility to hold these operators liable for potential mistakes further widens this power gap. Landowners, towns, municipalities, and residents should be aware of the repercussions of this decision in making future

5. The Pegasus Pipeline runs through properties in Texas, Arkansas, Missouri, and Illinois and is subject to easement contracts in all of these states. *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1153–54 (8th Cir. 2017).

6. *Id.* at 1154; *Exxon Shuts Oil Pipeline After “Major” Spill in Arkansas*, REUTERS (Mar. 30, 2013), <https://www.reuters.com/article/exxon-pipeline-spill/exxon-shuts-oil-pipeline-after-major-pipeline-spill-in-arkansas-idUSL2N0CN00720130331>.

7. *Reference News Release: U.S. Settles with ExxonMobil over Violations Stemming from 2013 Oil Spill in Mayflower, Arkansas*, EPA (Apr. 22, 2015), <https://www.epa.gov/enforcement/reference-news-release-us-settles-exxonmobil-over-violations-stemming-2013-oil-spill> [hereinafter *Reference News Release*].

8. Kristen Hays & Matthew Robinson, *Exxon Cleans Up Arkansas Oil Spill; Keystone Plan Assailed*, REUTERS (Mar. 30, 2013), <https://www.reuters.com/article/us-exxon-pipeline-spill/exxon-cleans-up-arkansas-oil-spill-keystone-plan-assailed-idUSBRE92U00220130331>.

9. Amended Complaint for Petitioners at 2, *Webb*, 856 F.3d 1150 (No. 4:13 CV 232 BSM), 2013 WL 9600153, ¶ 35.

10. *Webb v. Exxon Mobil Corp.*, No. 4:13CV00232 BSM, 2014 WL 11498052, at *5 (E.D. Ark. Aug. 12, 2014) (granting class certification in part); *Webb v. Exxon Mobil Corp.*, No. 4:13CV00232 BSM, 2015 WL 11090403, at *1 (E.D. Ark. Mar. 17, 2015), *aff’d on other grounds*, 856 F.3d 1150 (8th Cir. 2017) (reconsidering class certification, reversing, and granting defendant’s motion for summary judgement).

11. *Webb*, 856 F.3d 1150.

agreements with pipeline owners and operators, as well as any industries or facilities that carry major risks of environmental contamination.

Part II of this Note provides the facts and holding of *Webb*. Part III discusses the requirements of class action lawsuits under Rule 23(a) and Rule 23(b) in light of *Wal-Mart v. Dukes* and other class action suits involving environmental contamination claims. Part IV reviews the instant decision of the Eighth Circuit in *Webb*. Part V explains why the Eighth Circuit adopted a standard for certifying classes that is too stringent, even after *Dukes*, and further explains why the court erred in decertifying the class in *Webb*. Part VI concludes this Note by explaining the impact this case will have on landowners and easement holders in the future.

II. FACTS AND HOLDING

The Pipeline was constructed in 1947 and spans more than 650 miles through Texas, Arkansas, Missouri, and Illinois.¹² Magnolia, the corporate predecessor of Exxon Mobil and the first owner of the Pipeline, entered into easement contracts with property owners in these four states to build the Pipeline alongside or across their properties.¹³ Magnolia used a low frequency electric resistance welding process to construct the Pipeline.¹⁴ This process of welding was replaced industry wide with a high-frequency welding process in the 1970s after finding the low resistance construction was more susceptible to corrosion, cracks, and bonding issues.¹⁵ At the time of the spill in Mayflower, Exxon had upgraded approximately 200 miles of the original pipe with a stronger welding process.¹⁶

The Pipeline was originally intended to transport crude oil from Texas up through Illinois, traveling south to north, but in 2009, Exxon reversed the flow of the oil while simultaneously increasing the amount of oil transported by the Pipeline by fifty percent, totaling 95,000 barrels per day.¹⁷ Exxon reversed the flow in order to transport tar sands, as opposed to the heavy crude it had transported for the past fifty years.¹⁸ Reversing the flow and

12. *Webb*, 856 F.3d 1150 at 1153–54.

13. *Id.*

14. *Webb*, 2014 WL 11498052, at *1, *aff'd on other grounds*, 856 F.3d 1150.

15. *Id.*; *Fact Sheet: Pipe Manufacturing Process*, U.S. DEP'T OF TRANSP., <https://primis.phmsa.dot.gov/comm/FactSheets/FSPipeManufacturingProcess.htm> (last updated Dec. 1, 2011).

16. *Webb*, 2014 WL 11498052, at *1.

17. *Webb*, 856 F.3d at 1154.

18. *Webb*, 2014 WL 11498052, at *1. Tar sands are a sticky deposit containing bitumen (a type of petroleum that can be turned into fuel), and tar sands oil is much heavier and more corrosive than crude. Melissa Denchak, *What is the Keystone Pipeline?*, NAT'L RESOURCE DEF. COUNCIL (Apr. 7, 2017), <https://www.nrdc.org/stories/what-keystone-pipeline>.

transporting a much heavier oil through the aging Pipeline led many to question if this was the direct cause of the 2013 spill in Mayflower.¹⁹

In April of 2013, Plaintiffs brought a class action suit against Exxon, claiming that Exxon breached the easement contracts by failing to maintain and repair the Pipeline.²⁰ Plaintiffs asked for relief in the form of “either (1) rescission of the easement contracts and removal of the [P]ipeline from the[] propert[ies], or (2) specific performance of the easement contract[s],” which would have required Exxon to replace the entirety of the Pipeline.²¹ Alternately, Plaintiffs asked for compensatory damages for each class member if the first two types of relief failed.²²

Plaintiffs sought class certification under either Rule 23(b)(2) or Rule 23(b)(3).²³ Two couples represented the class: Rudy F. and Betty Webb and Arnez and Charletha Harper.²⁴ Both couples owned real property subject to the easement contracts – the Webbs in Mayflower, Arkansas, and the Harpers in Conway, Arkansas.²⁵ Plaintiffs estimated the size of the class to be in the thousands and included “all persons and entities who owned real property as of March 29, 2013, with an easement for the . . . Pipeline on their real property from Patoka[,] Illinois[,] to Corsicana, Texas.”²⁶

Plaintiffs claimed Exxon materially breached the terms of the easements under a “common course of corporate policy, pattern, practice and wrongful conduct” by “failing to inspect, maintain, repair, and replace the [P]ipeline, resulting in hazardous conditions and damages to the . . . servient estates.”²⁷ Plaintiffs cited language in the form easement contracts stating that Magnolia “hereby agree[d] to pay any damages that may arise to crops, timber, or fences from the use of said premises for such purposes.”²⁸ Plaintiffs also asserted

19. See Nora Caplan-Bricker, *This Is What Happens When a Pipeline Bursts in Your Town*, NEW REPUBLIC (Nov. 18, 2013), <https://newrepublic.com/article/115624/exxon-oil-spill-arkansas-2013-how-pipeline-burst-mayflower>. After the Mayflower spill and a spill that occurred in North Dakota when the Pipeline’s flow was reversed, the Pipeline and Hazardous Materials Safety Administration issued an advisory to pipeline operators with safety guidelines for reversing the flow of pipelines. See generally DEP’T OF TRANSPORTATION, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, PIPELINE SAFETY: GUIDANCE FOR PIPELINE FLOW REVERSALS, PRODUCT CHANGES AND CONVERSION TO SERVICE (2014), https://www.pipelinelaw.com/wp-content/uploads/sites/24/2014/09/Advisory_re_Flow_Reversals.pdf. The advisory notes that reversal can impact pipeline function and lead to spills. See *id.* at 2.

20. *Webb*, 856 F.3d at 1154, 1158.

21. *Webb*, 2014 WL 11498052, at *1.

22. See Amended Complaint for Petitioners, *supra* note 9, at 18.

23. *Webb*, 2014 WL 11498052, at *1.

24. Amended Complaint for Petitioners, *supra* note 9, at 3–4.

25. *Id.* Neither couple suffered property damage as a result of the 2013 spill in Mayflower. *Webb*, 2014 WL 11498052, at *1.

26. Amended Complaint for Petitioners, *supra* note 9, at 13–14.

27. *Webb*, 856 F.3d at 1154.

28. Amended Complaint for Petitioners, *supra* note 9, at 17–18.

that Exxon, as the holder of the easement, had an affirmative duty to maintain the property but breached this duty by operating the Pipeline in an “unsafe, defective, and unreasonably dangerous condition.”²⁹ By breaching this duty, Plaintiffs ultimately alleged Exxon’s breach of the easement contracts “create[d] an immediate zone of danger to the[m] . . . and class members who have the Pipeline on their property pursuant to an easement.”³⁰

A. Plaintiffs’ Motion for Class Certification

In 2014, The U.S. District Court for the Eastern District of Arkansas certified the class under Rule 23(b)(3), finding Plaintiffs established the predominance requirement and that granting class certification was the superior method for litigating these claims to reduce “costs and the use of judicial resources.”³¹ The court found certification under Rule 23(b)(2) improper, reasoning that neither of the remedies that Plaintiffs’ sought for their sole breach of contract claim – “rescission of the easement contract or specific performance” – were “tantamount to the injunctive relief that must be asserted in order to certify a Rule 23(b)(2) class action.”³² In light of this reasoning, the court denied certification under Rule 23(b)(2), instead finding certification under Rule 23(b)(3) proper for the claims Plaintiffs brought.³³

The Eastern District found Plaintiffs met the numerosity requirement under Rule 23(a)(1) because the Pipeline spanned 650 miles, making joinder of all Plaintiffs impracticable.³⁴ The Eastern District further concluded Plaintiffs satisfied commonality under Rule 23(a)(2) because their claims presented common questions of law or fact – specifically whether Exxon failed to operate and maintain the Pipeline properly and whether this breached the easement contracts.³⁵ The court also found Plaintiffs satisfied typicality under Rule 23(a)(3) because their claims stemmed from “Exxon’s operation of the [P]ipeline.”³⁶ To properly satisfy the requirement of adequacy under Rule 23(a)(4), the court removed the Webbs as class representatives because even though their property was subject to an easement, the Pipeline did not actually touch the Webbs’ property.³⁷

Exxon contended, in part, the definition of the class was too broad because it could include property owners who sold their property prior to the

29. *Id.*

30. *Id.* at 18.

31. *Webb*, 2014 WL 11498052, at *4–5 (finding that Plaintiffs produced common evidence to show that common issues predominated on a “systematic, class-wide basis” and was “sufficiently cohesive”).

32. *Id.* at *4.

33. *Id.* at *5.

34. *Webb*, 2014 WL 11498052, at *3; FED. R. CIV. P. 23(a)(1).

35. *Id.* at *3; FED. R. CIV. P. 23(a)(2).

36. *Webb*, 2014 WL 11498052, at *4; FED. R. CIV. P. 23(a)(3).

37. *Webb*, 2014 WL 11498052, at *3; FED. R. CIV. P. 23(a)(4).

spill of 2013.³⁸ In response to this, the Eastern District, sua sponte, narrowed the class definition to include “all persons and entities who *currently* own real property subject to an easement for the . . . Pipeline and who have pipeline physically crossing their property from Patoka, Illinois to Corsicana, Texas.”³⁹ The court determined Exxon’s other arguments in support of its motion to dismiss were better suited as defenses to present in the course of litigation and not as proper grounds for dismissal or for decertifying the class.⁴⁰

B. Exxon’s Motion for Reconsideration and Summary Judgment

After the Eastern District granted class certification in 2014, Exxon motioned for reconsideration and summary judgment.⁴¹ At this reconsideration hearing, the court granted both motions.⁴² In determining Plaintiffs did not actually meet the requirement for commonality under Rule 23(a)(2), the court viewed the Pipeline as “a series of individual segments, with each segment corresponding to each individual landowner.”⁴³ The court reasoned that if the Pipeline spilled in one place, it would have no real effect on a property owner subject to the Pipeline easement in a different state and that, because of this, Plaintiffs could not meet the commonality requirement.⁴⁴ The court further held Plaintiffs could not satisfy the typicality requirement because to prove Exxon breached its easement contracts, the court would need to conduct an “individualized inquiry” into each property to resolve the claims.⁴⁵ Because Plaintiffs could not meet these requirements, the court found they similarly could not meet the requirement of adequacy and decertified the class.⁴⁶

Another issue the court faced was the potential of invoking conflicting state property laws if Plaintiffs prevailed on their claims.⁴⁷ Exxon and Plaintiffs disagreed about easement law in the four states the Pipeline ran through, with Plaintiffs arguing the laws were the same and Exxon arguing they differed substantially.⁴⁸ The court, agreeing with Exxon, found Arkansas law was unique compared to the other states because Arkansas law defines ease-

38. *Webb*, 2014 WL 11498052, at *3.

39. *Id.* (emphasis added).

40. *Id.* (arguing that the pipe had been repaired in certain locations, so property owners in those locations and others not in Mayflower suffered no injury).

41. *Webb v. Exxon Mobil Corp.*, No. 4:13CV00232 BSM, 2015 WL 11090403, at *1 (E.D. Ark. Mar. 17, 2015), *aff’d on other grounds*, 856 F.3d 1150 (8th Cir. 2017).

42. *Id.*

43. *Id.* at *3.

44. *Id.* (“[S]imply because Exxon may not be fulfilling its duties on one person’s land does not necessarily mean it is not fulfilling its duties on all landowners’ property.”).

45. *Id.* (citing *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006)).

46. *Id.*

47. *Id.* at *4.

48. *Id.*

ments solely as granting a right of way with no affirmative duty to repair or maintain the easement.⁴⁹ Therefore, the court held a verdict in favor of Plaintiffs would create a potential problem of applying inconsistent state laws and granted summary judgment in favor of Exxon.⁵⁰

The court declined to determine if class certification was appropriate under Rule 23(b)(2), citing to its previous discussion that Plaintiffs' claims did not appropriately fall under the injunctive requirement of a Rule 23(b)(2) class.⁵¹

C. Plaintiffs' Appeal to the U.S. Court of Appeals for the Eighth Circuit

On appeal, Plaintiffs challenged the Eastern District's decision to decertify the class and grant summary judgment in favor of Exxon.⁵² The Eighth Circuit affirmed the Eastern District's decision to decertify the class and grant summary judgment in favor of Exxon.⁵³ The Eighth Circuit agreed with the Eastern District's conclusion that because Exxon operated the Pipeline as individual segments, Plaintiffs could not meet the commonality requirement under Rule 23(a).⁵⁴ The Eighth Circuit found that even if it came to the alternate conclusion that Exxon operated the Pipeline as one segment, the injury Plaintiffs suffered was not the same because "establishing breach would require examination of how Exxon's operation of the [P]ipeline affects . . . [P]laintiffs, which . . . varies depending on where the individual class members' property is located."⁵⁵ The Eighth Circuit concluded that because Plaintiffs could not meet the commonality requirement, they consequently could not meet the "far more demanding" predominance requirement under Rule 23(b)(3) because "individual issues [of class members] predominate over common ones."⁵⁶

In finding the Eastern District did not abuse its discretion by decertifying the class, the Eighth Circuit echoed the Eastern District's concern about the potential conflicting state laws arising under the contract, property, and tort claims Plaintiffs proposed.⁵⁷ The Eighth Circuit hinged its reasoning on the fact that, under Arkansas property law, Exxon had no affirmative duty to repair or maintain the Pipeline as a term of the easement contracts.⁵⁸ There-

49. *Id.*

50. *Id.*

51. *Id.*

52. *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1153 (8th Cir. 2017).

53. *Id.*

54. *Id.* at 1156.

55. *Id.*

56. *Id.* at 1156–57.

57. *Id.* at 1157.

58. *Id.* at 1158.

fore, the Eighth Circuit found no genuine issue of material fact as to whether Exxon breached the easement contracts.⁵⁹

Because the Eighth Circuit determined Exxon had no affirmative duty to repair the Pipeline, it further held Plaintiffs could not show they suffered the same injury to meet either the commonality or predominance requirements.⁶⁰ The court was also concerned class litigation was not the superior method for litigating these claims because determining injury of Plaintiffs in the class in this case would require individual assessments of each Plaintiff's property.⁶¹ The Eighth Circuit affirmed class decertification, holding that where members of a proposed class have suffered individualized injuries, the class cannot meet the requirements for commonality and predominance under Rule 23(a)(2) and Rule 23(b)(3).⁶²

III. LEGAL BACKGROUND

Because the legal questions presented in *Webb v. Exxon Mobil Corp.* focus on issues of class certification, this Part will begin with an overview and discussion of the relevant Rules. This Part then will analyze various environmental contamination cases where classes were both certified and decertified.

A. Class Certification

Under Rule 23(a), members of a class action must meet four requirements, commonly referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.⁶³ The requirement of numerosity is simply that the class of plaintiffs must be so large that joinder of all plaintiffs would be impracticable.⁶⁴ The commonality requirement requires a class to show that "questions of law or fact common to the class" exist.⁶⁵ To meet the typicality requirement, class representatives must show their claims or defenses are "typical of the claims or defenses of the class"; such a showing ensures the class representatives are members of the class and will pursue the class mem-

59. *Id.*

60. *Id.* at 1157 ("[P]laintiffs here may assert all of the pipe for 850 miles is bad, but demonstrating breach is more complicated.").

61. *Id.*

62. *Id.* at 1156–57.

63. FED. R. CIV. P. 23(a)(1)–(4).

64. FED. R. CIV. P. 23(a)(1). While the Rules do not specify an exact number of plaintiffs that meet the numerosity requirement, it is typically apparent whether or not a proposed class meets this requirement, and numerosity determinations are rarely challenged. WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:12, West (database updated Nov. 2018).

65. FED. R. CIV. P. 23(a)(2).

bers' claims.⁶⁶ The final requirement of adequacy requires the class representatives to "fairly and adequately protect the interests of the class."⁶⁷

Once the class meets these four requirements, it must seek certification within one of the categories under Rule 23(b):

- (1) Prosecuting separate actions would result in inconsistent or varying adjudications;
- (2) Injunctive or declaratory relief is appropriate for the class as a whole;
- (3) The common questions of law or fact predominate over any individual issues of members of the class, and therefore class action is the superior method for adjudicating the claims.⁶⁸

Typically, classes seeking money damages must seek certification under Rule 23(b)(3) because many courts, including the United States Supreme Court, have held that Rule 23(b)(1) and Rule 23(b)(2) class adjudications are not proper for classes seeking individualized money damages.⁶⁹

Prior to 2011, the standard for meeting the commonality requirement under Rule 23(a)(2) was not a difficult one to meet.⁷⁰ However, the United States Supreme Court's holding in *Wal-Mart v. Dukes* made this requirement more stringent.⁷¹ In *Dukes*, a proposed class of current and former female employees of Wal-Mart brought claims under Title VII of the Civil Rights Act of 1964, alleging Wal-Mart discriminated against female employees on the basis of sex.⁷² This class of 1.5 million current and past Wal-Mart employees was one of "the most expansive class actions ever."⁷³ Plaintiffs argued class certification was appropriate to adjudicate these claims because, while Wal-Mart did not have an "express corporate policy" against women, the strong "corporate culture" of the operation of the stores had a disparate impact on all of its female employees.⁷⁴ The U.S. District Court for the

66. FED. R. CIV. P. 23(a)(3); RUBENSTEIN, *supra* note 64, at § 3:28.

67. FED. R. CIV. P. 23(a)(4).

68. FED. R. CIV. P. 23(b)(1)–(3).

69. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

70. *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (stating that this requirement has been construed "permissively"); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (holding that the test for commonality is "not demanding").

71. *Dukes*, 564 U.S. at 350.

72. *Id.* at 342–43.

73. *Id.* at 342.

74. *Id.* at 344–45.

Northern District of California certified the class under Rule 23(b)(2),⁷⁵ and the U.S. Court of Appeals for the Ninth Circuit affirmed with a 6-5 vote.⁷⁶

The United States Supreme Court, in a decision that changed the future of class action litigation, reversed the Ninth Circuit's decision and decertified the class.⁷⁷ Justice Antonin G. Scalia, writing for the majority, held it is not enough for members of a class to show they have "all suffered a violation of the same provision of law"; they must also show their claims "depend upon a common contention."⁷⁸ Plaintiffs must show this "common contention" to be "capable of classwide resolution" in that the "truth or falsity [of the claims] will resolve an issue that is central to the validity of each one of the claims in one stroke."⁷⁹ Because so many of the discriminatory employment practices the class alleged were left to the discretion of lower level managers, plaintiffs did not sufficiently establish a "common mode of exercising discretion that pervade[d] the entire company."⁸⁰ As a result, the Court held the class did not satisfy the commonality requirement because it failed to establish a common contention capable of classwide resolution.⁸¹ Justice Scalia further agreed with Judge Alex Kozinski's dissent in the Ninth Circuit's opinion, stating the class members in this case had "little in common but their sex and this lawsuit."⁸²

Dukes has significantly changed the course of class action lawsuits.⁸³ Prior to *Dukes*, a proposed class could satisfy the commonality requirement by establishing a single common question.⁸⁴ While the Court in *Dukes* did not specifically reject this previous standard for satisfying commonality, the

75. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 188 (N.D. Cal. 2004), *aff'd* by *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev'd* by 564 U.S. 338 (2011).

76. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev'd* by 564 U.S. 338 (2011). Judge Hawkins delivered the majority opinion joined by Judges Reinhardt, Fisher, Paez, and Berzon; Judge Graber concurred; Judge Ikuta dissented and was joined by Judges Kozinski, Rymer, Silverman, and Bea. *Id.*

77. *Dukes*, 564 U.S. at 359 (holding that the class could not alternatively be certified under Rule 23(b)(3)).

78. *Id.* at 350.

79. *Id.*

80. *Id.* at 356.

81. *Id.* at 357 ("Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.").

82. *Id.* at 360 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting)).

83. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 774-75 (2013).

84. See *Kanter v. Casey*, 43 F.3d 48 (3d. Cir. 1994) ("[C]lass members can assert such a single complaint even if they have not all suffered actual injury; demonstrating that all class members are *subject* to the same harm will suffice." (alteration in original)).

Court held the class could not satisfy this requirement without “convincing proof of a companywide discriminatory pay and promotion policy.”⁸⁵

Closely related to the requirement of commonality is that of predominance, which is required for classes seeking certification under Rule 23(b)(3).⁸⁶ Rule 23(b)(3) certification differs slightly from the other categories of class certification because it was “designed to expand class action practice to include new categories of cases where class treatment ‘would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’”⁸⁷ In *Amchem Products, Inc. v. Windsor*,⁸⁸ the United States Supreme Court held the predominance requirement is meant to test “whether proposed classes are sufficiently cohesive to warrant adjudication by representation” to determine if “common questions ‘predominate over any questions affecting only individual members.’”⁸⁹ To determine whether a class is “sufficiently cohesive,” the Court has differentiated between common and individual questions by looking at the evidence necessary to prove the claims.⁹⁰ If at least one issue common to the class predominates over the individual issues, the class action is proper under Rule 23(b)(3).⁹¹

Class certification under Rule 23(b)(2) has a similar requirement of cohesion among class members, but claims falling under this category typically must be for injunctive or declaratory relief.⁹² In *Dukes*, the Court explained the class was not an appropriate Rule 23(b)(2) class because plaintiffs were seeking individualized monetary damages.⁹³ The Court declined to make a definitive statement as to whether classes seeking monetary damages can ever be certified under Rule 23(b)(2) but did find that “at a minimum, claims for *individualized* relief . . . do not satisfy the Rule.”⁹⁴ The Court reasoned this type of relief is inappropriate because “[t]he key to the [Rule 23](b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’”⁹⁵

85. *Dukes*, 564 U.S. at 359.

86. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997) (“[Q]uestions of law or fact common to class members predominate over any questions affecting only individual members.”).

87. FED. R. CIV. P. 23 (advisory committee’s note to 1966 amendment).

88. 521 U.S. 591, 623–24 (1997).

89. *Id.* at 593–94.

90. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (stating that individual questions require evidence that varies between members of the class, while common questions require the same evidence for each member).

91. *Id.* at 1045.

92. *See Wal-Mart v. Dukes*, 564 U.S. 338, 360 (2011); FED. R. CIV. P. 23(b)(2).

93. *Dukes*, 564 U.S. at 361–62.

94. *Id.* at 360 (emphasis added).

95. *Id.*

The requirement of cohesion among class members and the relief sought is closely related in a Rule 23(b)(2) class.⁹⁶ The Court has found that to prove cohesion a class can demonstrate “the party opposing the class has acted or refused to act on grounds generally applicable to the class.”⁹⁷ The Advisory Committee Notes to the Rules further explain Rule 23(b)(2) is appropriate when “[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.”⁹⁸

A problem courts often run into when determining if class certification is appropriate is the line between inquiries of class certification and determination of the merits of the class members’ claims.⁹⁹ In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,¹⁰⁰ the Court clarified that a class does not need to demonstrate it will prevail on the merits of its claims in order to meet the requirements of class certification. The Court further explained that for a class seeking certification under Rule 23(b)(3), the class must show “questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.”¹⁰¹ In *Amgen*, a class of plaintiffs brought claims against Amgen, a biotechnology company, for securities fraud and asked for class certification under Rule 23(b)(3).¹⁰² Plaintiffs alleged Amgen made misrepresentations and misleading omissions that affected its stock price, causing economic injury to the proposed class.¹⁰³ Amgen argued the class could not meet the predominance requirement under Rule 23(b)(3) because it failed to prove Amgen’s conduct “materially” affected the stock price, which was an element of the cause of action plaintiffs brought.¹⁰⁴ The court rejected this argument for two reasons: (1) materiality is an objective inquiry that can be proved “through evidence common to the class,” and (2) failure to prove materiality would not result in individual questions predominating over questions common to the class.¹⁰⁵ Because the Court found the class alleged a “fatal similarity” among class members, therefore satisfying predominance, the claims would be best addressed at a

96. *See id.* (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.”).

97. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

98. FED. R. CIV. P. 23 (advisory committee’s note to 1966 amendment).

99. *See Amgen Inc. v. Conn. Retirement Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013).

100. *Id.* at 466 (“Rule 23 grants no license to engage in free-ranging merits inquiries at the certification stage.”).

101. *Id.* at 459 (alteration in original).

102. *Id.* at 458–59.

103. *Id.*

104. *Id.* at 466.

105. *Id.* at 467–68.

trial or on a motion for summary judgment rather than at the class certification stage.¹⁰⁶

The Court has also recognized that the line between class certification inquiries and inquiries into the merits of the claims is not always easy to determine.¹⁰⁷ In *Dukes*, in determining if the proposed class met the commonality requirement, the Court found that proving commonality “necessarily” overlapped with the merits of plaintiffs’ claims of employment discrimination because these claims involved understanding the reasoning behind employment decisions.¹⁰⁸ While it is ideal for courts to separate the inquiries into class certification and determination of the merits, the Court has acknowledged this line is often blurred.

B. Environmental Contamination Claims

Class action lawsuits often provide a vehicle for plaintiffs to recover for property damage or physical illness resulting from environmental contamination caused by negligent practices or clean-up efforts by corporations and industries. The federal circuit courts have typically handled these claims differently, with some using a more plaintiff-friendly approach than others.

1. Successful Class Certification in the Fifth Circuit: *Deepwater Horizon* Litigation

In 2010, the Deepwater Horizon offshore oil rig exploded in the Gulf of Mexico, killing eleven people and causing the worst oil spill in American history, which lasted almost three months.¹⁰⁹ Thousands of plaintiffs brought claims against BP, the owners and operators of the rig, for property damage, and these were consolidated in one class action in 2012.¹¹⁰ After the class was certified by the Eastern District of Louisiana, the class reached a settlement with BP.¹¹¹ On appeal to the U.S. Court of Appeals for the Fifth Circuit seeking approval of settlement of the class members’ claims, objectors to the settlement argued the class should not have been certified because it “include[d] persons who have not actually been injured” and therefore failed to

106. *Id.* at 470–71.

107. *Id.* at 465–66 (“[W]e have cautioned that a court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap with the merits of the plaintiff’s underlying claim’”).

108. *Wal-Mart v. Dukes*, 564 U.S. 338, 352 (2011).

109. Chad Bray, *BP to Take \$1.7 Billion Charge Over Deepwater Horizon Spill*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/business/dealbook/bp-oil-spill-deepwater-horizon.html>.

110. *In re Oil Spill*, 910 F. Supp. 2d 891, 900 (E.D. La. 2012), *aff’d sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).

111. *Id.* at 901, 914–17, 921–25.

satisfy the commonality requirement.¹¹² The Fifth Circuit rejected this argument.¹¹³ In discussing the “common contention” requirement set out by the United States Supreme Court in *Dukes*, the Fifth Circuit held this “contention need not relate specifically to the damages component of the class members’ claims” and the “requirement that class members have all ‘suffered the same injury’ can be satisfied by an instance of the defendant’s injurious conduct.”¹¹⁴

The Fifth Circuit further explained that a district court does not need to address the merits of the class members’ claims in order to certify the class.¹¹⁵ Because, as the Court determined in *Dukes*, Rule 23 does not set forth a “mere pleading standard,” the Fifth Circuit explained that even if a class needs to provide evidence to establish a common contention for purposes of satisfying commonality, a district court does not need to determine if the contention is “correct” to certify the class.¹¹⁶ The Fifth Circuit therefore affirmed class certification in *Deepwater Horizon*, finding questions about whether BP was negligent or could have prevented the massive spill, whether BP acted timely in stopping the spill, and whether BP had a valid defense were all common questions that were “central to the validity of all the class members’ claims.”¹¹⁷

2. Class Decertification in the Eighth Circuit: *Smith* and *Ebert*

The outcome of *Dukes* and its heightened standard for meeting the commonality requirement have impacted the U.S. Court of Appeals for the Eighth Circuit’s willingness to certify classes, especially in cases involving claims for environmental damage.¹¹⁸ In *Smith v. ConocoPhillips Pipe Line Co.*,¹¹⁹ the defendant (“Phillips”) owned a pipeline that spilled in West Alton, Missouri, in 1963. After the spill, the site of contamination was not properly remediated, and in 2002, nearby property owners discovered contaminants in their soil from this spill.¹²⁰ Two separate classes formed and brought claims against Phillips, the first seeking injunctive relief and damages for its nuisance claims and the second seeking compensation for medical monitoring as a result of potential exposure to the contaminants.¹²¹ The U.S.

112. *In re Deepwater Horizon*, 739 F.3d at 808, 810.

113. *Id.* at 810.

114. *Id.* (citing *Wal-Mart v. Dukes*, 564 U.S. 338 (2011)).

115. *Id.* at 811 (“There is no need to resolve the merits of the common contention at the Rule 23 stage . . .”).

116. *Id.*

117. *See id.*

118. *See, e.g., Webb v. Exxon Mobil Corp.*, 856 F.3d 1150 (8th Cir. 2017); *Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016); *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015).

119. *Smith*, 801 F.3d at 922.

120. *Id.*

121. *Id.* at 923.

District Court for the Eastern District of Missouri certified only the first class, but the Eighth Circuit decertified the class on appeal.¹²²

The Eighth Circuit decertified the class because plaintiffs could not show they were commonly affected by the contamination and accordingly could not meet the commonality requirements under Rule 23(a)(2).¹²³ Because plaintiffs could not all prove the contamination affected, or even touched, each class member's land, the Eighth Circuit agreed with Phillips that "absent the injury of actual contamination . . . plaintiffs cannot meet the Rule 23 requirements of commonality or typicality" because they failed to prove a "classwide injury."¹²⁴ In reaching its decision, the Eighth Circuit further held "fear of contamination . . . [was] not a sufficient injury to support a claim for common law nuisance in the absence of proof."¹²⁵

In *Ebert v. General Mills, Inc.*,¹²⁶ the defendant ("General Mills") owned an industrial facility in the Como neighborhood of Minneapolis. For about fifteen years, General Mills dumped as much as one thousand gallons of hazardous waste in the ground at the facility.¹²⁷ After working with the EPA to clean up the land, remnants of the hazardous waste were found in the soil vapor of the Como neighborhood in 2013.¹²⁸ Residents brought a class action suit against General Mills for "threatening home and business owners" in the area and decreasing property values.¹²⁹ After the U.S. District Court for the District of Minnesota certified the class, the Eighth Circuit reversed, finding the district court abused its discretion in determining the class satisfied the predominance requirement under Rule 23(b)(3).¹³⁰

Finding the class did not meet the predominance requirement, the court emphasized that allowing the class to proceed would "require an inquiry into the causal relationship between the actions of General Mills and the resulting alleged vapor contamination" and that this type of inquiry was not "suitable for class-wide determination."¹³¹ The court acknowledged that questions common to the class existed, and while this might have been enough for the class to meet Rule 23(a)(2) commonality requirement, the analysis under Rule 23(b)(3) of common questions is one that is "qualitative rather than quantitative."¹³² Because the court determined class members would need to

122. *Id.* at 925, 927.

123. *Id.* at 927.

124. *Id.* at 926.

125. *Id.* at 927.

126. *Ebert v. General Mills, Inc.*, 823 F.3d 472, 475 (8th Cir. 2016).

127. *Id.*

128. *Id.*

129. *Id.* at 476.

130. *Id.* at 479.

131. *Id.* ("To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills' actions, and, if so, whether that contamination is wholly, or actually attributable to General Mills . . .").

132. *Id.* at 478.

produce individual evidence of their injuries, the court found that individual questions of the class predominated over issues common to the class.¹³³ The court decertified the class on these grounds, finding the individual inquiries necessary to determining liability made this case “not suitable for class-wide determination.”¹³⁴

In contrast to the Fifth Circuit’s reasoning in *Deepwater Horizon*, the Eighth Circuit in *Smith* and *Ebert* placed greater focus on the injuries suffered by plaintiffs seeking class certification in determining whether the proposed classes met the requirements of commonality and predominance.¹³⁵ In *Deepwater Horizon*, the Fifth Circuit instead focused on the question the class raised regarding BP’s conduct to find the class met the requirements of commonality and predominance.¹³⁶

IV. INSTANT DECISION

The Eighth Circuit decertified the class in *Webb v. Exxon Mobil Corp.* for failing to meet the requirements under Rule 23(a)(2) and Rule 23(b)(3).¹³⁷ This decision centered mainly on the commonality and predominance requirements under Rule 23 and whether there was a genuine issue of material fact regarding the class members’ claim that Exxon breached the easement contracts.¹³⁸ This Part discusses the Eighth Circuit’s reasoning that the claims Plaintiffs brought were not proper for a class action.

A. Decertifying the Class

The Eighth Circuit decertified the class because Plaintiffs could not meet the requirements for commonality and predominance under Rule 23(a)(2) and Rule 23(b)(3).¹³⁹ With the understanding that Exxon operated the Pipeline as “individual segments,” the court determined Plaintiffs could not prove a common contention because “Exxon’s actions, or inactions, on one individual’s land would not necessarily implicate the interests of other landowners.”¹⁴⁰ Because of this, the court stated that even if Exxon did operate the entirety of the Pipeline in the same way, the effect of this on each

133. *Id.* at 479.

134. *Id.*

135. *Id.* at 481; *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 927 (8th Cir. 2015).

136. *In re Deepwater Horizon*, 739 F.3d 790, 818 (5th Cir. 2014).

137. 856 F.3d 1150, 1156–57 (8th Cir. 2017).

138. *Id.* at 1155–56.

139. *Id.* at 1156–57.

140. *Id.* at 1156 (quoting *Webb v. Exxon Mobil Corp.*, No. 4:13CV00232 BSM WL 11090403, at *3 (E.D. Ark. Mar. 17, 2015)).

class member would still be different because of the varied nature of the individual properties and easement contracts.¹⁴¹

The Eighth Circuit used a similar analysis of the claims to determine Plaintiffs could not meet the “far more demanding” requirement of predominance under Rule 23(b)(3).¹⁴² Because Exxon operated the Pipeline as separate units, unique to each piece of property the Pipeline touched, the court found that determining liability in this case would have required an assessment of each property to determine what injury each Plaintiff suffered.¹⁴³ Because of this, the Eighth Circuit found individual questions necessarily predominated over issues common to the class.¹⁴⁴

B. No Breach of Easement Contracts Under Arkansas Law

In addition to decertifying the class, the Eighth Circuit also granted summary judgment in favor of Exxon because there was no issue of material fact as to whether Exxon breached its easement contracts with Plaintiffs.¹⁴⁵ The court stated that for Plaintiffs to show a breach in this case, “they must demonstrate Exxon has failed to perform a duty.”¹⁴⁶ Resting on its conclusion that under Arkansas law easement contracts do not give rise to a duty of the easement holder to maintain or repair the easement, the court found Exxon did not breach its easement contracts with Plaintiffs.¹⁴⁷

The Eighth Circuit applied the reasoning set forth in *City of Crosett v. Riles* to reach its conclusion that easement contracts do not create an affirmative duty to repair or maintain under Arkansas law.¹⁴⁸ While the court agreed with Plaintiffs’ argument that easement holders have a duty to not interfere with the “use and enjoyment” of the servient estate, Plaintiffs failed to establish this because their allegations of property damage were “vague” and failed to show an actual physical injury.¹⁴⁹ Even though this was a question of fact, the Eighth Circuit found the evidence was so vague it was “insufficient to

141. *Id.* at 1156–57.

142. *Id.* at 1156.

143. *Id.* at 1156–57.

144. *Id.* at 1157.

145. *Id.* at 1159.

146. *Id.* at 1158.

147. *Id.*

148. *Webb*, 856 F.3d at 1159; *see also* *City of Crosett v. Riles*, 549 S.W.2d 800 (1977) (regarding Plaintiffs with property subject to easements owned by the City brought action against City for failing to maintain the easements, resulting in flooding). *But see* RESTATEMENT (THIRD) OF PROPERTY § 4.13(1) (AM. LAW INST. 2000) (noting the “beneficiary of an easement” is required “to repair and maintain the portions of the servient estate” and to “prevent unreasonable interference with the servient estate”).

149. *Webb*, 856 F.3d at 1158–59.

raise a genuine issue of material fact” and summary judgment for Exxon was appropriate.¹⁵⁰

V. COMMENT

This Part further discusses the Eighth Circuit’s decision to decertify the class in *Webb* for failing to meet the commonality and predominance requirements under Rule 23. The Eastern District of Arkansas initially certified the class in *Webb* under Rule 23(b)(3).¹⁵¹ This Part argues the court should have originally certified the class under Rule 23(b)(2) but certification under Rule 23(b)(3) was also appropriate.

Specifically, this Part argues a more preferable approach would have been to certify the class under Rule 23(b)(2), but the Eastern District of Arkansas mistakenly found a claim for breach of contract does not fall under injunctive relief for the purposes of class certification. This Part also argues the Eighth Circuit inappropriately determined the merits of the claims when deciding whether to certify the class and, for these reasons, the class should have been allowed to proceed.

A. The Eastern District’s Failure to Certify the Class Under Rule 23(b)(2)

After the Eastern District originally certified the class in *Webb* under Rule 23(b)(3), the crux of this case on appeal became whether this class was proper for Rule 23(b)(3) adjudication.¹⁵² However, the Eastern District and the Eighth Circuit failed to recognize that class certification in this case under Rule 23(b)(2) was not only proper but preferable to certification under Rule 23(b)(3).¹⁵³

The two main requirements under a Rule 23(b)(2) class action are that the class must be sufficiently cohesive and seeking injunctive or declaratory relief.¹⁵⁴ The Eastern District erroneously determined in its first class certification hearing that class certification was not proper under Rule 23(b)(2) because Plaintiffs were seeking either rescission of the contracts or specific performance, which are equitable remedies that the court determined were not “tantamount to the injunctive relief that must be asserted.”¹⁵⁵ This is plainly incorrect given that equitable remedies, such as contract rescission, are by

150. *Id.* at 1159.

151. *Webb v. Exxon Mobil Corp.*, No. 4:13CV00232 BSM, 2014 WL 11498052, at *1 (E.D. Ark. Aug. 12, 2014), *aff’d on other grounds*, 856 F.3d 1150 (8th Cir. 2017).

152. *Webb*, 856 F.3d at 1157.

153. *Id.* at 1156–57.

154. FED. R. CIV. P. 23(b)(2).

155. *Webb*, 2014 WL 11498052, at *4.

nature injunctive relief.¹⁵⁶ The court cites to *Dukes*, where the United States Supreme Court stated that Rule 23(b)(2) “does not speak of ‘equitable’ remedies generally but of injunctions and declaratory judgments.”¹⁵⁷ However, in the context of this quote, the Court determined the backpay the class in *Dukes* was seeking was not injunctive or declaratory relief, as required by Rule 23(b)(2).¹⁵⁸ This comparison is entirely different when determining if contract rescission and specific performance are forms of injunctive relief. While the class in *Dukes* tried to argue backpay was an equitable remedy rather than a monetary remedy, the Court was not convinced.¹⁵⁹ In *Webb*, however, the class sought rescission of the contracts or specific performance, which are two remedies that squarely fall within the meaning of injunctive relief required by Rule 23(b)(2).

The class in *Webb* would have further met the requirement of cohesion under Rule 23(b)(2) by showing Exxon acted on grounds “generally applicable to the class.”¹⁶⁰ While the Eastern District and Eighth Circuit decided to view the Exxon’s operation of the Pipeline as a series of separate units, this understanding fails to consider the actual physical nature of the Pipeline. Exxon’s decisions to maintain, or not maintain, the Pipeline on one person’s land necessarily affected the status of the Pipeline on another person’s land because the Pipeline was a singular physical entity connected from start to finish. Further, Exxon sends the oil through the entirety of the Pipeline – not just through individual segments.. The way the Pipeline connected all the class members by nature of its physical presence on each class member’s property would be enough to satisfy the cohesion requirement under Rule 23(b)(2) and present a common question of whether Exxon’s course of conduct amounted to a breach.¹⁶¹ It appears the class deliberately chose to bring a breach of contract claim as opposed to a mass tort action¹⁶² because of the way the breach of contract claim fits within the requirements of a Rule 23(b)(2) action. For these reasons, the class should have been certified under Rule 23(b)(2).

156. See 11A FED. PRAC. & PROC. CIV. § 2941, West (database update Apr. 2019); 5 BUS. & COM. LITIG. FED. CTS. § 49:38, West (database updated Nov. 2018).

157. *Webb*, 2014 WL 11498052, at *4.

158. *Wal-Mart v. Dukes*, 564 U.S. 338, 365 (2011).

159. See *id.*

160. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

161. See *Chi. Teachers Union, Local No. 1 v. Bd. of Educ.*, 797 F.3d 426, 442 (7th Cir. 2015) (certifying a class of teachers who alleged discrimination by school board under Rule 23(b)(2) and finding “the fact that the plaintiffs might require individualized relief does not preclude certification of a class for common equitable relief”).

162. Class certification is notoriously difficult to attain with mass tort claims.

B. The Eighth Circuit's Decision to Decertify the Class

Even though, in *Webb v. Exxon Mobil Corp.*, class certification would have been preferable under Rule 23(b)(2), the Eighth Circuit's decision not to certify the class under Rule 23(b)(3) was still flawed. In this ruling, the Eighth Circuit adopted a stringent analysis of the commonality and predominance requirements compared to other federal circuit courts considering class certification after *Dukes*.¹⁶³ In concluding the class did not meet the commonality requirement, the court focused its reasoning on the question of whether Plaintiffs all suffered the same injury.¹⁶⁴ In *Dukes*, the Court held that for class members to suffer the same injury for the purposes of class certification, it is not enough that they "have all suffered a violation of the same provision of law."¹⁶⁵ The class members' claims, the Court explained, must depend upon a common contention that is capable of "classwide resolution."¹⁶⁶

The Fifth Circuit's reasoning in *Deepwater Horizon* was more favorable to plaintiffs bringing claims arising from environmental contamination than the Eighth Circuit's reasoning in *Webb*. In *Deepwater Horizon*, the Fifth Circuit determined the common contention a class alleges does not need to "relate specifically to the damages component of the class members' claims."¹⁶⁷ The Eighth Circuit in *Webb*, however, focused on the damages claims of class members in emphasizing determination of injury would require individual assessments of each class members' land.¹⁶⁸ Because of this, the court reasoned, the claims of the class members did not rest upon a common contention.¹⁶⁹ However, the injury the class suffered in *Webb* is much more analogous to the injury the class suffered in *Deepwater Horizon* than in *Dukes*. The class in *Webb* suffered injury because of a uniform practice by Exxon of not maintaining or repairing the Pipeline while simultaneously transporting double the amount of product through it in breach of the easement contracts.¹⁷⁰ Just because the injury might have differed from property

163. See, e.g., *Chi. Teachers Union*, 797 F.3d at 440 ("The court need only resolve whether the same conduct or practice by the same defendant gives rise to the same kind of claims from all the class members."); *In re Nat'l Football League Players Concussion Injury Litigation*, 821 F.3d 410, 427 (3d Cir. 2016) ("[E]ven if players' particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the NFL's conduct.").

164. *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156 (8th Cir. 2017).

165. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

166. *Id.*

167. *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014).

168. *Webb*, 856 F.3d at 1156–57.

169. *Id.* at 1156.

170. *Id.* at 1153. In *Dukes*, the Court found that individual questions predominated over questions common to the class because Wal-Mart did not have a uniform or blanket practice of discrimination; the conduct in question came from thousands of

to property does not change the fact that whether Exxon breached the easement contracts is a question common to all class members.¹⁷¹

In *Amgen*,¹⁷² the United States Supreme Court cautioned against determining the merits of a claim in the class certification process. While analyzing whether common questions of the class predominate, the Court acknowledged this can naturally lead to some crossover between certification and assessing the merits.¹⁷³ The Court stated the merits should only be considered to the extent necessary to determine predominance.¹⁷⁴ Justice Ruth B. Ginsberg, in the majority opinion, clarified, “Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.”¹⁷⁵ Accordingly, a class is not required to prove it will succeed on the merits in order to be certified.¹⁷⁶

The Eighth Circuit hinged its decision that class certification was not proper under Rule 23(b)(3) on the argument that Plaintiffs could not show a common contention because Exxon operated the Pipeline as individual segments, and therefore, its operation of the Pipeline in one area would not affect operation in another area.¹⁷⁷ Not only does this argument fail as a practical matter – because the Pipeline is by definition one physical entity – but this conclusion illustrates that the Eighth Circuit engaged in the sort of “free-ranging merits inquiries” that the Court warned against in *Amgen*.¹⁷⁸ In fact, the Eighth Circuit granted summary judgment to Exxon on the grounds that, under Arkansas state property law, an easement holder has no implied duty to

supervisors at stores across the country who were given discretion in the hiring process. *Dukes*, 564 U.S. at 355–56.

171. *In re Nat'l Football League Players Concussion Injury Litigation*, 821 F.3d 410, 427 (3d Cir. 2016) (finding that the class of retired professional football players met the commonality requirement because the “NFL Parties allegedly injured retired players through the same course of conduct” and rejecting the argument that the class could not meet the commonality requirement because players’ suffered different injuries); see also *Barfield v. Sho-Me Power Elec. Co-op*, No. 11-cv-04321-NKL, 2013 WL 3872181, at *16 (W.D. Mo. 2013) (certifying a class of plaintiffs who owned property subject to easements with electric company and brought claims against the electric company for exceeding the scope of the easements; the court found that the class met the commonality requirement because determining whether or not the electric company violated the easements was a question common to the class).

172. 568 U.S. 455, 465–66 (2013) (“Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.”).

173. *Id.*

174. *Id.* at 466.

175. *Id.* at 459 (alteration in original).

176. *Id.*

177. *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156 (8th Cir. 2017).

178. *Amgen Inc.*, 568 U.S. at 466.

repair or maintain the easement and therefore found Exxon could not have breached the easement contracts.¹⁷⁹

C. Future Impact

Class action litigation can provide an even playing field between individuals and powerful industries. Wealth and income status are necessarily connected to class action litigation involving environmental contamination. Property values are typically lower near industries and facilities likely to pollute or contaminate nearby lands, and those who are able to afford to live elsewhere do.¹⁸⁰ The Eighth Circuit, in its rulings in *Webb*, *Ebert*, and *Smith*, has sent a clear message to property owners that class litigation of their claims against big industry for environmental contamination will not proceed. The Eighth Circuit effectively removed class action litigation as a tool for shrinking the power gap between individuals affected by environmental contamination and the big industries that cause such contamination. The Eastern District noted the issues *Webb* presents for class action litigation moving forward:

The difficulty with this case is that the decision-maker has to decide between two objectionable options. If Exxon's position prevails, the message to easement grantors is that they are helpless in attempting to avoid a pipeline oil spill, and have no rights until after the oil starts spewing from the [P]ipeline. And, this does not seem fair. On the other hand, if [P]laintiffs' position prevails, easement grantors would essentially be able to hold pipeline easement holders hostage, threatening them with lawsuits or contract rescission every time the easement grantors possess any notion that the companies are not meeting the easement grantors' personal safety standards. And, this appears to be neither fair nor commercially acceptable.¹⁸¹

The court recognized this was essentially a losing fight but decided fairness to Exxon in this case trumped fairness to the class.¹⁸² Even where there was a clear answer for the class to proceed, like certification under Rule 23(b)(2) in *Webb*, the Eighth Circuit still refused to allow Plaintiffs to bring

179. *Webb*, 856 F.3d at 1158 (citing *City of Crossett v. Riles*, 549 S.W.2d 800 (Ark. 1977)).

180. See Emmie Martin, *13 Things That Will Trash Your Home's Value*, BUS. INSIDER (Nov. 26, 2016), <https://www.businessinsider.com/factors-lower-home-value-2016-11>. But see *Lemings v. Eastridge*, No. 4:12CV00342 JLH, 2012 WL 12076464, at *3 (E.D. Ark. 2013); *Minyard v. Habbe*, No. CA 00-1099, 2001 WL 1092818, at *4 (Ark. Ct. App. 2001).

181. *Webb v. Exxon Mobil Corp.*, No. 4:13CV00232 BSM, 2015 WL 11090403, at *1 (E.D. Ark. Mar. 17, 2015), *aff'd on other grounds*, 856 F.3d 1150 (8th Cir. 2017).

182. See *id.*

their claims. To better even out the playing field between individuals and big industry, the Eighth Circuit should have allowed the class to proceed. Many of the issues the Eighth Circuit grappled with in decertifying the class, like whether Exxon breached the contracts, would have been better left to a fact finder to determine.

Moving forward, states, especially those within the Eighth Circuit's jurisdiction, should create more protections for residents affected by environmental contamination caused by big industry to help bridge the power gap. While residents should maintain skepticism about pipeline construction, popular opposition to pipeline construction is only half the battle. Special attention should also be focused on pipeline companies' right to use eminent domain to seize property for new construction.¹⁸³

Allowing pipeline companies free range over land across the country while courts refuse to allow the individuals who are or might become affected by environmental contamination to bring their claims to court eliminates a major check on the power of pipeline companies. While Exxon and BP were forced to pay hefty fines after major spills,¹⁸⁴ these fines rarely have a major effect on giant oil companies. In fact, just one month after the Pipeline leaked in Mayflower, the Pipeline leaked again Ripley County, Missouri.¹⁸⁵ Class action litigation could be an important check on big industries like oil, and potential findings of liability could force companies to operate at higher quality and safety standards – breaking the current cycle of waiting for a spill to occur and then paying fines.

The fight over pipelines will only increase in intensity moving forward. To begin shrinking the gap between individual landowners and powerful corporations, courts should give more leeway to class actions pursuing claims of environmental damage.

VI. CONCLUSION

In *Webb v. Exxon Mobil Corp.*, the Eighth Circuit set in place stringent requirements for class certification under *Dukes* while overlooking appropri-

183. See generally *Transcontinental Gas Pipe Line Co. v. 6.04 Acres, 910 F.3d 1130* (11th Cir. 2018); *Natural Gas Act*, 15 U.S.C. § 717f(h) (2018); Ilya Somin, *The Growing Battle Over the Use of Eminent Domain to Take Property for Pipelines*, WASH. POST (June 7, 2016), https://wapo.st/1t67vrU?tid=ss_tw&utm_term=.4c4373f10ec4.

184. Timothy Gardner, *U.S. Fines Exxon \$2.63 Billion for Arkansas Oil Pipeline Leak*, REUTERS (Oct. 1, 2015), <http://reut.rs/1YRRD83>; Nathan Bomey, *BP's Deepwater Horizon Costs Total \$62B*, USA TODAY (July 14, 2016), <https://www.usatoday.com/story/money/2016/07/14/bp-deepwater-horizon-costs/87087056/>.

185. *Missouri Oil Spill: Exxon Pegasus Pipeline Leaks Again, One Month After Mayflower, Arkansas Rupture*, HUFFPOST (May 1, 2013), https://www.huffingtonpost.com/2013/05/01/missouri-oil-spill-exxon_n_3194177.html.

ate class certification under Rule 23(b)(2). In interpreting the necessity of a common contention to satisfy commonality, the court held that where a proposed class could establish a similar course of conduct by the defendant, commonality is not met if class members have suffered different injuries.¹⁸⁶ Even where a defendant's course of conduct involves a physical pipeline running through plaintiffs' properties, the court held this was insufficient to show a common contention.¹⁸⁷ In its ruling, the Eighth Circuit has created a nearly impossible bar for class certification, especially in cases of environmental contamination.¹⁸⁸

The total effects oil spills have on surrounding land and wildlife is hard to account for in terms of money, and usually takes years to fully comprehend the damage. The spill in Mayflower severely impacted nearby wetlands and the wildlife inhabiting the area,¹⁸⁹ and years after the Deepwater Horizon spill scientists are still attempting to understand how it fundamentally impacted wildlife in the Gulf of Mexico.¹⁹⁰ While oil spills may just be the cost of doing business in a society so dependent on fossil fuels, the powerful oil industry must be checked from time to time to ensure safe practices and to mitigate the harms spills cause. Moving forward, class litigation should be an important part of that check in the face of mass environmental contamination.

186. *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156 (8th Cir. 2017).

187. *See id.*

188. *See generally, id.*

189. Miles Grant, *As Arkansas Community Reels from Tar Sands Oil Spill, Wildlife Remain in Peril*, NAT'L WILDLIFE FOUND. BLOG (Apr. 3, 2013), <https://blog.nwf.org/2013/04/as-arkansas-community-reels-from-tar-sands-oil-spill-wildlife-remain-in-peril/>.

190. Oliver Milman, *Deepwater Horizon Disaster Altered Building Blocks of Ocean Life*, GUARDIAN (June 28, 2018), <https://www.theguardian.com/environment/2018/jun/28/bp-deepwater-horizon-oil-spill-report>.