

Big-Deal Third Circuit Medical Monitoring Case

Friday, August 26, 2011

The Third Circuit has decided Gates v. Rohm & Haas Co., No. 10-2108, [slip op.](#) (3d Cir. Aug. 25, 2011). Although not a pharmaceutical case, it's something our readers would want to know about. Gates was decided under Pennsylvania law - somewhat bizarre because the contamination occurred in Illinois. It pretty much kills medical monitoring class actions except possibly in single-event contamination episodes - and thus takes medical monitoring class actions effectively off the table in pharma mass tort actions. The court refuses to allow plaintiffs to use statistical analyses to gloss over individual differences in terms of length, amount, and seriousness of exposure.

"Plaintiffs cannot substitute evidence of exposure of actual class members with evidence of hypothetical, composite persons in order to gain class certification. . . . The evidence here is not "common" because it is not shared by all (possibly even most) individuals in the class. Averages or community-wide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average. Attempts to meet the burden of proof using modeling and assumptions that do not reflect the individual characteristics of class members have been met with skepticism."

[Slip op.](#) at 20-21 (citations omitted). Also, Gates refuses to apply prophylactic government regulatory exposure standards to civil litigation:

"Although the positions of regulatory policymakers are relevant, their risk assessments are not necessarily conclusive in determining what risk exposure presents to specified individuals. Thus, plaintiffs could not carry their burden of proof for a class of specific persons simply by citing regulatory standards for the population as a whole."

Id. at 25-26 (numerous citations omitted)

The court "questions" but does not decide whether medical monitoring could ever be a Rule 23(b)(2) class after the Wal-Mart decision. [Slip op.](#) at 15. The court goes on to affirm denial of class certification under (b)(2), (b)(3), and (c)(4). The court

adopts the Principles of Aggregate Litigation for (c)(4), and affirms the court's finding that medical monitoring intertwines common and individual issues so that there are no "joints" at which to cut. [Slip op.](#) at 35-37. Denial of certification of a property damage class was also affirmed. [Slip op.](#) at 31-34.

If you defend medical monitoring cases, whether in pharmaceutical cases or otherwise, you'll like [Gates](#).