

Court of Appeals Rejects Medical Monitoring Class Action

August 31, 2011 by [Sean Wajert](#)

The Third Circuit last week affirmed a lower court decision denying class certification in a medical monitoring case alleging vinyl chloride exposures. [Gates v. Rohm & Haas Co.](#), No. 10-2108 (3d Cir., 8/25/11).

Readers may recall we [posted on this case](#) at the trial court level last year. Plaintiffs alleged that vinyl chloride released from Rohm & Haas's specialty chemicals manufacturing facility in Ringwood, Illinois contaminated the groundwater in and around McCollum Lake Village, as well as the air in the Village. Plaintiffs alleged that between 1968 and 2002, the vinyl chloride evaporating from the shallow plume blew over the Village, contaminating the air in the Village and causing some Village residents to breathe varying amounts of it. Plaintiffs claimed that the levels of vinyl chloride in the Village air were higher than the background level.

Plaintiffs sought certification of two classes: (1) a class seeking medical monitoring for Village residents exposed to the airborne vinyl chloride between 1968 and 2002, and (2) a liability-only issue class seeking compensation for property damage from the exposure. (We will focus on medical monitoring.)

The district court denied certification; it found the medical monitoring class lacked the cohesiveness needed to maintain a class under Rule 23(b)(2), and that common issues of law and fact did not predominate as required under Rule 23(b)(3). Both failed for the same reason—the “common” evidence proposed for trial did not adequately typify the specific individuals that composed the two classes. In particular, the court found plaintiffs failed to present common proof of three issues critical to recovering on the medical monitoring claim—(1) that plaintiffs suffered from exposure greater than normal background levels, (2) the proximate result of which is significantly increased risk of developing a serious disease, and (3) whether the proposed medical monitoring regime is reasonably medically necessary. The court also found the remaining individual issues would require individual trial proceedings, undoing any efficiencies of class treatment and possibly leading a second jury to reconsider evidence presented to the jury in the class proceeding.

Plaintiffs took an interlocutory appeal under Fed. R. Civ. P. 23(f) from the denial of class certification. The court of appeals affirmed.

The Third Circuit offered a number of important points for readers that may be confronting putative medical monitoring class actions:

1) what is a medical monitoring class?

A medical monitoring cause of action allows those exposed to toxic substances to recover the costs of periodic medical appointments and the costs of tests to detect the early signs of diseases associated with exposure. The few states that recognize medical monitoring as a remedy recognize it as a cause of action, like *Pennsylvania, Redland Soccer Club, Inc. v. Dep't of the*

Army, 696 A.2d 137, 142 (Pa. 1997), or treat it as a type of relief granted in connection with a traditional tort cause of action, see, e.g., *Bourgeois v. A.P. Green Indus., Inc.*, 716 So.2d 355, 359 (La. 1998).

The remedy of medical monitoring has divided courts on whether plaintiffs should proceed under Rule 23(b)(2) or Rule 23(b)(3), said the court. The Pennsylvania Supreme Court has talked about awarding medical monitoring damages as a trust fund which “compensates the plaintiff for only the monitoring costs actually incurred.” *Redland Soccer Club*, 696 A.2d at 142 n.6. But it has not yet clearly decided whether or when medical monitoring awards can be in the form of a lump-sum verdict.

The appeals court noted, however, that some guidance may have come from the fact that the Supreme Court [recently clarified](#) that Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2557 (2011). In light of the Supreme Court's recent decision, the Third Circuit would “question whether the kind of medical monitoring sought here can be certified under Rule 23(b)(2).” If the plaintiffs here prevailed, class members' regimes of medical screenings and the corresponding cost would vary individual by individual. A single injunction or declaratory judgment would seem to not be able to provide relief to each member of the class proposed here. Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *Wal-Mart*, 131 S. Ct. at 2557. But it did not need to reach the issue, because certification was improper under either category of Rule 23 for reasons apart from the monetary nature of plaintiffs' claims.

2) Cohesion and (b)(2) Certification

Although Rule 23(b)(2) classes need not meet the predominance and superiority requirements of Rule 23(b)(3), it is well established that the class claims must be cohesive. A key to the (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. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2557 (quoting [Richard A. Nagareda](#), *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class. As all class members will be bound by a single judgment, members of a proposed Rule 23(b)(2) injunctive or declaratory class must have strong commonality of interests. The Supreme Court in *Wal-Mart* recently highlighted the importance of cohesiveness in light of the limited protections for absent class members under subsections (b)(1) and (b)(2) of the class rule.

3) Individual Issues in Medical Monitoring Class

Because causation and medical necessity often require individual proof, medical monitoring classes may founder for lack of cohesion. See *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727-28 (6th Cir. 2004); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195-96, amended, 273 F.3d 1266 (9th Cir. 2001); *Barnes*, 161 F.3d at 143-46; *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995). Frequently the rigorous analysis of common and individual issues will entail some overlap with the merits of the plaintiff's underlying claim. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. The trial court may consider

the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take. The District Court here did so and found individual issues were significant to certain elements of the medical monitoring claims here.

Readers will recall that to prevail on a [medical monitoring claim](#) under Pennsylvania law, plaintiffs must prove:

- (a) exposure greater than normal background levels;
- (b) to a proven hazardous substance;
- (c) caused by the defendant's negligence;
- (d) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease;
- (e) a monitoring procedure exists that makes the early detection of the disease possible;
- (f) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and
- (g) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Redland Soccer Club, 696 A.2d at 145-46. "Expert testimony is required to prove these elements." [Sheridan](#) v. NGK Metals Corp., 609 F.3d 239, 251 (3d Cir. 2010).

Here, the District Court identified individual issues that would eclipse common issues in at least three of the required elements, noting several potential variations in proving exposure above background, a significantly increased risk of a serious latent disease, and the reasonable necessity of the monitoring regime.

4) Exposure

Plaintiffs proposed to show the exposure of class members through expert opinions on air dispersion modeling that mapped concentrations of vinyl chloride exposure (isopleths) that allegedly could provide average exposure per person. But in fact those isopleths only showed *average* daily exposure, not minimum exposure, used *average* exposure over very long periods of time when exposure likely varied, and thus could not show that every class member was exposed above background. Instead of showing the exposure of the class member with the least amount of exposure, plaintiffs proof would show only the amount that hypothetical residents of the village would have been exposed to under a uniform set of assumptions without accounting for differences in exposure year-by-year or based upon an individual's characteristics. At most, the isopleths showed the exposure only of persons who lived in the village for the entire period the isopleth represents and who behaved according to all assumptions that the experts made in creating the isopleth.

5) Composite Proof

Plaintiffs cannot, said the court, substitute for evidence of exposure of actual class members evidence of hypothetical, composite persons in order to gain class certification. The evidence here was not truly common because it was 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, noted the court of appeals. See *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990); *In re "Agent Orange" Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145, 165 (2d Cir. 1987); see also 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 8:9, at 8-55 to -57 (3d ed. 2006).

Plaintiffs have traditionally loved medical monitoring in part because they think that class certification may come more readily given their alleged ability to use epidemiological or group or aggregate proof to establish some the elements of the medical monitoring claim. That is why it is significant that the Third Circuit recognized that plaintiffs' aggregate proof in the form of exposure isopleths did not reflect that different persons may have different levels of exposure based on biological factors or individual activities over the class period. Factors which affect a person's exposure to toxins can include activity level, age, sex, and genetic make-up. See Federal Judicial Center, *Reference Manual on Scientific Evidence* 430 (2d ed. 2000). For example, some people will have higher breathing rates per body weight which would create a disparity between the concentrations of vinyl chloride (based on estimated exposure as opposed to actual exposure).

Each person's work, travel, and recreational habits may have affected their level of exposure to vinyl chloride. Differences in the amount of time spent outside the village would create different average concentrations to which the class members were exposed. A person who worked outside the village would have been exposed less than a stay-at-home parent, or retiree. The isopleths approach simply assumed exposure to the same concentration for class members who may have spent very different amounts of time in the village.

6) Significant Increased Risk

Plaintiffs were unable to prove a concentration of vinyl chloride that would create a significant risk of contracting a serious latent disease for all class members. Nor was there common proof that could establish the danger point for all class members. The court rejected plaintiffs' attempted use of a regulatory threshold by the EPA -- for mixed populations of adults and children—as a proper standard for determining liability under tort law. Even if the regulatory standard were a correct measurement of the aggregate threshold, it would not be the threshold for each class member who may be more or less susceptible to diseases from exposure to vinyl chloride. Although the positions of regulatory policymakers are relevant in litigation, their risk assessments are not necessarily conclusive in determining what risk an exposure presents to specified individuals. See Federal Judicial Center, *Reference Manual on Scientific Evidence* 413 (2d ed. 2000) (“While risk assessment information about a chemical can be somewhat useful in a toxic tort case, at least in terms of setting reasonable boundaries as to the likelihood of causation, the impetus for the development of risk assessment has been the regulatory process, which has different goals.”); *id.*

at 423 (“Particularly problematic are generalizations made in personal injury litigation from regulatory positions. . . . [I]f regulatory standards are discussed in toxic tort cases to provide a reference point for assessing exposure levels, it must be recognized that there is a great deal of variability in the extent of evidence required to support different regulations.”). Plaintiffs proposed a single concentration without accounting for the age of the class member being exposed, the length of exposure, other individual factors such as medical history, or showing the exposure was so toxic that such individual factors are irrelevant. The Third Circuit concluded that the trial court did not abuse its discretion in concluding individual issues on this point make trial as a class unfeasible, defeating cohesion.

7) Necessity of Monitoring

Nor did the lower court abuse its discretion in determining individual issues defeat cohesion with respect to whether the proposed monitoring regime is reasonably medically necessary. Many courts have been skeptical that the necessity for individuals' medical monitoring regimes can be proven on a class basis. See *Barnes*, 161 F.3d at 146; see *Principles of the Law of Aggregate Litigation* § 2.04 reporter's notes cmt. b, at 126 (2010). Plaintiffs' experts had no compelling answer to the point that the negative health effects of screening may outweigh any potential benefits. For example, the proposed regime of serial MRIs would be contraindicated and potentially risky because the contrast agent used for MRIs poses dangers to those with kidney disease.

8) Certification under (b)(3)

Courts have generally denied certification of medical monitoring classes when individual questions involving causation and damages predominate over (and are more complex than) common issues such as whether defendants released the offending chemical into the environment. See *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008). Here, the same the inquiries into whether class members were exposed above background levels, whether class members faced a significantly increased risk of developing a serious latent disease, and whether a medical monitoring regime was reasonably medically necessary all required considering individual proof of class members' specific circumstances. Common issues did not predominate.