



THE THIRD CIRCUIT COURT OF APPEALS PULLS THE PLUG ON MEDICAL MONITORING CLASS ACTIONS

William Patrick Shelley • 215.665.4142 • wshelley@cozen.com

Andrea Cortland • 215.665.2751 • acortland@cozen.com

On August 25, 2011, the U.S. Court of Appeals for the 3rd Circuit entered judgment in *Gates v. Rohm & Haas Co., et al.*, No. Civ. A. 10-2108, --- F.3d ---, 2011 WL 3715817, which, for all intents and purposes, signifies an end in the jurisdiction for bringing a medical monitoring suit as a class action.

The plaintiffs are residents of McCullom Lake Village, Illinois, a primarily residential area of approximately 2,000 people. These residents brought suit in the U.S. District Court for the Eastern District of Pennsylvania against the Rohm & Haas Company and its subsidiaries, including the maker of Morton Salt, for alleged damages stemming from the defendants' ownership and operation of a chemical facility one mile from the village. The plaintiffs sought, among other relief, certification of a medical monitoring class for village residents exposed between 1968 and 2002 to airborne vinyl chloride, which the plaintiffs allege resulted from the defendants' dumping of chemicals into a nearby lagoon. The District Court denied the plaintiffs' motion for class certification, holding that the medical monitoring class lacked the cohesiveness required under Rule 23(b)(2) and that the common issues of law and fact did not predominate as required under Rule 23(b)(3) because the "common" evidence proposed for trial did not adequately typify the specific individuals that composed the class. In a unanimous decision, the 3rd Circuit Court of Appeals lauded the District Court's "reasoned analysis" and affirmed its decision, questioning "whether the kind of medical monitoring sought here can be certified" as a class action "[i]n light of the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, --- U.S. ---, 131 S.Ct. 2541, 190 L.Ed.2d 274 (2011)."

Plaintiffs' Failure to Satisfy Cohesiveness Needed to Maintain a Class Action Under Rule 23(b)(2)

The Court of Appeals stated that "it is well established that the class claims [of Rule 23(b)(2) classes] must be cohesive[.]" citing the Supreme Court's decision in *Wal-Mart Stores* for the proposition that "[t]he key to the (b)(2) classes is the 'indivisible nature of the injunctive or declaratory remedy warranted[.]'" The District Court "identified individual issues that would eclipse common issues in at least three of the [seven] required elements" to prevail under a medical monitoring claim in Pennsylvania, specifically:

1. that the 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 medically necessary.

The Court of Appeals discussed the plaintiffs' failure to prove "cohesiveness" with regard to each of these issues in great detail, focusing largely on the plaintiffs' proffered evidence; chiefly, a report by an expert estimating the dispersion of vinyl chloride over the village based on data from various monitoring wells (the "expert report"), and an expert's risk assessment of exposure to vinyl chloride (the "expert risk assessment").

With regard to the first element, that the plaintiffs suffered from exposure greater than normal background levels, the Court of Appeals agreed with the District Court that the proposed expert evidence did not reflect exposure of any

specified individuals within the class. The District Court rejected the expert risk assessment because it represented an average exposure, not the exposure of any actual class member, and rejected the expert report because it assumed a constant value for exposure during lengthy time periods and averaged the class members' exposure. The Court of Appeals affirmed, holding that "Plaintiffs cannot substitute evidence of exposure to actual class members with evidence of hypothetical, composite persons ... Averages or community-wide estimations would not be probative of any individual's claim[.]" Moreover, the Court of Appeals took issue with plaintiffs' expert report because "under the plaintiffs' proposed modeling ... a class member who lived in the village from 1988-89 – a full decade after the dumping ended – would be assumed to have been exposed to the same concentration ... as a person living in the same neighborhood from 1968-69 when the dumping occurred."

With regard to the second element, proof that a concentration of vinyl chloride would create a significant risk for all class members of contracting a serious disease, the Court of Appeals held that the District Court properly identified various problems with the plaintiffs' proposed evidence, as the 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." Finally, with regard to the third element, whether the proposed medical monitoring regime is medically necessary, the Court of Appeals held that the District Court properly rejected the plaintiffs' "conclusory allegation that they could prove the need for serial MRIs on a classwide basis" in light of the fact that there were conflicting expert reports regarding whether a regime for the entire class could be developed despite the class members' differing ages, medical histories, genetic predispositions, and tolerance of serial MRIs.

Plaintiffs' Failure to Satisfy Predominance and Superiority Needed to Maintain a Class Action Under Rule 23(b)(3)

After finding that the plaintiffs failed to satisfy the cohesiveness needed to maintain a class action under Rule 23(b)(2), the Court of Appeals held that the plaintiffs also failed to satisfy the predominance and superiority needed to maintain a class action under Rule 23(b)(3). The Court of Appeals noted that "[t]he requirements of predominance and superiority for maintaining a class action under Rule 23(b)(3) are less stringent than the cohesiveness requirement of Rule 23(b)(2)," but stated that "the two inquiries are similar." Therefore, the Court of Appeals, citing back to its discussion of the requirements of Rule 23(b)(2), held that the plaintiffs did not satisfy the requirements of Rule 23(b)(3).

Overall, it appears that the Supreme Court's decision in *Wal-Mart Stores* set into motion a shift in how the 3rd Circuit Court of Appeals considers motions for class certification. Importantly, in *Gates*, the Court of Appeals placed great weight on the Supreme Court's clarification in *Wal-Mart Stores* that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class," holding that such relief is impossible here due to individual issues unrelated to the monetary nature of the claim." In *Gates*, the Court of Appeals' strict adherence to the standards articulated in *Wal-Mart Stores* leaves us to question, just as the Court of Appeals itself questioned, whether a medical monitoring class can ever be certified in the future.

Cozen O'Connor is a global leader in representing the insurance industry. For further analysis of Gates v. Rohm & Haas Co., et al., --- F.3d ---, 2011 WL 3715817 (3d Cir. August 25, 2011), please contact William P. Shelley at wshelley@cozen.com or Andrea Cortland at acortland@cozen.com.