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TOXIC TORT

IN A CLASS ALL BY THEMSELVES

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Is any exposure to a toxin harmful? If so, is a person entitled to medical monitoring for such exposure; can groups of such people qualify for class status in state and federal courts? Courts are now being challenged to accept and certify claims for medical monitoring of exposed persons. Medical monitoring is essentially an equitable claim for a defendant (but not necessarily a tortfeasor) to pay a sum for damages to monitor the future health status of otherwise unimpaired persons exposed to an environmental condition to determine whether they may have an actual claim in the future for which a tort recovery may be available. Courts are split on whether such class treatment is available and under what circumstances. This article considers the varying approaches to class certification for medical monitoring litigation in Pennsylvania, where plaintiffs are seeking relief as a result of an alleged exposure to toxins.

In Pennsylvania, the leading state court case on the certification of a class is Pohl v. NGK Metals Corp., 2003 WL 24207633, 2003 Phila. Ct. Com. Pl. LEXIS 103 (Pa. Ct. Com. Pl., Philadelphia Cnty. Jul. 9, 2003). In Pohl, plaintiffs asserted that they were exposed to beryllium particles and fumes and as a result, required medical monitoring to evaluate whether they had developed a beryllium-related condition. The court held that pursuant to Pennsylvania Rule of Civil Procedure 1702, several prerequisites must be satisfied in order for plaintiffs to be entitled to class action certification. These prerequisites are: 1) "the class is so numerous that joinder of all members is impracticable;" 2) "there are questions of law or fact common to the class;" 3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class;" 4) "the rep-

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resentative parties will fairly and adequately assert and protect the interests of the class;" and 5) "a class action provides a fair and efficient method for adjudication of the controversy." *See* Pa. R.C.P. 1702. The Pohl Court noted that the class, as projected by plaintiffs, had the potential to include more than 200,000 residents living near the particular beryllium production facility in question. In fact, plaintiffs suggested that the entire population of the geographical location in question during the relevant periods of time would be eligible for monitoring, without providing evidence of sensitivity to beryllium. The trial court in Pohl Court also discussed the scientific evidence provided in opposition to the certification of the class which indicated that only a proportionally small number of the total number of residents were actually at risk for beryllium disease since hypersensitivity to beryllium (with a predicted occurrence between one to three percent in the general public) was a required precursor for the development of chronic beryllium disease. The Court found that without evidence of beryllium sensitization, the class representatives themselves could not even be members of the proposed class of which they wished to represent; therefore, the plaintiff who brought suit did not meet the typicality element required for class certification.

The Pohl Court found another difficulty with class certification of these beryllium matters in that the standard for beryllium was not adopted by the Environmental Protection Agency until 1973. Therefore, no defendant could be held liable for any emissions before the standard was adopted. As such, this issue made each plaintiff's case individualized as to the time frame in which they may have been exposed to beryllium, thereby further rendering class certification of these beryllium plaintiffs inappropriate. Specifically, the Pohl Court held that "individual questions of susceptibility, negligence, causation, dose, and possibly the statute of limitations… cannot be resolved by class treatment." Thus, the Court found that plaintiffs were unable to satisfy the elements of numerosity or commonality.

Other Pennsylvania courts have also made determinations pertaining to petitions for class certification concerning toxins. In the U.S. District Court for the Eastern District of Pennsylvania, Shirley Sheridan filed a lawsuit claiming personal injury related to alleged exposure to beryllium particles and fumes. Sheridan v. Cabot Corp., 2003 WL 22999256, 2003 U.S. Dist. LEXIS 4564 (E.D. Pa. Mar. 12, 2003). The District Court found that Ms. Sheridan did not suffer from a compensable injury and therefore, dismissed her cause of action by granting Cabot's motion for summary judgment. Soon thereafter, Ms. Sheridan, as a representative on behalf of a proposed class, filed a class action lawsuit wherein she sought to establish a fund for costs associated with medical monitoring for future beryllium related injuries. *See* Sheridan v. NGK Metals Corp., 614 F.Supp.2d 536 (E.D. Pa. 2008). In granting defendant's motion for summary judgment, the Court ruled that the plaintiffs had not proved that they were at an increased risk for the development of beryllium-related disease and therefore certification of class would not be a "fair and efficient method of adjudication."

The seminal case in Pennsylvania on medical monitoring due to toxic exposure is Redland Soccer Club, Inc. v. U.S. Dep't of the Army, which was initially filed as a class action complaint in the Middle District of Pennsylvania. Redland Soccer Club, Inc. v. U.S. Dep't of the Army, 696 A.2d 137 (Pa. 1997). However, the District Court denied certification for class treatment and the matter was later dismissed in the federal court system. Eventually, plaintiffs re-filed in Pennsylvania's state court system which lead to the landmark decision rendered by the Supreme Court of Pennsylvania. The Court's decision did not focus on the issue of class certification; therefore, this analysis will move onto other Pennsylvania decisions which more clearly address the sufficiency of claims where plaintiffs sought medical monitoring and whether certification of a class is an appropriate method of adjudicating those claims.

Pennsylvania Courts have also been faced with classes within classes or sub-classes for certification. One such case Lipinski v. Beazer East, Inc., where the Court of Common Pleas in Butler County denied class certification for plaintiffs who sought to certify several different categories of plaintiffs. Lipinski v. Beazer East, Inc., 76 Pa. D.&C.4th 479, 2005 WL 3955773, 2005 Pa. Dist. Cnty. Dec. LEXIS 399 (Pa. Ct. Com. Pl., Butler County 2005). The Lipinski plaintiffs claimed they were injured as a result of the allegedly improper disposal of various chemicals at the Bear Creek Area Chemical Site. One of the classes identified by plaintiffs were individuals who used contaminated well water in the area surrounding Bear Creek Area Chemical Site and as a result, required medical monitoring to determine whether they had developed cancer and/or thyroid disease. The Butler County Court noted that plaintiffs did not satisfy the numerosity element; they did not properly enumerate how many people could have been exposed or were actually exposed to contaminated well water. Specifically, the court held that "[a] class definition is insufficient where, as here, it would require an individualized determination just to determine who is in the class." Moreover, the Lipinski Court ruled that plaintiffs failed to satisfy the requisite commonality element since there were individual issues of causation, namely as to the conduct and resulting liability of the different defendants, the fact that there were various chemicals of which plaintiffs alleged exposure, inconsistent exposure periods and individual dosages of the alleged chemicals. The Lipinski Court noted that plaintiffs, in the process of proving causation, would require a highly individualized analysis. The court also found that the named plaintiffs were not typical of the class they wanted to represent because there was an inherent conflict in representing both symptomatically injured plaintiffs and asymptomatic medical monitoring plaintiffs. The Court held that the named plaintiffs could not represent both. These matters were not suitable to class treatment and the Lipinski Court denied class certification.

As noted initially, courts are evenly split in Pennsylvania. In Foust v. SEPTA, the Commonwealth Court of Pennsylvania affirmed the trial court's certification of a class in a matter where plaintiffs sought medical monitoring

related to alleged exposure to polychlorinated biphenyls (PCBs). Foust v. SEPTA, 756 A.2d 112 (Pa. Commw. Ct. 2000). The trial court in Foust granted class certification for the medical monitoring claims, but denied certification as to the emotional distress, property damage and punitive damage claimms. Despite plaintiffs adding their claims for medical monitoring after the expiration of the statute of limitations, the Commonwealth Court found that defendants did not prove that they were prejudiced by the addition of the medical monitoring claims and therefore, the claims would not be dismissed. Moreover, the Commonwealth Court held that the trial court did not abuse its discretion in its determination that plaintiffs had met their burden of showing numerosity, commonality and that a class action was the most effective manner in which to try the case. Specifically, the Court found that the potential class members, based on the description of the class, could number in the thousands. Secondly, the Court found that since plaintiffs, through their expert, showed that they were exposed to background levels of PCBs which were greater than normal, the trial court properly found that plaintiffs had satisfied their burden for commonality even though the individuality of plaintiffs' exposure differed. Thirdly, the Commonwealth Court in Foust found that questions of whether the defendants acted negligently would be more easily and consistently handled in one trial rather than many separate trials. Interestingly, the dicta of the opinion, states that in the scope of appellate review, that "any error should be committed in favor of allowing class certification". In considering whether the only fair and efficient manner to handle these cases was through a class action. The Court referred to Pennsylvania Rule of Civil Procedure 1708, which delineates the factors to be considered by a court in actions where plaintiffs seek solely monetary recovery. Pursuant to Pa. R.C.P. 1708, some of the factors to be considered by the trial court were: 1) whether the common questions of law or fact dominated individualized questions of law or fact; 2) whether there would be administrative difficulties managing the class of the proposed size; and 3) whether there would be inconsistencies in judgment if the cases were split, since the plaintiffs at bar were seeking strictly monetary recovery for their medical monitoring claims. Nevertheless, the Commonwealth Court found that class certification was appropriate.

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