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Client Alert

Sixth Circuit Ruling Adopts "Broad" Approach to Issue Class Certification in Toxic Tort Case

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On July 16, 2018, the United States Court of Appeals for the Sixth Circuit affirmed an Ohio federal court's certification of a so-called "issue class" under Federal Rule of Civil Procedure 23(c)(4) in *Martin v. Behr Dayton Thermal Products LLC*,[1] thereby becoming one of the few courts that have certified a Rule 23(c)(4) issue class in a toxic tort action. By joining certain circuits that have adopted a "broad" approach to issue classes, the Sixth Circuit has allowed plaintiffs to proceed on a class basis by merely showing that common questions predominate over individualized questions with respect to seven issues. The court thus affirmed the district court's conclusion that individualized issues of causation, injury, and damages could be reserved for follow-on proceedings—a ruling that may serve as persuasive authority for future toxic tort plaintiffs who seek to certify a class without having to establish a defendant's liability to any individual class member with common proof.

BACKGROUND

In 2008, thirty residents of the McCook Field neighborhood of Dayton, Ohio filed suit against four corporate defendants—Behr Dayton Thermal Products LLC; Behr America, Inc.; Chrysler Motors LLC; and Aramark Uniform & Career Apparel, Inc.—alleging that the companies had contaminated the groundwater beneath their properties with carcinogenic volatile organic compounds (VOCs).[2] Although the plaintiffs had access to drinking water from a municipal water source, they alleged that the chemicals in the groundwater exceeded regulatory safe levels and created a risk of VOC vapor intrusion in their homes and buildings.[3] They sued defendants on behalf of a class encompassing 540 properties, raising claims such as trespass, nuisance, strict liability, and negligence.[4]

Plaintiffs sought certification under Rule 23(b)(3), which requires plaintiffs to show, among other things, that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[5] Alternatively, they

sought certification under Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[6] The Southern District of Ohio rejected plaintiffs' attempt to certify under Rule 23(b)(3), holding that individualized issues of causation and injury-in-fact defeated their effort to show predominance.[7] The court determined, however, that plaintiffs' inability to satisfy the predominance requirement with respect to the entire action did not pose an insuperable obstacle to issue-class certification under Rule 23(c)(4). Accordingly, the district court certified seven allegedly "common" issues—including questions concerning each defendant's role in creating the contamination, whether the defendants engaged in abnormally dangerous activities, the foreseeability of subsequent injuries, the extent of the plume boundaries, whether defendants caused class members to incur "the potential for vapor intrusion," and whether they negligently failed to investigate and remediate the contamination.[8] Although acknowledging that individualized issues of causation, fact-of-injury, and damages could not be resolved via common proof, the district court posited that a Special Master could be appointed to resolve the remaining individual issues.[9]

THE SIXTH CIRCUIT'S OPINION

On appeal, a three-judge panel of the Sixth Circuit unanimously affirmed the district court in a published opinion.[10] The Sixth Circuit primarily focused on the split among circuits concerning how the predominance requirement should function in issue-class certification. Under the "broad" view—recognized by the Second, Fourth, Seventh, and Ninth Circuits—a plaintiff seeking to certify a Rule 23(c)(4) issue class need not show that the entire action could satisfy the Rule 23(b)(3) predominance requirement.[11] By contrast, under the "narrow" approach adopted by the Fifth Circuit in *Castano v. American Tobacco Company*, and largely endorsed by the Eleventh Circuit, a district court "cannot manufacture predominance through the nimble use of subdivision (c)(4)," which is merely "a housekeeping rule that allows courts to sever the common issues for a class trial."[12] Other circuits—such as the Third and Eighth Circuits—have declined to adopt either position, opting instead for more functional, efficiency-based approaches.[13]

The Sixth Circuit first concluded that "the broad approach respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous."[14] Next, the Sixth Circuit found that, under this standard, the district court did not err in finding that the proposed issue class passed muster under Rule 23(b)(3) because the seven certified issues did not overlap with injury-in-fact or causation determinations, thus ensuring that individualized inquiries did not "taint" the class proceeding.[15] Moreover, recognizing that the superiority requirement "functions as a backstop against inefficient use of Rule 23(c)(4)," the Sixth Circuit concluded that resolution of the certified issues would materially advance the litigation.[16] Lastly, the Sixth Circuit declined to address the question of whether the Special Master procedure referenced by the district court would violate the Seventh Amendment—which prohibits reviewing courts from reexamining any fact tried by a jury in any manner other than according to the common law[17]—because the district court had not formally settled on a specific procedure to resolve either the common issues or the separate individualized issues.[18]

POTENTIAL IMPLICATIONS FOR COMPANIES FACING TOXIC TORT CLASS ACTIONS

The Sixth Circuit's opinion in *Martin* is significant in several respects. First, it resolved an undecided question in the Sixth Circuit: whether plaintiffs must show that common questions predominate over individualized questions with respect to the *entire action* before a Rule 23(c)(4) issue class can be certified. Second, it represents one of the few examples in which a court has certified a Rule 23(c)(4) issue class in a toxic tort class action.[19] Third, and perhaps most importantly, the Sixth Circuit held that, at least on the record before it, the resolution of plaintiffs' seven "common" issues would materially advance the litigation even though individualized issues of causation, injury, and damages—required elements of all tort claims in virtually every jurisdiction—would need to be resolved in separate proceedings. *Martin* thus appears

to part ways with courts that have concluded, even in circuits that have adopted the "broad" conception of Rule 23(c)(4), that issue classes cannot be certified where fundamental liability questions remain unresolved.[20]

Though the Sixth Circuit's ruling in *Martin* may inspire more plaintiffs to pursue Rule 23(c)(4) issue classes in toxic tort cases, defendants can seek to combat such efforts by deploying key arguments that will be available in many—if not most—environmental contamination cases. First, defendants should develop a factual record demonstrating that individualized inquiries overwhelm the common questions *even within each Rule 23(c)(4) issue*. For instance, the Sixth Circuit noted in *Martin* that, while the defendants disputed the plume boundaries drawn by plaintiffs' expert, the defendants did *not* contend that contamination varied within the plume itself.[21] In so doing, the court implied that variations within the plume could potentially present an individualized issue sufficient to foreclose Rule 23(c)(4) certification. Moreover, even if an issue is truly "common" for purposes of Rule 23(c)(4), defendants should also be prepared to argue that separate proceedings to resolve key individual issues such as causation, injury, and damages preclude plaintiffs' ability to show that a Rule 23(c)(4) class would materially advance the litigation.[22] In particular, defendants should press plaintiffs to identify *exactly how* these issues will be resolved in follow-on proceedings and not allow them to avoid Rule 23 scrutiny with vague assertions that this all can be determined at some later point "down the road." Indeed, it is critical that the plaintiffs be compelled to articulate the process with specificity so that the district court can determine, *at the outset*, whether the proposed procedure will implicate important Seventh Amendment concerns or otherwise present insurmountable manageability problems.

[1] Slip Op. No. 17-3663 (6th Cir. July 16, 2018).
[2] *Id.* at 1.
[3] *Id.* at 2.
[4] *Id.* at 4.
[5] Fed. R. Civ. P. 23(b)(3).
[6] Fed. R. Civ. P. 23(c)(4).
[7] *Martin*, Slip Op. at 4.

[8] *Id.* at 5.
[9] *Id.*
[10] *Id.* at 2, 6.
[11] *See, e.g.*, *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439–45 (4th Cir. 2003); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).
[12] 84 F.3d 734, 745 n.21 (5th Cir. 1996); *see also Sacred Heart Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010).
[13] *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008).
[14] *Martin*, Slip Op. at 9.
[15] *Id.* at 11.
[16] *Id.* at 9, 14.
[17] U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").
[18] *Martin*, Slip Op. at 14–15.
[19] *See Gates*, 655 F.3d at 274 (denying certification of liability-only issue class where "[a] trial on whether the defendants discharged vinylidene chloride into the lagoon that seeped in the shallow aquifer and whether the vinyl chloride evaporated from the air from the shallow aquifer is unlikely to substantially aid resolution of the substantial issues on liability and causation"). *But see Good v. Am. Water Works Co., Inc.*, 310 F.R.D. 274, 296 (S.D.W. Va. 2015) (certifying liability-only issue class under Rule 23(c)(4) in groundwater contamination case).
[20] *Moeller v. Taco Bell Corp.*, No. C 02-5849 PJH, 2012 WL 3070863, at *5 (N.D. Cal. July 26, 2012) (holding that Rule 23(c)(4) issue certification is plainly inappropriate where "[i]t is not only damages that are individualized, but also liability and causation, because the issue is whether an individual class member has any claim at all.").
[21] *Martin*, Slip Op. at 11.
[22] *Robertson v. Monsanto Co.*, 287 Fed. App'x 354, 362 (5th Cir. 2008) (reversing certification of class suing chemical manufacturer for the accidental release of ammonia fumes where "the remaining issues of causation and damages are highly individualized" and thus a class action would not be superior); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (where defendant allegedly released TCE into groundwater, court found superiority lacking because "diminution in property value, loss of use and enjoyment, and annoyance … require individualized proof," resulting in "mini-trials on complex causation and damages issues").