Property Damage Claims for Environmental Contamination: The Problems Inherent in Attempting to Bring Them as Class Actions

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A RECENT TREND IN ENVIRONMENTAL CLASS ACTION LITIGATION has arisen from the realization of plaintiffs' attorneys that raising personal injury claims allegedly arising from environmental contamination are too expensive, too difficult, or too likely to result in class certification being denied. To better their odds for class certification, plaintiffs' attorneys are abandoning personal injury claims and are instead focusing on property damage claims alone. However, the decision to abandon personal injury claims raises serious due process issues, as the named plaintiffs can not adequately represent those class members with legitimate personal injury claims. Government lawyers caught up in the mess of such litigation may be able to use the weakness inherent in this trend to fend off claims. When governments are plaintiffs, they would be well advised to consider the downside of recasting personal injury claims as class action property claims.

I. Class Action Requisites

A. *Class Issues Must Predominate*

Among other requirements, the Federal Rules of Civil Procedure require that "questions of law or fact common to members of the class predominate over any questions affecting only individual members. . . ."[1] The mere presence of common class issues is insufficient; rather, the court must determine whether the common issues *predominate.*[2]

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1. FED. R. CIV. P. 23(b)(3).

2. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (satisfying the predominance requirement is far more demanding than the commonality requirement); Edgington v. R.G. Dickinson & Co., 139 F.R.D. 183, 190 (D. Kan. 1991) ("It is apparent from the rule that predominance requires more than the mere existence of common questions and that the determination of predominance requires the courts to assess the relationship between the common and individual questions.").

When the case involves numerous individualized issues, it is likely that the case will disintegrate into a series of mini-trials, thus negating the benefits of a class action.[3]

B. *Named Class Representatives Must Adequately Represent the Class*

In addition to the requirement that class issues predominate, Rule 23(a)(4) mandates that "the representative parties will fairly and adequately protect the interests of the class."[4] The adequacy requirement "uncover[s] conflicts of interest between named parties and the class they seek to represent."[5] The adequacy requirement serves to protect the due process rights of absent class members, ensuring that the class representative possesses the same interest and suffers the same injury as absent class members. "The requirement that the class representatives fairly and adequately protect the interests of the class may be regarded as a threshold question of constitutional dimension, since it would violate due process to bind a class member to a ruling against inadequate class representatives."[6]

"The [typicality and adequacy] tests merge because 'if the representatives' claims are not typical of the class, they cannot adequately protect the interests of the absent class members.' "[7] Thus, in order to satisfy the adequacy or typicality requirement, the plaintiff must "demonstrate that other members of the class he purports to represent have suffered the same grievances of which he complains."[8]

II. History of Mass Torts—The Class Action Becomes Recognized as a Necessity

A. *Historically Motions for Class Certification for Mass Tort Claims Were Disfavored Due to the Predominance of Individual Issues*

Drafters of the precursor to the modern federal rule of civil procedure authorizing the certification of class actions explicitly determined that

3. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (in the mass accident context, significant individual issues of liability and damages may arise, and "an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.").
4. FED. R. CIV. P. 23(a)(4).
5. *Amchem Prods.*, 521 U.S. at 625.
6. *In re* Storage Tech. Corp. Sec. Litig. 113 F.R.D. 113, 117 (D. Colo. 1986).
7. Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 423–24 (D.N.M. 1988).
8. White v. Gates Rubber Co., 53 F.R.D. 412, 415 (D. Colo. 1971).

use of the class action device in a mass accident scenario was inappropriate due to the prevalence of individual issues:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[9]

In addition, one of the main purposes of the newly drafted rule was to enable negative value litigants to pursue claims that were otherwise of insufficient monetary worth to justify the costs of litigation.[10] Because tort claims do not generally fall into the category of negative value suits, and because individual issues are generally pervasive in tort claims, early implementation of the new rule resulted in ultimate denials of motions for class certification in the mass tort arena.[11]

B. *Despite the Inappropriateness of Class Actions in Mass Exposure Cases, Fear of Inundation of Federal Dockets Forced a Sea Change*

The more complex the circumstances surrounding the alleged injury, the more likely that individual issues will predominate. Among other circumstances, claims can range from a discrete vector of injury occurring at one instant in time (e.g., transportation accident), to the same vector of injury occurring over a particular time period (e.g., claims based on defective products), to different potential vectors of injury occurring over a particular period of time (e.g., toxic tort cases). It is generally recognized that class action certification is more appropriate in mass accident cases (discrete vector of injury, which reduces the likelihood of individual issues) in comparison to cases of mass exposure (multiple vectors of injury affecting varied populations, which increase the likelihood of individual issues).[12]

Yet, because of the inundation of mass tort actions filed in the federal court system, the trend in the mid-to-late 1980s was to certify classes without regard to the nature of the vector of injury. For instance, in the

9. FED. R. CIV. P. 23(b)(23) advisory committee's note.

10. *See id.*

11. *See, e.g., In re* N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) (vacating district court's decision to certify a class of women allegedly injured by the Dalkon Shield Intra-Uterine Device); *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1184 (8th Cir. 1982) (reversing lower court's decision to certify class of plaintiffs due to the collapse of two skywalks at a Hyatt Regency Hotel). *See generally* Richard A. Chesley & Kathleen W. Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467 (1985).

12. *See generally*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358 (1995).

mid-1980s, federal courts recognized that the class action mechanism was necessary (although not necessarily appropriate) in asbestos litigation cases. The Fifth Circuit affirmed class certification in *Jenkins v. Raymark Industries*, stating, "[t]he courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."[13] In the same year, the Third Circuit affirmed, in part, class certification in another asbestos case.[14]

C. *By Their Very Nature, Individual Issues Predominate in Environmental Contamination Claims*

Because typical environmental contamination claims generally lack a discrete vector of injury (whether personal injury or property damage), individual issues are more likely to predominate. Unlike a mass transportation accident, or even defective product cases, claimants in environmental contamination cases must first prove that they were actually exposed to the alleged injury-causing agent. This hurdle was easier to overcome in the Agent Orange claims, where it could be shown that a *unique* product had been distributed in *particular areas* at *discrete times* and that, in those areas and at those times, putative plaintiffs were present.[15]

However, in the more typical environmental contamination claim, geographic and temporal causation issues are more prominent. Plaintiffs must show that more ubiquitous agents (or resulting degradation products) came from the source complained of and that the class was actually exposed to the product after the defendant's product was released. Even if plaintiffs can show class-wide exposure and class-wide harm, claimants must show that it was not only the ubiquitous agent that caused class-wide harm, but that it was the defendant's source of the ubiquitous agent that did so.

In addition to the general intricacies involved with establishing geographic and temporal causation in environmental contamination claims, allegations of personal injury raise further complexities that normally sound the death knell for class certification.[16] A district court in *Hurd v. Monsanto Co.* denied class certification in a claim based on exposure to polychlorinated biphenyls (PCBs), summarizing the issues as follows:

13. 782 F.2d 468, 473 (5th Cir. 1986).

14. *See In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986).

15. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (affirming class certification in a mass tort action involving exposure to Agent Orange).

16. *See, e.g.*, Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181 (1993) (discussing various complexities in establishing causation in mass tort actions alleging damages due to personal injury).

> Here, plaintiff has not shown that common issues will predominate over individual issues. Unlike airplane crash or hotel disaster cases, which usually involve a single set of operative facts used to establish liability . . . this case involves continuing exposure over as many as twenty years. Undeniably, some class members have been exposed to PCBs only for a few months and at low levels, while others, for decades and at high levels . . . [and] even if a jury could make a class-wide finding of fact regarding the general health risks posed by PCBs, resolution of liability issues would still require an individual inquiry into the circumstances involving each class member's exposure and susceptibility.[17]

This is not to say that claims based on property damage are any better suited for class action. Property damage claims are normally based on allegations of trespass and nuisance, where plaintiffs must show that the contamination physically and adversely impacted the owner's use and enjoyment of the property.[18] Just like personal injury claims, in which each individual plaintiff's exposure is unique, the physical and adverse impact to each property owner will vary depending on circumstances including knowledge upon sale, length of exposure, level of exposure, and whether particular owners have water rights.[19] As a result, many courts have denied class certification in claims based solely on property damage in the environmental context.[20]

III. Res Judicata and Claim Splitting

A basic function of res judicata is to prevent parties from relitigating an action or issue that has already been decided by a proper judgment in a prior proceeding. Beyond the goal of bestowing finality on validly decided judgments, the doctrine of res judicata serves to protect defen-

17. 164 F.R.D. 234, 240 (S.D. Ind. 1995) (citations omitted).

18. *See, e.g.*, Allison Rittenhouse Hayward, *Common Law Remedies and the UST Regulations*, 21 B.C. ENVTL. AFF. L. REV. 619 (1994).

19. *See, e.g.*, Schuerman v. Chevron Pipe Line Co., Case No. CV OC 9502258D at 10–14 (4th J.D. Idaho 1996); Satsky v. Paramount Communications, Inc., No. Civ.A. 90-S-1561, 1996 WL 1062376, at *13 (D. Colo. Mar. 13, 1996); Church v. General Elec. Co., 138 F. Supp. 2d 169, 182 (D. Mass. 2001).

20. However, denial of class certification in these cases is less than certain, as other courts have certified classes based on property damage claims. *See, e.g.*, Coastal Corp. v. Garza, 979 S.W.2d 318, 321 (Tex. 1998); DeSario v. Indus. Excess Landfill, Inc., 587 N.E.2d 454 (Ohio Ct. App. 1991); Boughton v. Cotter Corp., 65 F.3d 823, 827–28 (10th Cir. 1995); Thomas v. Fag Bearings Corp., 846 F. Supp. 1400, 1403 (W.D. Mo. 1994); McGuire v. Int'l Paper Co., No. 1:92-CV-593, 1994 U.S. Dist. LEXIS 4783, at *25 (S.D. Miss. Feb. 18, 1994); Daigle v. Shell Oil Co., 133 F.R.D. 600, 602–03 (D. Colo. 1990); Brown v. Southeastern Pa. Transp. Auth., No. 86–2229, 1987 U.S. Dist. LEXIS 5095, at *40 (E.D. Pa. Apr. 9, 1987); Ouellette v. Int'l Paper Co., 86 F.R.D. 476, 482–83 (D. Vt. 1980); Sherrill v. Amerada Hess Corp., C.A. 95-CVS-15754, slip op. (N.C. Sup. Ct. Nov. 7, 1996); Cordova v. Hughes Aircraft Co., C-284158, slip op. (Ariz. Sup. Ct. July 10, 1996); Dyer v. Monsanto Co., CV-93–250, slip op. (Ala. Cir. Ct. Aug. 4, 1995); RSR Corp. v. Hayes, 673 S.W.2d 928, 933 (Tex. Ct. App. 1984).

dants from being forced to protect themselves from plaintiffs' "claim splitting," i.e., repetitive actions brought by the same plaintiff involving the same cause of action. Some states apply the doctrine narrowly, only barring subsequent claims when the prior claim was based on the same cause of action, and when it is clear that the evidentiary proof would be the same.[21] However, other states apply res judicata more broadly, finding that former actions are conclusive as to all issues that were actually litigated *or that could have been litigated.*[22]

Specifically, early court decisions, mostly based on vehicle accidents, held that when a plaintiff brings a first action based on either personal injury *or* property damage (not both), a subsequent action based on the previously abandoned claim is barred.[23]

IV. Abandonment of Personal Injury Claims at the Expense of Potential Personal Injury Claimants Violates the Due Process Rights of Putative Class Members

Beyond the fact that class certification is inappropriate due to individual issue predominance in environmental contamination cases generally—and particularly in those asserting personal injury claims—serious due process issues arise when plaintiffs' attorneys abandon personal injury claims in order to increase their odds for class certification.[24] Res judicata applies to absent class members with the same force and effect as it does to the named plaintiffs.[25] Thus, all class members face a potential bar of future personal injury claims if the class action is one that is based on property damages only.[26] As such, named plaintiffs

21. *See, e.g.*, Diebold Safe & Lock Co. v. Morse, 124 N.E. 429 (Mass. 1919).

22. *See, e.g.*, Golden v. Mascari, 25 N.E.2d 462 (Ohio Ct. App. 1939) (finding that a subsequent claim based on quantum meruit was barred as it was not sufficiently different to create a new cause of action when a prior claim brought by plaintiff based on express contract had already been decided); Kinzel v. Boston & Duluth Farm Land Co., 145 N.W. 124 (Minn. 1914) (finding that even though the issue of value of services was not actually litigated in prior claim, a subsequent claim for value of services was barred because it could have been litigated in prior suit).

23. *See, e.g.*, Ozan Lumber Co. v. Tidwell, 212 S.W.2d 349 (Ark. 1948) (prior suit based on personal injuries in a car accident barred subsequent suit based on property damage); Pratt v. Vaughan, 38 P.2d 799 (Cal. Ct. App. 1934) (prior suit based on personal injury relating to a vehicle accident barred subsequent suit based on property damage).

24. The same argument applies to plaintiffs who attempt to bring claims based solely on economic damages, abandoning claims for injunctive relief. *See, e.g., Ex parte* Russell Corp., 703 So. 2d 953 (Ala. 1997) (denying class certification because plaintiffs' abandonment of injunctive relief claims could bar any future injunctive relief claims against the defendant for environmental contamination).

25. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).

26. *See, e.g.*, Millett v. Atl. Richfield Co., No. CV-98–555, 2000 Me. Super. LEXIS 39, at *31 n. 18 (Mar. 2, 2000).

who bring class actions based solely on property damage claims in environmental contamination cases are necessarily inadequate representatives of a putative class. They cannot adequately represent absent class members who also have personal injury claims.

To this end, several courts have held that abandonment of personal injury claims by named plaintiffs render them inadequate class representatives.[27] In *Millett*, the proposed class was comprised of owners of private water wells allegedly contaminated with MTBE.[28] The named plaintiffs sought testing of the well water, compensation for alleged losses in property value, and remediation costs but did not seek compensation for personal injury claims.[29] The court determined that the named plaintiffs' failure to include personal injury claims rendered them inadequate class representatives: "The possible prejudice of losing personal injury claims is 'simply too great for [this] Court to conclude that the named Plaintiffs' interests are aligned with those of the class.' "[30]

V. The Opt-Out "Notice" Is Insufficient to Notify Putative Plaintiffs of the Potential Permanent Abandonment of Claims

It is generally understood that the opt-out notice is commonly disregarded by putative class members, and those who do attempt to read it have difficulty understanding it.[31] By no means does the typical opt-out notice spell out with any clarity that the claims being pursued are based on property damage only and that putative class members may be barred from bringing personal injury claims in the future. While some courts rely on the opt-out notice to support their theory that putative

27. *In re* MTBE Prod. Liab. Litig., 209 F.R.D. 323, 338–39 (S.D.N.Y. 2002) (class certification denied because named plaintiffs who chose to abandon personal injury claims in environmental contamination case arising out of leaking underground storage tanks were necessarily inadequate class representatives); Thompson v. Am. Tobacco Co., Inc., 189 F.R.D. 544, 550–51 (D. Minn. 1999) (named plaintiffs who asserted claims for medical monitoring but not personal injury were inadequate representatives); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 n.16 (S.D.N.Y. 1992) (named plaintiffs who did not assert personal injury claims along with breach of warranty claims found inadequate); Millett v. Atl. Richfield Co., No. CV-98–555, 2000 Me. Super. LEXIS 39, at *31 n. 18 (Mar. 2, 2000).

28. *Millett*, 2000 Me. Super. LEXIS 39, at *31 n.18.

29. *Id.* at *11, *31.

30. *Id.* at *32–34; *see also Feinstein*, 535 F. Supp. at 606 n.16 ("It is difficult to imagine many courts sanctioning separate actions for property and injury claims arising out of the same incident.").

31. As Newberg suggests, the extent to which putative class members do not understand the opt-out notice can not be understated, as returned opt-out notices include remarks like, "I am unable to attend your class." ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 8–39 (4th ed. 2002).

class members are on notice that, by joining the class, their right to bring future claims is at issue,[32] other courts have explicitly rejected the usefulness of the opt-out notice in that regard.[33]

VI. Conclusion

Environmental contamination cases commonly fail to fulfill the requirements for certification as a class action due to the predominance of individual issues. While the waiver of personal injury claims by named class action plaintiffs generally simplifies environmental contamination claims, the abandonment of personal injury claims by named class representatives necessarily implicates serious due process issues with respect to putative class members, which the opt-out notice does not address. As a result, class certification is inappropriate as the named class members become inadequate representatives of the class.

32. *See, e.g.*, Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 926 (Cal. Ct. App. 2001) (stating that waiver of putative class members' property damage claims could be cured by the opt-out notice).

33. *See In re* MTBE Prods. Liab. Litig., 209 F.R.D. 323, 338 (S.D.N.Y. 2002) ("[T]here can be little doubt that the right to opt out does nothing to protect the unraised personal injury claims of those class members who decide not to opt out.").