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Combating Commonalities In Toxic Tort Class Actions

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A federal judge in Oklahoma recently denied class certification to homeowners living near a research facility, holding that individual issues outweighed allegedly common issues among the class claiming injury from contamination from the facility site. (See Mitchell McCormick, et al. v. Halliburton Co. et al., No. 5:11-cv-01272 (W.D. Ok. March 3, 2015).) The decision offers a practical, common-sense view of Rule 23 in the toxic tort context.

For several decades, the opinion recited, defendant Halliburton Energy Services performed a variety of important tasks on the site at issue, semirural parcels in Duncan, Oklahoma. This included work for the U.S. Department of Defense cleaning out missile motor casings. This particular work involved removing solid rocket propellant, consisting primarily of ammonium perchlorate, from the missile casings using a high-pressure water jet. As the missile motor casings were cleaned, water from the hydrojet and the dislodged propellant was run through screens to separate the solid materials from the cleaning water. The solid propellant was collected and periodically burned in pits, and the cleaning water was ultimately discharged into evaporation ponds. Over time, plaintiffs alleged, perchlorate from these operations reached the groundwater under the site and migrated off-site.

In 2011, plaintiffs filed suit, asserting causes of action for private nuisance, public nuisance, negligence, trespass, strict liability and unjust enrichment. Plaintiffs then moved the court, pursuant to Federal Rule of Civil Procedure 23(b)(3), to certify a class with respect to Halliburton's alleged liability for contamination of their properties. Specifically, plaintiffs proffered a "Plume Class," consisting of owners whose property allegedly currently suffers from perchlorate-contaminated groundwater; and a "Threatened Class," consisting of owners of properties not currently suffering from the alleged contamination, but allegedly threatened by the contamination and thus suffering diminished property value. Presumably to avoid individual issues, plaintiffs tried to carve damages issues out of the class definition.

The court began its analysis by noting the class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. (See Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011).) "To come within the exception, a party seeking to maintain a class action

must affirmatively demonstrate his compliance with Rule 23." (See Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).) Further, plaintiff ultimately bears the burden of showing Rule 23 requirements are met and the district court must engage in its own "rigorous analysis" to ensure that certification is appropriate. (See Shook v. El Paso Cnty., 386 F.3d 963, 968 (10th Cir. 2004).) Here, analysis revealed plaintiffs had not shown questions of law or fact common to class members predominate over the questions affecting only individual members, nor that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." (See Erica P. John Fund Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011).) Halliburton's liability under any of plaintiffs' proposed causes of action could not be determined on a classwide basis because certain elements of each of plaintiffs' causes of action require significant individualized evidence. For example, regarding plaintiffs' nuisance causes of action, the court observed that under state law "[a] nuisance consists in unlawfully doing an act, or omitting to perform a duty which act or omission either ... annoys, injures, or endangers the comfort, repose, health, or safety of others; or ... in any way renders the other persons insecure in life, or in the use of property ..." Okla. Stat. tit. 50, § 1. Furthermore, "[i]n order to maintain a cause of action for nuisance, the plaintiff must prove an unlawful act or omission of duty which either injured or endangered his use of his property." (See N.C. Corff P'ship, Ltd. v. OXY USA Inc., 929 P.2d 288, 294 (Okla. Civ. App. 1996).)

Thus, in order to establish Halliburton's liability for nuisance, plaintiffs here had to prove an injury to the use and/or the enjoyment of the property or that the use and/or the enjoyment of the property was endangered. This clearly would require an individual plaintiff-by-plaintiff factual determination (i.e., Did that particular plaintiff have a well on his property?; Did that particular plaintiff use the well for drinking water?; Was that particular plaintiff already using public water?; What was the actual use of that particular property?).

Additionally, regarding a cause of action for public nuisance, "Before an individual can abate a public nuisance, it must be shown that the activity is specifically injurious to the person's rights." (See Smicklas v. Spitz, 846 P.2d 362, 369 (Okla. 1992).) In order to make this showing, noted the court, a plaintiff must demonstrate that he sustained injuries "different in kind from that suffered by the public at large." (See Schlirf v. Loosen, 232 P.2d 928, 930 (Okla. 1951).) Thus, no class member could recover under a public nuisance theory without introducing individualized evidence of special harm different from harm to the other members of the public, which would necessarily include other members of the proposed class.

Class action plaintiffs have frequently asserted that a nuisance theory supports class certification more readily than more common tort causes of action. The court's analysis clearly explains why that is not necessarily the case, as the issues of exposure and injury remain predominant individual issues.

Regarding plaintiffs' negligence cause of action, while the court thought it might in theory be possible for plaintiffs to establish the "duty" element on a classwide basis, plaintiffs clearly could not show injury on a common basis: establishing that defendant proximately caused an injury to a plaintiff is necessarily a highly individualized determination requiring each plaintiff to show that his property contained perchlorate and that the perchlorate came from the site and not from some other source. Of course, in a useful observation for practitioners, the court touched on why even the duty element may not be common in toxic tort claims, especially those with a long-proposed class period. Whether Halliburton violated any duty could depend on the date the perchlorate allegedly migrated to a specific plaintiff's

property, as the state of knowledge and state of the art may have differed depending upon the mode of release, the technology applicable for testing for the presence of perchlorate, the medical and scientific understanding of the health effects of perchlorate, and the technology available to minimize and remediate any impact on neighboring properties at the relevant times.

Such individual issues permeated the other causes of action as well. The court concluded that "the vast number of important individualized issues" relating to defendant's alleged ultimate liability as to all of plaintiffs' causes of action overwhelmed any alleged common questions. The case thus offers a useful reminder of how an emphasis on the allegedly common issue of defendants' asserted wrongful conduct cannot displace the recognition that each element of the plaintiffs' causes of action is significant for the class analysis.

The court also found that a trial just on whether defendant released perchlorate into the groundwater, as well as the current and future scope and extent of that groundwater contamination, was unlikely to substantially aid resolution of the ultimate determination of liability. Proof of these allegedly classwide facts would neither establish liability to any class member nor fix the level of damages to be awarded to any plaintiff; the "common facts" would not establish a single plaintiff's entitlement to recover under any theory of liability, or even show that a single plaintiff was in fact injured. Simply put, the individual issues would dwarf whatever common issues there may be. Without citing Rule 23 (c)(4), the court succinctly focused the issue-trial dilemma: Even assuming that a common issue could be carved out, as a practical matter a vast array of minitrials on other significant issues would still be required for each class member if such certification were granted. The court stated it thus need not reach the Daubert challenge to plaintiffs' expert, who, typically, would offer opinions purporting to address defendant's conduct and the spread of the chemical on a "common" basis. The facts and data the expert would rely on, and that defendant would muster in opposition, would vary from class member to class member.

The court similarly concluded that a class action in relation to Halliburton's liability was not superior, under Rule 23 (b)(3)(D), to other available methods for fairly and efficiently adjudicating the controversy. Even if the court was to certify the allegedly common issues, the subsequent separate proceedings necessary for each plaintiff, again, would undo whatever efficiencies such a class proceeding would have been intended to promote.

The lesson here is for defendants to urge the court to look down the road with an eye toward the trial proceedings needed to bring the entire class proceeding to conclusion; the courts may not simply assume that the case will settle after certification, thereby, in essence, ignoring the superiority requirement.

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