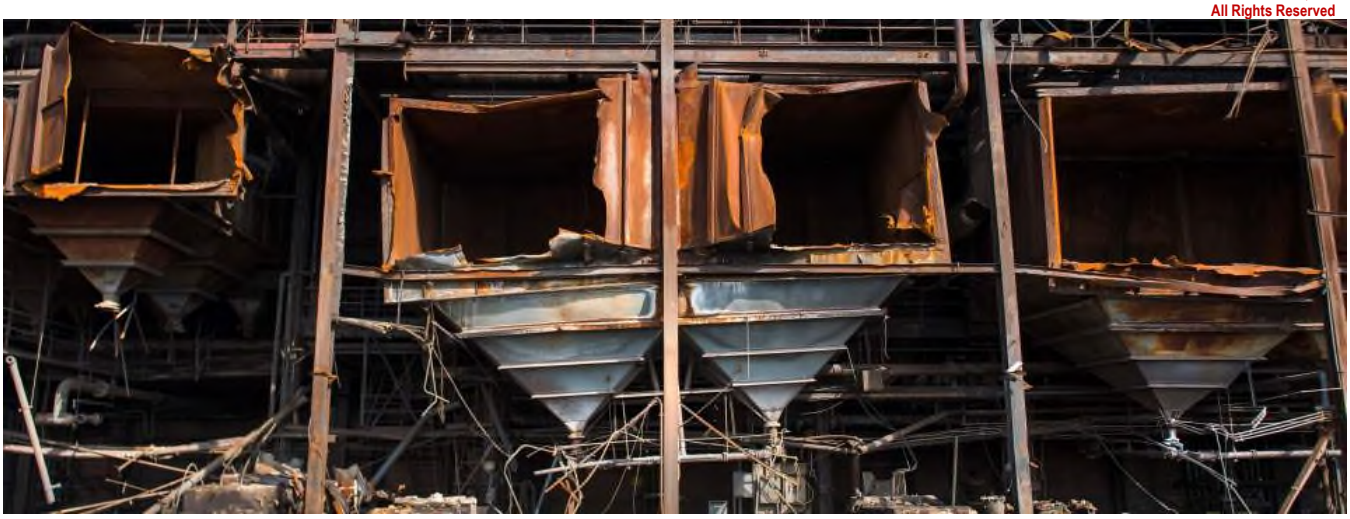
Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

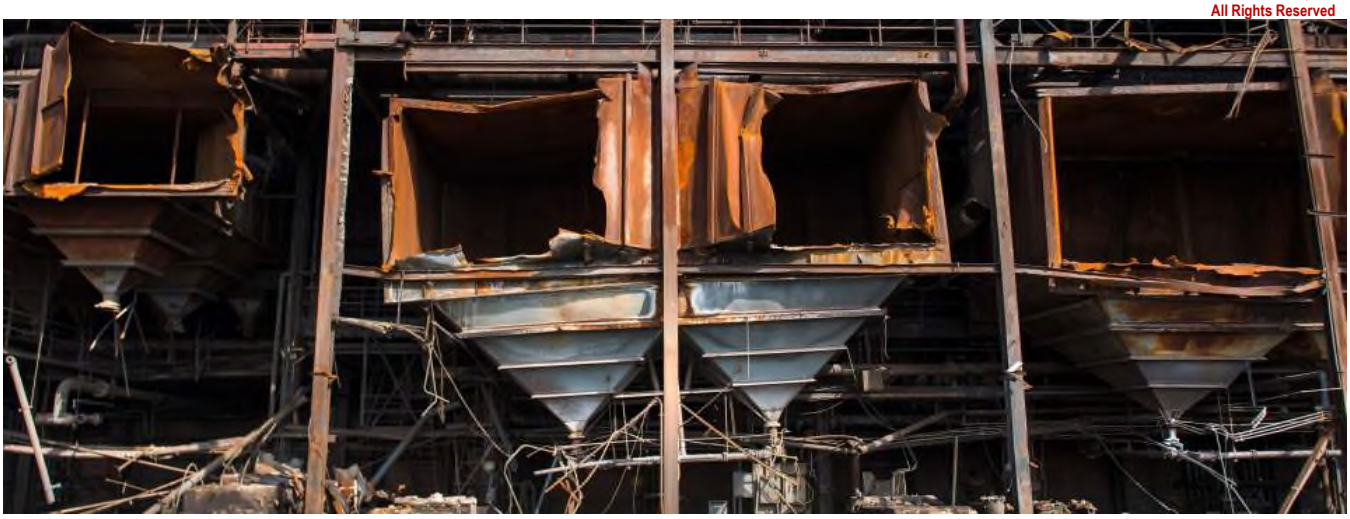
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

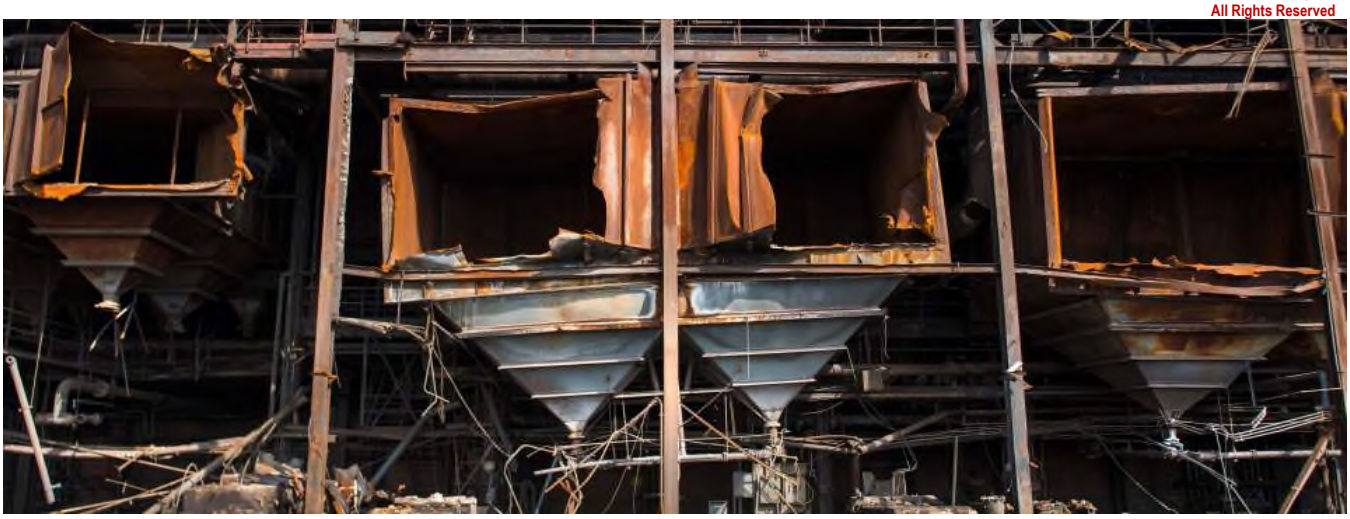
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

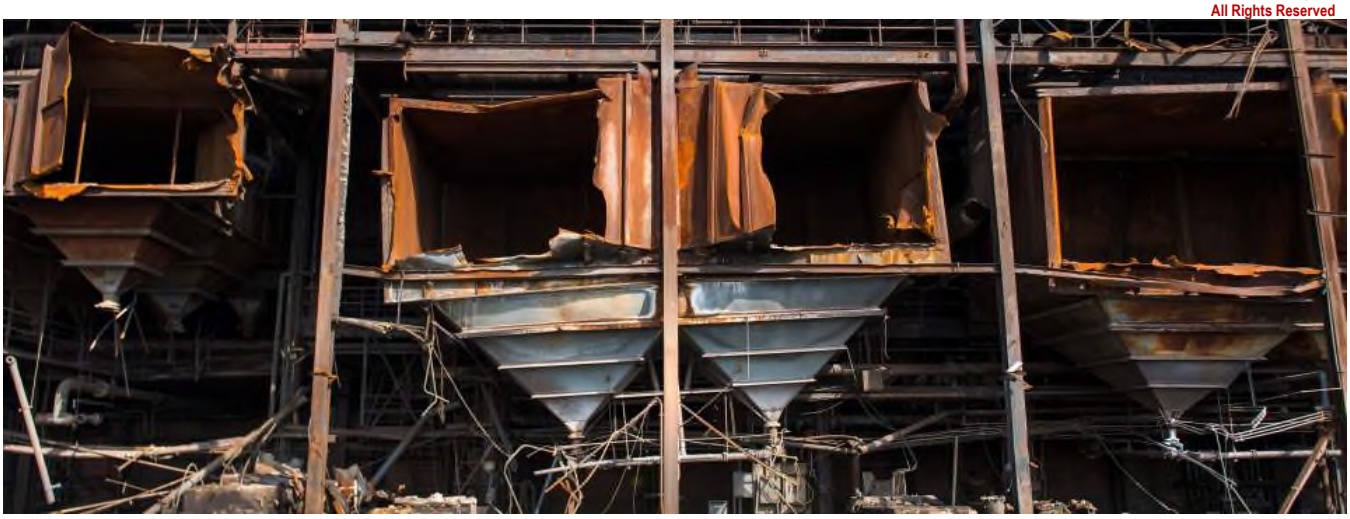
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

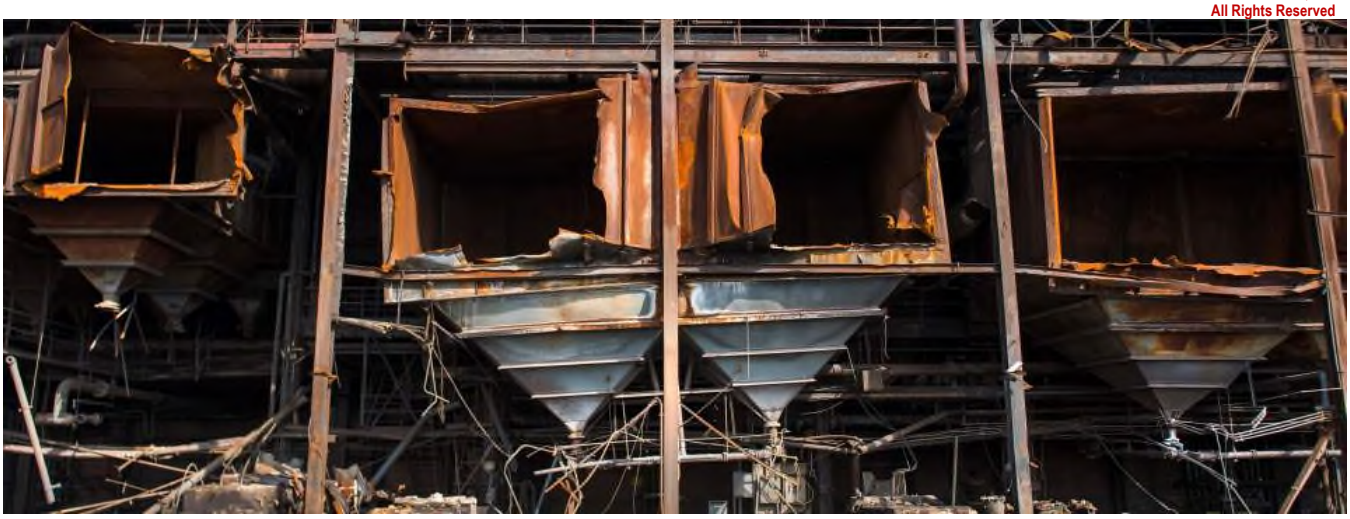
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

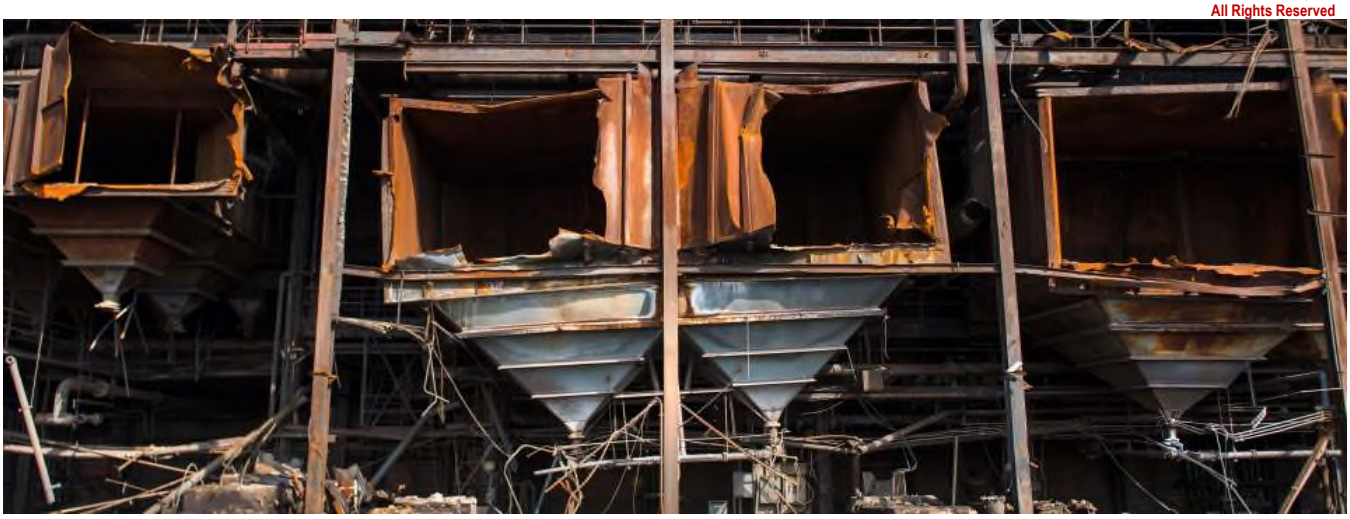
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

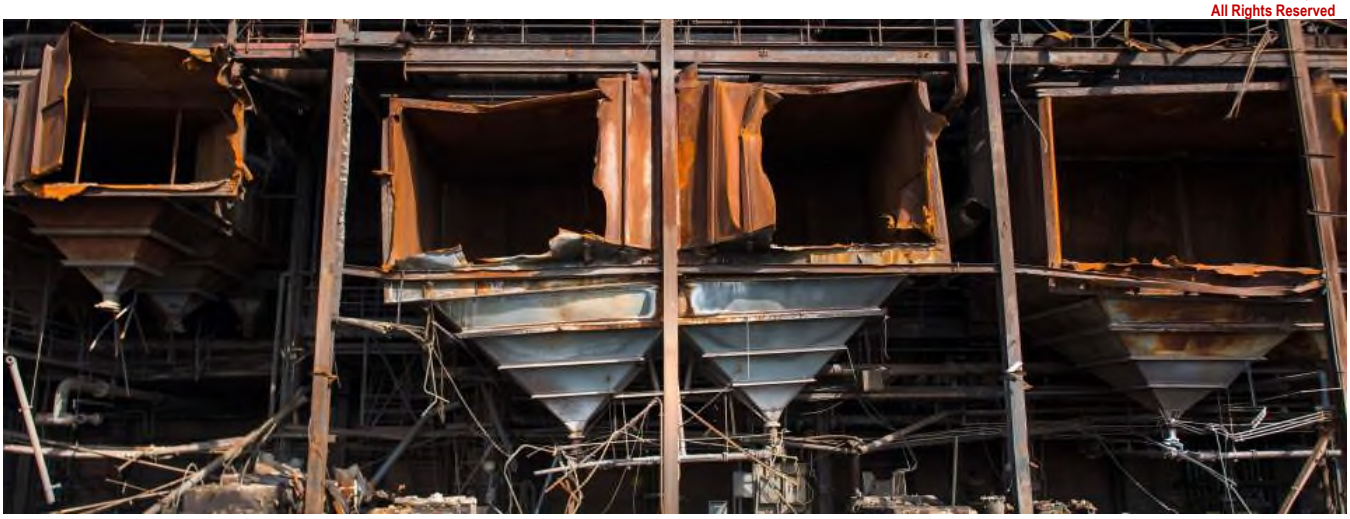
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

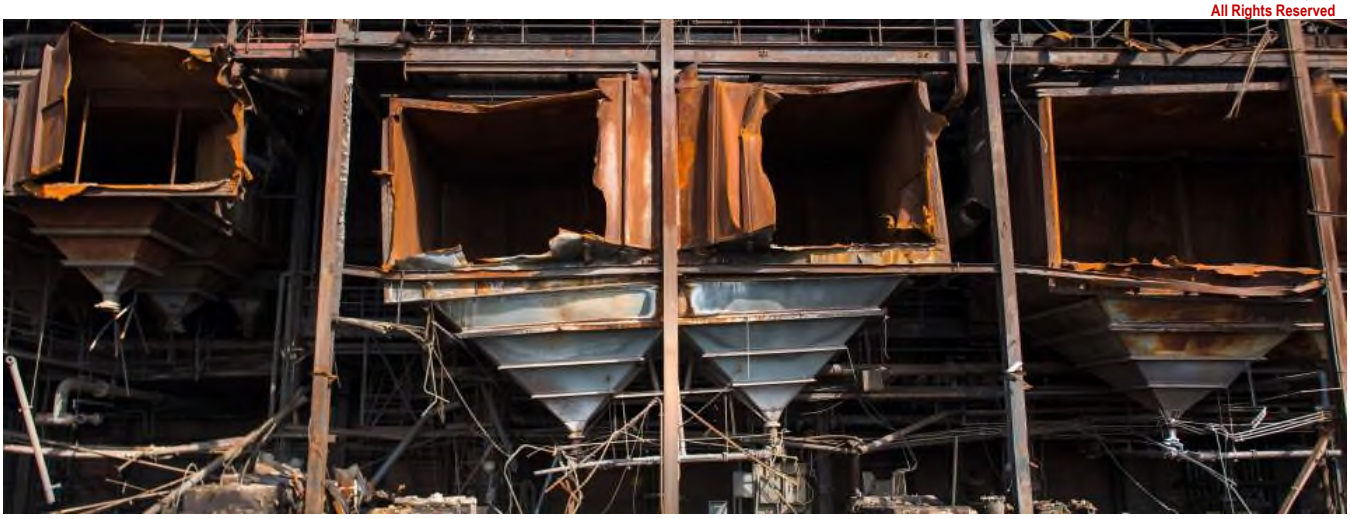
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

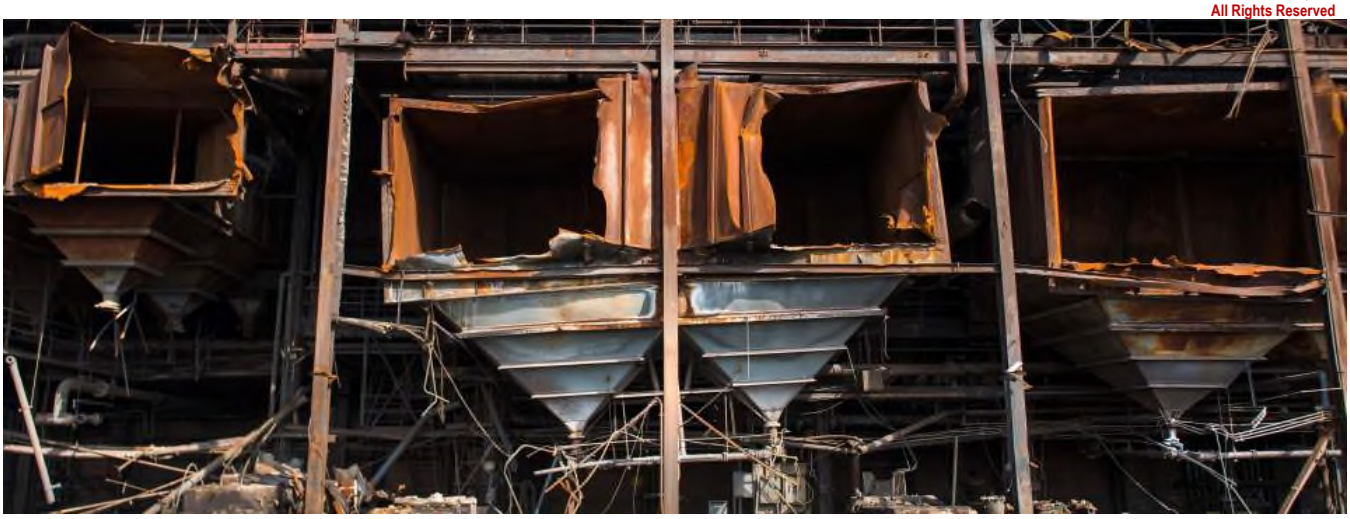
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

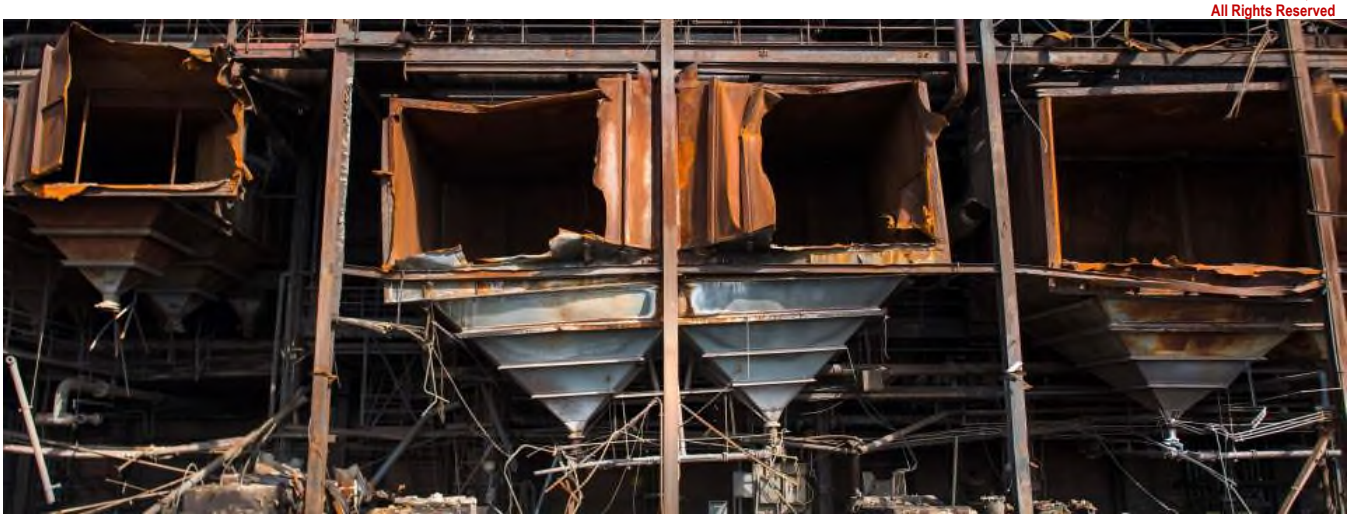
Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.

Bloomberg Law

CLASS ACTION



Abandoned plant stands in decay
Photographer: Jim Watson/AFP/Getty Images
Insights

INSIGHT: Contamination 'Issue' Class Actions—Recent Certification Realities

Posted Jan. 18, 2019, 4:00 AM

By Douglas A. Henderson, Lindsey B. Mann, and Nicholas H. Howell

Three Troutman Sanders LLP attorneys examine two recent court rulings that accentuate the confusion surrounding "issue" class actions involving environmental contamination. The authors explain that "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.


Douglas A. Henderson
Troutman Sanders LLP


Lindsey B. Mann
Troutman Sanders LLP


Nicholas H. Howell
Troutman Sanders LLP

In the context of industrial explosions, chemical spills, and manufacturing plant emissions, when courts refuse to certify environmental class actions under Federal Rule of Civil Procedure 23(a) and (b), what can plaintiffs do?

Instead of certifying traditional liability classes or damage classes, recent plaintiffs are pushing the class action envelope and trying to certify environmental "issue" class actions under Rule 23(c).

Yet two recent decisions—although addressing virtually identical facts—underscore the confusing outcomes and mistaken promise for "issue" class actions in the environmental exposure context.

Hostetler v. Johnson Controls Inc.

At issue in *Hostetler v. Johnson Controls Inc.*, 2018 BL 292048 (N.D. Ind., Aug. 15, 2018), was solvent-contaminated groundwater at a closed manufacturing plant migrating to neighboring properties in Goshen, Ind. In addition to seeking damages for personal injuries, plaintiffs acknowledged liability and damages classes could not be certified for properties near the plant.

Nevertheless, defining a class as everyone who owned, rented, or occupied property in the area from 1992 to May 2014, plaintiffs sought certification on seven environmental "issues"—namely, whether: (1) defendants leaked solvents and other chemicals from the site; (2) solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; (3) defendants unlawfully demolished buildings at the site without adequate asbestos abatement; (4) asbestos contamination reached properties in the class; (5) subsurface contamination was migrating through the class area; (6) injunctive relief to remediate contamination was needed; and (7) defendants acted with reckless indifference toward the health and well being of class members.

Plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, as to each class member even with certification on the seven issues, whether the defendants are liable on any of the claims, including a "property-by-property estimate of the dose and duration of vapor exposure."

Working through the issues one by one, the court, asking whether certifying the "issues" class would streamline the overall case, denied certification for all of the "issue" classes. On whether the defendants leaked solvents in issue (1), the court concluded individual actions would not be facilitated by a class-wide determination because property-specific facts would still be necessary to establish the leaks affected all class properties. As for the class definition in issue (2), a class-wide issue determination of contamination "somewhere below-ground, in some amount, within the property lines of the properties in the class area," similarly would not preclude the need for property-by-property determinations.

As for the asbestos issues (3) and (4), the court found that no question of asbestos was common to plaintiffs' proposed class. On the "preferential pathways" in issue (5), because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. And because injunctive relieve would involve fact-by-fact issues, issue (6) seeking injunctive relief failed to improve the procedural status of the case.

Finally, with respect to issue (7) addressing "reckless indifference," the court found this issue could not be established with evidence common to the class as a whole. In other words, because the "issues" for certification would not assist the court in resolving key liability and damages questions across the class, which were, by definition, individual and not amenable to class-wide determination, none of the "issues" warranted certification.

Martin v. Behr Dayton Thermal Prods.

Facts virtually identical to those in *Johnson Controls* were at issue in *Martin v. Behr Dayton Thermal Prods.*, 2018 BL 250691 (6th Cir., July 16, 2018): alleged vapor intrusion from solvent-contaminated groundwater in the McCook Field neighborhood in Dayton, Ohio. Following the majority rule, the district court denied certification of damages classes on predominance and superiority grounds under Rule 23(b)(3).

Alternatively, however, the plaintiffs sought, and the trial court granted class certification for seven "issues," specifically whether: (1) defendants created the contamination; (2) it was foreseeable that improper solvent handling and disposal caused the contamination; (3) defendants engaged in abnormally dangerous activities; (4) the Chrysler-Behr contamination migrated to the Chrysler-Behr class areas; (5) the Aramark contamination migrated to the Chrysler-Behr class areas; (6) defendants' actions and inaction caused

potential vapor intrusion, and (7) defendants negligently failed to investigate and remediate contamination at their facilities.

On appeal, the U.S. Court of Appeals for the Sixth Circuit analyzed whether an issue class could be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). The Sixth Circuit assessed the three different approaches adopted by courts answering this question. Under the "broad view," issue classes under Rule 23(c)(4) could be certified even if predominance and superiority under Rule 23(b)(3) would not be met.

For other courts, taking a "narrower" view, issue classes cannot be certified if predominance has not been satisfied. Still other courts follow a "functional, superiority-like" analysis which is a more fact-by-fact, case-by-case analysis. Comparing the approaches, the Sixth Circuit embraced the "broad" approach, noting, for example, that it would maintain issue classes in certain circumstances, but would not effectively nullify Rule 23(c)(4) issue classes if claim-wide predominance could not be established.

Affirming the trial court, the Sixth Circuit found issue classes satisfied the predominance requirement because the certified issues *themselves* were capable of resolution with generalized, class-wide proof. According to the court, all seven of the issues were questions that need only be answered once because the "answers apply in the same way to each property owner within the plumes." Although proof of actual injury and causation implicated individualized issues defeating certification under Rule 23(b)(3), the court was not persuaded the same individual inquiries tainted the certified issues.
Because defendants did not identify any individualized inquiries that outweighed the common questions, within each issue, the Sixth Circuit found "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." For the court, predominance problems with a liability-only class did not automatically translate into predominance problems within an "issue" class.

Ostensibly focusing on superiority, but with a wink toward settlement, the court held that, by certifying these issues, the procedure would save time and scarce judicial resources. Class treatment of the seven certified issues would not resolve the defendants' liability entirely, the court held, but it would materially advance the litigation, especially for residents in the "low-income" area surrounding the plant.
Finding no abuse of discretion by the district court, the Sixth Circuit concluded: "[t]his case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step towards resolving Plaintiffs' claims."

Implications

Finding for each "issue" individualized facts overwhelmed any common class-wide issues, the *Johnson Controls* court found no procedural benefit in certifying the "issue" classes.

Yet in certifying nearly identical "issues" in *Behr-Dayton*, the court—with misplaced signals encouraging settlement—created an end-run around the requirement of Rule 23(b). Its analysis was not only extreme, but inconsistent with the fundamental requirements under Rule 23. Even worse, nowhere did the court in *Behr-Dayton*, either on appeal or at the district court, actually evaluate admissible evidence to determine whether the common "issues" would predominate.

If the *Behr-Dayton* approach stands, claim-wide predominance and superiority become aspirational, rather than the requirements they were intended to be, so long as the "issue" class will, in the court's estimation, advance the litigation or push the parties to settle. Whether involving groundwater impact, stock price drops, or bank charges, "issue" class actions under Rule 23(c) should not be used to resuscitate flawed Rule 23(b) putative class actions.

Author Information

Douglas A. Henderson is a partner at Troutman Sanders LLP who concentrates on environmental litigation, toxic and mass torts, and property rights disputes.

Lindsey B. Mann is a partner at Troutman Sanders in the business litigation section who focuses on class action defense, environmental litigation, and e-discovery.

Nicholas H. Howell is an associate in the environmental litigation and business litigation practices at Troutman Sanders.