Still the Exception

Environmental Tort Class Actions

By Douglas A. Henderson and Nicholas H. Howell

Although most courts do not certify environmental tort class actions, over the last two years, relying on uncommon Rule 23 interpretations, a few courts have.

In what has become a near legal certainty following plant explosions, train wrecks with chemical spills, and other large-scale accidents, plaintiffs often file suit and seek to certify personal injury and property damage classes under Federal Rule of Civil Procedure 23 or state class action laws. Increasingly, class actions are filed within hours of an incident, well before the smoke clears or the facts are known. In hundreds of environmental tort class actions filed over the past forty years, the legal lines for certifying environmental tort class actions are not always bright, but they are well established—environmental class actions are generally not certified. Of twenty-five or so putative environmental tort class actions filed over the last two years, a majority are still are not certified, but a few courts, employing distinctive views of commonality and predominance, and considering local conditions, certified class actions under unique facts.

Key Class Certification Considerations

The rules for certification of environmental tort class actions are well known. First, a plaintiff must satisfy the four necessary requirements in Rule 23(a): numerosity, commonality, typicality, and adequacy. Second, assuming the Rule 23(a) requirements are met, a plaintiff must then satisfy the requirements of Rule 23(b). For environmental tort class actions, under Rule 23(b)(3), a plaintiff must show that "common issues of law or fact" "predominate over any individual questions" and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In addition to the Rule 23 requirements, numerous courts considering environmental tort class actions also regularly address ascertainability—namely, whether and how the class is defined. In most cases, four issues drive the analysis of environmental tort class actions: (1) whether "common" issues meet the modern definition under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); (2) whether common issues "predominate" over individual issues under Rule 23(b)(3); (3) whether the class is "ascertainable;" and (4) whether plaintiffs provide sufficient facts at the pleading stage and offer sufficient proof at the evidentiary stage.

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General Rule: Denying Certification of Environmental Tort Class Actions

Of the post-2017 environmental tort class actions, certification was denied in the lion's share of cases, with courts typically finding a lack of commonality and a lack of predominance to defeat certification. A good example is *Lafferty v. Sherwin-Williams Co.*, 2018 U.S. Dist. Lexis 141549 (D.N.J. Aug. 21, 2018), where plaintiffs sought to certify a class of residential property owners who alleged that a Sherwin-Williams predecessor released paint, varnish, coatings, and related products into areas surrounding Gibbsboro, New Jersey. Alleging a variety of "exposure pathways," the plaintiffs sought class certification for elevated levels of chemicals, which allegedly resulted in physical injuries, increased risk of disease, and diminution in the value of their properties. The plaintiffs defined the class area as "all persons who have owned or rented property, resided, or worked within the Class Area at any time since January 1, 1930." *Id.* at *5. The class area also included all homes and other structures connected to, or within the fate and transport of, one or more of the substances allegedly manufactured or used in the area. For this class, three subclasses were proposed: all persons within the class who had no known medical diagnosis of a contaminant-related bodily injury, including cancer; all persons who had been diagnosed with a contaminant-related bodily injury, including cancer; and all persons who owned or have owned property within the class. *Id.*

The *Sherwin-Williams* court turned first to "commonality," finding that it "requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* at *12 (citations omitted). The court then focused on predominance, which the court found "more demanding than commonality and requires more than a common claim." *Id.* at *13 (citations omitted). Given the claims of historical emissions, the court noted that to certify the class, "individual fact finding is essential to determine whether one of these hazardous substances impacted someone," and their potential exposures, if any, are likely drastically different." *Id.* The court concluded, "Conducting such causative inquiries on a class-wide basis would be problematic and wildly inaccurate—individualized proceedings are necessary…. We cannot do this for thousands of people and call it a class-action." *Id.* at *13–14 (citations omitted). Finding a lack of predominance, the court denied certification. *Id.* at *15.

Another recent decision denying certification is *Modern Holdings, LLC v. Corning, Inc.*, 2018 U.S. Dist. Lexis 52559 (E.D. Ky. Mar. 29, 2018), where the plaintiffs alleged that the owners of a glass manufacturing plant intentionally or negligently released toxic chemicals during its sixty years of operation. Alleging releases of contaminated air, water, and soil within a five-mile radius of the plant, the plaintiffs defined the class as "all persons who at any time between 1952 and November 27, 2013, resided within the Affected Area or who owned off-Site property within the Affected Area as of November 27, 2013." *Id.* at *5. The plaintiffs defined the "Affected Area" as a "parabolic shape extending 4,000 feet to the North of the on-Site [*sic*] smoke stacks, 12,000 feet to the East, 4,000 to the South, and 3,000 to the West." *Id.* at *6.

Citing *Dukes*, the court found that simply identifying "common" questions was not enough. The court noted, "Commonality requires the plaintiff to demonstrate the class members have suffered the same injury." 2018 U.S. Dist. Lexis 52559, at *17 (citations omitted). Citing *Dukes*, and reflecting the growing majority rule, the court found that "[w]hat matters to class certification is not the raising of common questions—even in droves—but rather the capacity of classwide proceedings to generate common answers." *Id.* at *23. The plaintiffs failed to show that their listed common questions would elicit common answers leading to classwide relief. *Id.*

Also dooming certification in *Modern Holdings* was a lack of typicality. As the court noted, one plaintiff claimed to have diabetes, a bleeding ulcer, gout, and chronic bronchitis, while another plaintiff had trouble breathing and nerve problems. And another plaintiff had "prostate cancer, and another had a brain tumor." *Id.* at *28. In short, the court concluded the named plaintiffs had unique medical histories and factual backgrounds, which may affect determinations of causation. *Id.* at *28–29. Reviewing the property claims, the court noted that while the plaintiffs identified 3,000 distinct parcels, they were not all similarly situated in relation to the defendants' property. Variations in distance to the alleged source of contamination, as well as distances to other potential sources of contamination, would affect the typicality of the named plaintiffs' claims.

After discussing various expert affidavits presented by the plaintiffs on health and property issues, the court concluded that "[n]one of this information, however, resolves the fact that individual questions predominate over common questions, or the matter of whether class action treatment is a superior method of resolving these controversies." *Id.* at *47. The court elaborated:

> The varied nature of the named plaintiffs' afflictions, their lengths of exposure, the sources through which their alleged exposure occurred, their unique medical histories, inconsistencies between the injuries from which the named plaintiffs suffer and those they complain of, etcetera, all reveal individual issues that predominate over common issues, including statute of limitations concerns, precluding a Rule 23(b)(3) class.

Id. The named plaintiffs each allegedly had been exposed to toxic substances at differ-

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ent times, and in different ways, between 1952 and 2013, a sixty-one year period. *Id.* And some of the named Plaintiffs suffer from zero of the listed diseases known to result from the listed diseases known to result from the listed toxic substances." *Id.* at *47–48. For these reasons, the court denied class certification.

Ascertainability was also a key consideration for the *Sherwin-Williams* court. 2018 U.S. Dist. Lexis 141549, at *14–15. The court found that a class defined as an "area containing all homes and other structures to or within the fate and transport of one or more of Defendants' Contaminants," could not be "ascertainable without individualized investigation and creates an impermissible fail-safe class where the question of whether a person qualifies as a member depends on whether the person has a valid claim." *Id.* In other words, "the class itself is rendered impossible to identify without extensive individual fact-finding or mini-trials." *Id.* at *15. Rejecting the definition of the class, the court held that the plaintiffs were asking the court to "greenlight a Class Area defined as anywhere there is contamination," a step the court was not prepared to take. For all these reasons, the court dismissed the case. *Id.*

Ascertainability was likewise a central issue in *Cotromano v. United Techs. Corp.*, 2018 U.S. Dist. Lexis 73775 (S.D. Fla. May 2, 2018), a case involving historical releases to air, water, and soil from an industrial plant in Palm County, Florida, in an area known as the "Acreage." The plaintiffs defined the class as "[a]ll persons who on August 24, 2009 (or alternatively on February 1, 2010) owned residential property within the neighborhood in Palm Beach County, Florida known as The Acreage, as defined on the map." *Id.* at *30. The putative class representatives were five married couples who owned residential properties in the Acreage, all of whom had a child declared to be a member of the pediatric brain tumor cluster designated by the Florida Department of Health. *Id.*

Connecting *Daubert* and Rule 23, the court found little support for the class definition in the testimony of the plaintiffs' environmental and appraisal experts. The plaintiffs' hydrogeologist offered no opinion on the boundaries of the class from an environmental perspective, and the plaintiffs' engineer did not define the contours of the proposed area by reference to actual contamination, or proximity to it, but relied on a handful of sporadic detections of chemicals across a sixty-square mile area. *Id.* at *39. As for devaluation, the plaintiffs' appraisal expert testified not only that his working definition of the class "had nothing to do with the areas actually affected by the contamination," but he was unable to identify "any survey methodology by which an appraiser could define a geographic area affected by the 'stigma' of environmental contamination." *Id.* at *40. Excluding the appraiser's testimony, the court concluded:

> None of Plaintiffs' experts, then, connect the metes and bounds of the proposed class area to danger posed by soil or water contamination attributable to the conduct of the Defendant, and in this sense, offer nothing meaningful on the threshold ascertainability issue. Plaintiffs simply argue, without evidentiary support, that each named putative class representative is similarly affected by… [substances] that migrated off-site from the Pratt & Whitney Campus because they own property which shares a common aquifier with that underlying the Pratt & Whitney site, and is situated in some amorphous zone of "vicinity" to contamination detections (of different types and levels) at different sporadic locations throughout the Acreage.

Id. at *40–41. For the court, "while a definable class may, as a general proposition, be established by geographic boundaries, it is not possible to do so here because the geographic boundaries of the proposed class are not tied to exposure contours demonstrated to be dangerous to human life." *Id.* at *44–45 (citations omitted). In short, because the plaintiffs introduced "no class-wide evidence of the dangerous exposure levels," the court denied certification. *Id.* at *72.

In another case, certification was rejected because of the economic-loss rule. In the context of a significant Pacific Ocean pipeline rupture, in *Andrews v. Plains All Am. Pipeline, L.P.*, 777 Fed. Appx. 889 (9th Cir. 2019), the Ninth Circuit considered Rule 23 requirements for a proposed "oil industry subclass," which sought economic damages caused by the pipeline failure. Initially, the plaintiffs sought to certify a class of employees and businesses who supported the oil platforms or were "dependent" on "the functionality of Plains' pipeline," but the district court concluded that the class was "overbroad." *Id.* at 892. Based on a renewed motion, however, the district court certified a similarly broad oil industry subclass, limited only by the requirement that individuals and businesses must have some contractual tie to the oil industry. The certified subclass also included any company that contracted to provide any goods or services to support those facilities, whether it contracted directly with the platforms and processing facilities or with another third party.

On appeal, the Ninth Circuit reversed, holding that the district court erred in certifying the oil industry subclass, seeking recovery for economic injury suffered as a result of the shutdown associated with the pipeline spill. For the court, certification was improper because common issues did not predominate over individualized questions; the disparity in class members' connection to the facilities and the pipeline company would require individuals to present varying evidence on whether they suffered any economic injury. *Id.* at 892–93. *See also Diehl v. CSX Transp., Inc.*, 2019 U.S. Dist. Lexis 211187, at *13 (W.D. Pa. Dec. 9, 2019) (denying certifications to a putative class of homeowners claiming devaluation caused by a train derailment based on the economic-loss rule).

Addressing a range of class requirements, numerous other courts have recently denied certification of putative environmental tort class actions across a wide range of fact patterns. Finding lack of adequacy and predominance, one court denied certification of a putative class of property owners claiming devaluation from air emissions from a coal-fired power plant, *Little v. Louisville Gas & Elect. Co.*, No. 17CI003023, at *10–11 (Jefferson Cir. Ct. Jan. 8. 2020). Another court denied certification of a putative class of homeowners seeking devaluation damages caused by odors from a food-dehydrating plant. *Hamilton v. 3D Idapro Sols., LLC*, 2019 U.S. Dist. Lexis 128217, at *7, *13 (W.D. Wis. Aug. 1, 2019).

Similarly, certification of a putative class of property owners claiming damages from herbicide spraying was denied based on numerosity in *Chen v. Amtrak*, 2019 U.S. Dist. Lexis 180741, at *25 (E.D. Pa. Oct. 18, 2019), and a putative class of property owners

claiming devaluation from leaking underground storage tanks was dismissed based on commonality. *Millman v United Techs. Corp.*, 2019 U.S. Dist. Lexis 199595, at *20–21 (N.D. Ind. Nov. 18, 2019). For a putative class seeking Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost recovery, the court rejected certification, based on lack of commonality in *Rolan v Atl. Richfield Co.*, 2019 U.S. Dist. Lexis 182418, at *20–21 (N.D. Ind. Oct. 22, 2019). Other courts denied certification due to lack of proof alone. *See Anderson v. City of New Orleans*, 222 So. 3d 800, 806 (La. Ct. App. 2018) (rejecting a date-limited class because it "fail[ed] to account for the fact that plaintiffs [had] not established that toxic chemicals were leaking from the barrels in the basement prior to December 9, 1999"). And where the proposed class counsel had conflicts with other members of a per- and polyfluoroalkyl substances (PFAS) putative class, certification was reversed in *W. Morgan-East Lawrence Water & Sewer Auth. v. 3M Co.*, 737 Fed. Appx. 457, 469 (11th Cir. 2018) (*per curiam*).

Recent Cases Certifying Environmental Tort Class Actions

Still, other recent courts, far fewer in number and employing more mechanical Rule 23 interpretations, have certified environmental tort class actions. In *Bell v. Westrock CP*, LLC, 2019 U.S. Dist. Lexis 71209, at *16 (E.D. Va. Apr. 26, 2019), the court went through numerosity, commonality, typicality, adequacy, predominance, and superiority at warp speed, certifying a class of residents living within one-half mile of a large paper mill who claimed wood dust devalued their property. As for evidentiary challenges presented by predominance and superiority, the *Westrock* court offered scant analysis. *See also Wheeler et al. v. Arkema France, S.A.*, No. 4:17-CV-2960 (S.D. Tex. June 3, 2019) (certifying a class of property owners near a facility releasing substances during Hurricane Harvey), *on appeal,* No. 19-20723 (5th Cir. Oct. 17, 2019).

A slightly more detailed analysis was undertaken in *Goldstein v. ExxonMobil Corp.*, 2019 U.S. Dist. Lexis 221654 (C.D. Cal. Oct. 15, 2019), which involved a class of property owners surrounding the site of an industrial explosion. The court initially denied class certification but permitted leave to amend to narrow the class. The second time around, the court moved quickly through Rule 23, certifying two classes, one subclass of those residents living near a specifically defined groundwater plume, and the other being an air subclass of owners and tenants who occupy property in an area "where air emissions currently exceed safe levels or that are known to register as malodorous…." *Id.* at *27. The court acknowledged the presence of individual questions but found that they did not predominate on a "qualitative level." *Id.* at *23. The court's view of class actions—as a settlement tool more than as a procedural rule—appeared to influence its analysis.

A putative class of residential property owners receiving PFAS-impacted drinking water from the Town of Petersburgh, New York, was certified in *Burdick v. Tonoga*, Inc., 110 N.Y.S. 3d 219 (N.Y. Sup. Ct. 2018), *aff'd* 2019 N.Y. App. Div. Lexis 8498 (N.Y. App. Div. 2019). Alleging property damage and personal injury, plaintiffs sought to certify four classes, including a property water damage class, two private water well subclasses, and a perfluorooctanoic acid (PFOA) invasion class for individuals who ingested PFOA-contaminated drinking water and who "suffered invasion of their bodies and accumulation of PFOA in their blood as demonstrated by blood serum tests disclosing PFOA in their blood above the recognized average background level of 1.86 ug/L." *Id.* at *7–9.

Rejecting the defendant's argument that the properties each possessed unique features and different exposure levels, which prevented a finding of predominance, the court found these were "questions of damages," and statutory liability would be common to the class. *Id.* at *21–22. Blending commonality and predominance, the court found "ample support for certifying a class action in a contamination case even though there may be individualized issues, including issues of damages." *Id.* at *21. Without considering other key issues associated with the class, the *Tonoga* court found the "central basis for all of Plaintiffs' claims [was] defendant's course of conduct and its knowledge of the potential hazards." *Id.* at *18. With that standard, the court further found that "[a]ll class members allegedly suffered a common injury—soil and water contamination emanating from [the] facility that interfered with their use and enjoyment of their property." *Id.* at *18. Here, the court concluded, the "claims of the named plaintiffs [arose] from the same practice or course of conduct that [gave] rise to the claims of the proposed class members," and consequently, "common issues predominate[d]." *Id.* at *22.

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As discussed above, an off-shore Pacific Ocean pipeline rupture was at issue in *Andrews v. Plains All Am. Pipeline, L.P. et al.*, 2018 U.S. Dist. Lexis 177797 (C.D. Cal. Apr. 17, 2018), *rev'd Andrews v. Plains All Am. Pipeline, L.P.*, 777 Fed. Appx. 889 (9th Cir. 2019). Soon after the rupture, plaintiffs moved to certify four subclasses, various classes for fishers, property owners, oil-industry workers, and business tourism. *Id.* at *2. In various orders, the trial court certified or refused to certify the fisher, real property, and tourism classes, and ultimately certified an "oil industry" subclass, which was later decertified, as noted above. *See Andrews*, 777 Fed. Appx. 889 (9th Cir. 2019) (decertifying an "oil industry" class based on lack of commonality and predominance).

In a separate opinion not appealed, the trial court in *Andrews* ultimately certified a real property subclass. *Andrews v. Plains All Am. Pipeline, L.P.*, 2018 U.S. Dist. Lexis 177797 (C.D. Cal. Apr. 17, 2018). As defined, the real property subclass included "[r]esidential beachfront properties on a beach and residential properties with a private easement to a beach … where oil from the 2015 Santa Barbara oil spill washed up, and where the oiling was categorized as Heavy, Moderate or Light…." *Id.* at *3. After initially de-

nying certification for this class, the court, based on a motion to reconsider, found that commonality existed, given the question of "whether [the defendants] acted negligently, recklessly, and/or maliciously with regard to the design, inspection, repair, and/or maintenance of the Pipeline." *Id*. at *10.

Turning to predominance, which the court found to be a "qualitative concept rather than a quantitative concept," the court determined that liability would be across the subclass and would not require property-specific analysis, and damages would be consistent across the subclass, even if they differed to a certain degree. Following similar logic, the court found that superiority was met for four reasons: the cost of pursuing claims on an individual basis counseled in favor of proceeding as a group; given several other pending actions, there would be a risk of inconsistent adjudications; the desirability of adjudicating these matters in one forum was significant; and the class action was a superior method of adjudicating the claims of these subclasses. Finding predominance satisfied because liability was a common inquiry, injury was a predominantly common inquiry, and damages were susceptible to common proof, the court certified the real property subclass. *Id*. at *12.

Environmental "Issue" Class Actions

In the last two years, two courts considered "issue" class actions under Rule 23(c). At one extreme is *Martin v. Behr Dayton Thermal Prods*. LLC, 896 F.3d 405 (6th Cir. 2018), *cert. denied*, 2019 U.S. Lexis 1959 (Mar. 18, 2019), a case involving groundwater contamination in Dayton, Ohio, related to former automotive and dry-cleaning facilities. Initially, the plaintiffs sought class treatment for liability for five of their eleven causes of action: nuisance, negligence, negligence per se, strict liability, and unjust enrichment. In the alternative, the plaintiffs sought class certification for seven common issues under Rule 23(c)(4). The trial court denied certification under Rule 23(b)(3), finding no predominance and superiority, but it certified seven issues for class treatment under Rule 23(c)(4). The plaintiffs sought class status for multiple issues, including each defendant's role in creating the contamination within their plumes, and whether it was foreseeable that improper handling and disposal of TCE and PCE could cause the plumes. *Id*. at 410.

On appeal, the Sixth Circuit considered whether an issue class can be certified under Rule 23(c)(4) when predominance and superiority could not be established under Rule 23(b)(3). Under the broad view, the Sixth Circuit held, issue classes can be certified even if predominance and superiority under Rule 23(b)(3) cannot 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. *Id*. at 413–14. Comparing the approaches, the Sixth Circuit embraced the broad approach, noting, for example, that it would maintain issue classes in certain circumstances, but it would not effectively nullify Rule 23(c)(4) issue classes if predominance could not be established.

For the court, "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id*. at 415 (citations omitted). By certifying the issues, the court believed that it would resolve "the issues in one fell swoop and would conserve the resources of both the court and the parties." *Id*. at 416. Finding no abuse of discretion by the district court, the Sixth Circuit ended: "This case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classes took a meaningful step towards resolving Plaintiffs' claims." *Id*. at 417.

Hostetler v. Johnson Controls Inc., 2018 U.S. Dist. Lexis 137872 (N.D. Ind. Aug. 15, 2018), found just the opposite, rejecting an issue class involving releases from a closed manufacturing plant. In *Hostetler*, early on, the 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, the plaintiffs sought certification on seven environmental issues, including such issues as whether the defendants leaked solvents and other chemicals from the site; whether solvents from the site affected soil, groundwater, and utility lines beneath properties in the class; whether subsurface contamination was migrating through the class area; whether the defendants acted with reckless indifference toward the health and well-being of class members; and other issues. *Id*. at *22–23. The plaintiffs conceded that once the class issues were resolved, individual trials would be necessary to establish, for each class member, even with certification on the seven issues, whether the defendants were liable for any of the claims, and that process would need to include establishing a "property-by-property estimate of the dose and duration of vapor exposure." *Id*. at *23.

For all the issues, the court found class wide determination was not possible because property-specific facts would still be necessary to establish whether the leaks affected all class properties. As for the class definition issue, the plaintiffs' 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. *Id*. at *39. As for the "preferential pathways" issue, because nothing would be gained in a class proceeding where individual trials remained, certification was not appropriate. With respect to the "reckless indifference" issue, the court found that 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. *See* Douglas Henderson, Lindsey B. Mann, & Nicholas Howell, Contamination Issue Class Actions: Recent Certification Realities, *Bloomberg Law* (Jan. 18, 2019).

Medical Monitoring in Environmental Tort Class Actions

In the context of environmental (or nonenvironmental) tort class actions, putative class actions seeking medical-monitoring classes historically have been denied, largely for reasons related to the predominance of individual issues, the lack of present physical injury, and other policy considerations. *See Rhodes v. E.I. duPont de Nemours & Co*., 657 F. Supp. 2d 751, 774–76 (S.D. W. Va. 2009) (noting

trends). In a few instances, largely in the context of drinking water cases involving exposure to unregulated substances, several courts veer from well-established case law against certification of medical-monitoring classes for asymptomatic plaintiffs, primarily in states not requiring a present physical injury for tort claims.

A putative PFAS medical-monitoring class was at issue in *Sullivan v. Saint-Gobain Perf. Plastics Corp.*, 2019 U.S. Dist. Lexis 221612 (D. Vt. Dec. 27, 2019), and *Sullivan v. 211'Dec*, 2019 U.S. Dist. Lexis 221612 (D. Vt. Dec. 27, 2019). After reviewing the scope of the "physical injury" rule in Vermont, and after reviewing a small subset of medical-monitoring cases rejecting and accepting medical monitoring from other states, the court certified a class of individuals who tested positive for PFAS after consuming water in the area, finding that the PFAS cases were more in line with a catastrophic accident or negligent health care. *St.-Gobain*, 2019 U.S. Dist. Lexis 221612, at *45. In denying the defendants' motion for summary judgment on medical monitoring, the court required the plaintiffs to provide proof of each element of medical monitoring. Importantly, the court's ruling echoed the Vermont legislature's addressing a state bill proposing medical monitoring.

Yet another decision addressing a PFAS-medical-monitoring class is *Burdick v. Tonoga, Inc.*, 112 N.Y.S. 3d 342 (N.Y. App. Div. 2019). Affirming the trial court, the appellate court upheld certification of a class of residential property owners with property near a manufacturing facility seeking medical-monitoring damages for PFAS exposure. The court, "mindful" in its view that class actions were to be a "liberal remedy and given broad construction," found that class requirements were satisfied with little rigorous analysis. *Id.* at 347. As for what future litigation might show, the court noted that the trial courts in New York have "'considerable flexibility' and may create subclasses to resolve certain issues or decertify a class at any time." *Id.*

Addressing three similar PFAS cases, the Second Circuit recently interpreted New York law in detail in the context of medical monitoring claims in *Benoit v. Saint-Gobain Performance Plastics Corp.*, No. 17-3941 (2d Cir., May 18, 2020); *R.M. Bacon, LLC v. Saint-Gobain Performance Plastics Corp.*, No. 18-2018 (2d Cir., May 18, 2020); *Baker v. Saint-Gobain Performance Plastics Corp.*, No. 17-3942 (2d Cir., May 18, 2020). In *Benoit*, the trial court found that, under New York law, plaintiffs with "elevated" PFAS blood levels constituted an "injury" for purposes of recovering medical monitoring damages in tort. After reviewing applicable case law, the Second Circuit dismissed the defendants' motion to dismiss that alleged PFAS detections did not constitute an injury under New York law. In its analysis, the Second Circuit agreed that an action for personal injury could not be maintained "absent allegation of any physical injury." *Id.* at 22. But in this case, the court noted that blood tests of the plaintiffs showed levels of PFAS. Focusing on New York law, the court found "*allegations of the physical manifestation of* or *clinically demonstrable presence of toxins* in the plaintiff's body are sufficient to ground a claim for personal injury and that for such a claim, if proven, the plaintiff may be awarded, as consequential damages for such injury, the costs of medical monitoring." *Id.* at 23 (emphasis in original). Equating "clinically demonstrable" with "observable," the court remanded with instructions to permit medical monitoring as a consequential damage to go forward at the trial court.

In another PFAS case, and perhaps the best known, *Hardwick v. 3M Co.*, 2019 U.S. Dist. Lexis 169322 (S.D. Ohio Sept. 30, 2019), the defendants moved to dismiss a breathtakingly broad medical-monitoring class defined as all persons in the United States with PFAS "contamination of the blood and/or bodies." *Id.* at *7. Relying on what it considered to be established Ohio law, the court found that "physical injury is not required to demonstrate damages." *Id.* at *20. Treating the allegations as true, the court denied the defendants' motion to dismiss, finding that the plaintiffs properly pled a plausible claim for damages and medical monitoring to survive the 12(b)(1) and 12(b)(6) motions. At this time, it remains to be determined whether the class ultimately will be certified.

A PFAS-exposure medical monitoring class for asymptomatic plaintiffs was dismissed at the pleading stage in *Bell v. 3M Co.*, 344 F. Supp. 3d 1207 (D. Colo. 2018). There the court ruled the plaintiffs had not pleaded sufficient facts to sustain such a claim. Specifically, the plaintiffs failed to plead facts showing that a medical-monitoring program for the early detection of disease related to PFOA existed; a PFOA medical-monitoring program was different from monitoring normally recommended in the absence of exposure; and a medical-monitoring program was reasonably medically necessary under contemporary scientific principles. *Id.* at 1227. As a result, the court dismissed the complaint. *See also Lindsey v. 3M Co.*, 2020 U.S. Dist. LEXIS 52159, *5 (N.D. Ala., Mar. 26, 2020) (rejecting medical monitoring remedy for PFAS exposure because Alabama law requires plaintiffs to demonstrate current injury or disease).

Involving not PFAS, but lead in a public drinking water system, in *Berry v. City of Chicago*, 133 N.E.3d 1201 (Ill. App. Ct. 2019), a putative class of asymptomatic plaintiffs sought medical monitoring to evaluate lead exposure. After reviewing and rejecting case law from other jurisdictions, the court found that Illinois law did not include a physical harm requirement. *Id.* at 1208. A strong dissent disagreed, pointing out that medical monitoring would violate the single-recovery principle, prohibiting claim splitting and warning against a limitless pool of plaintiffs who may not be injured.

For the few recent courts certifying medical-monitoring classes, they are generally confined to claims involving unregulated substances in drinking water systems and involve states with atypical interpretations of injury in the context of asymptomatic plaintiffs and broadly interpreted class certification requirements.

Current Status

Just as class actions remain the exception, most courts reject certification of putative environmental tort class actions, mainly because individual—and not common—issues typically predominate. But even accounting for the uncommon application of commonality and predominance, the certification of a few recent environmental tort classes is difficult to square with established precedent. Whatever the cause, while well-established rules drive most environmental tort class certification decisions, local aberrations remain part of the analysis. FD