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JUDGE DENIES CLASS CERTIFICATION FOR 'TOXIC TORT'

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'All of those things lead me to the conclusion that there's been a reason why none of us can really find anything that is reported on this class certification of a mold case.'

Mold litigation has been called the "new asbestos," with plaintiffs ranging from Erin Brochovich to Ed McMahon. While a few multimillion-dollar judgments and settlements have been obtained, generally in the property damage and homeowner insurance context, many mold toxic tort cases have been brought as purported class actions. There has been little judicial resolution to date, however, of the question of whether such cases are appropriate for class certification, in either state or federal courts.

In a case of first impression in Illinois, the DuPage County Circuit Court recently denied plaintiffs' motion for class certification in a case involving the Johnson School in Warrenville.

In *Andreavich, et al. v. Board of Education v. ServiceMaster, et al.*, No. 99 L 671 (18th Jud.Cir.), Judge Kenneth Popejoy issued an oral ruling on June 4 that carefully examined the motion for mold personal-injury class certification against the requirements of Illinois statutory and case law, as well as the backdrop of the science surrounding mold claims. The author was an attorney for one of the third-party defendants which jointly opposed class certification.

Plaintiffs in the purported class, which consisted of students and faculty and staff members at the school over a lengthy period of time in the 1990s, had alleged a variety of symptoms that they asserted were caused by exposure to mold in the school, resulting from flooding as well as alleged faulty design, location, construction and/or maintenance at the school.

The defendant school district and the third-party defendants, contractors and maintenance companies, however, argued that the purported class failed to satisfy the requirements of 735 ILCS 5/2-801, which sets forth four requirements, all of which must be satisfied before a class can be certified.

Popejoy held that the plaintiffs had satisfied none of these statutory requirements, and his 28-page opinion described in detail the requirements for class certification under Illinois law and the inadequacy of the plaintiffs'

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evidence under each criterion.

Class certification in toxic tort cases generally turns on the requirement of "commonality" -- although purported class members in such cases typically will be able to demonstrate that there are common questions of law and fact relating to the causative substance at issue, the route of exposure and the alleged injuries, the statute requires that the plaintiff demonstrate that such common questions of fact or law predominate over the questions of fact or law affecting only individual class members. Section 2-801(2).

The U.S. court's class-action requirement, Federal Rule of Civil Procedure 23(b)(3), is similar to the Illinois commonality predominance requirement, although the federal rule differs from the Illinois statute in other respects.

Popejoy began his analysis by noting that the burden is upon the plaintiff to establish that the statutory class-action requirements have been satisfied, but that they may use a variety of pleadings, discovery responses, affidavits, scientific and medical reports, and other pretrial evidence in doing so.

Popejoy had received multiple volumes of pleadings and exhibits from both sides. He also noted that in spite of the research by the parties and his independent research, no personal-injury case involving mold had been certified as a class action in any reported state or federal case. It may be noted, however, that there are recent unpublished decisions from a New York state trial court and a California appeals court that have denied class certification in the mold property damage context.

After reviewing the scientific evidence and the statements of consensus scientific and medical organization statements on the issues, Popejoy concluded that "there just isn't any -- there hasn't been any set standard for the sampling, the analyzing or the interpreting of how mold has an effect or doesn't have an effect on different people and the different kinds of mold and the different effects of the mold." In addition, the court "did not find any submission of any medical evidence that -- of the in fact mold exposure to any of the named plaintiffs in this case at the current time."

The court did examine a medical statement submitted by the plaintiffs in which a physician "clearly said these types of symptoms that are being suffered are consistent with what could exist from mold contamination and exposure," but that "nobody has tied up any of the individual plaintiffs that exist at the present time with the symptoms that they are suffering to an exposure of mold and as that being the determining factor of what those illness are." It would thus appear that an expert determination that symptomatology is "consistent with" exposure to the causative agent at issue, is insufficient in this context, where an opinion that a substance has caused an illness, to a reasonable degree of medical certainty, may be required.

Finally, the court concluded on the commonality question that "even assuming exposure to mold, there are so many issues of different individuals' exposure, the amount of exposure, the duration of exposure, the date of exposure, the time frame of it over the 14 years that the school has been at issue in regarding to same, the 85,000-plus square feet of this building and the differentiation of ...

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locations within the building as to what could or couldn't be happening and the like.

"All of those things lead me to the conclusion that there's been a reason why none of us can really find anything that is reported on this class certification of a mold case, because it deals intrinsically with so many unique, diverse and individualistic issues in regard to this case. And the critical portion of my determination, the critical part of the determination is simply no substantial evidence of any kind or nature of the causal connection, the proximate cause of whatever happened in this middle school with its mold problems to the alleged symptoms that are laid out by the plaintiffs in this case."

The DuPage County court's treatment of the commonality question, although of first impression in the mold personal-injury context as noted, is consistent with other reported cases involving airborne toxic tort exposure as well as settled Illinois case law involving product and drug liability. See, e.g., *Commonwealth of Puerto Rico v. M/V Emily S.*, 158 F.R.D. 9 (D. P.R. 1994), and *Morrissy v. Eli Lilly & Co.*, 394 N.E.2d 1369, 1376 (Ill. App. 1979).

Popejoy went on to hold, however, that even if class certification were sought solely on a "liability only" basis, such that individual determinations of damages would be made if liability was established in the class action, such a purported liability-only class could not satisfy the statutory requirements. This is an important holding, as the effort to certify liability-only classes is becoming a common tactic where there are diverse individual injuries.

While in the course of its ruling the court held that the plaintiffs had not fully satisfied any of the four statutory requirements, the court did state that plaintiffs' counsel had done a "fine job" and was qualified to represent the class had one been certified.

The Illinois Supreme Court has amended its Rule 306 to make class-action determinations by trial courts subject to interlocutory appeal as of right, but the court recently clarified the rule by promulgating the limitation that the amended rule was applicable only to cases filed after Jan. 1, 2003. It is thus unclear when or whether Popejoy's ruling will be appealed, but as it stands it will serve as an impediment to plaintiffs seeking to use the class-action device in mold cases. Richard M. Kuntz is a partner with Bollinger, Rubeřy & Garvey. He can be reached at richard.kuntz@brg-law.net.

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