SEPTEMBER 29, 2022

Sixth Circuit grants Rule 23(f) interlocutory review in one of the largest class actions ever

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Takeaway: In the U.S. Supreme Court's seminal decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011), the court described a class consisting of 1.5 million class members as "one of the most expansive" classes ever certified. In litigation involving PFAS "forever chemicals," an Ohio district court certified an Ohio class consisting of virtually every resident of the state – a class of close to 12 million people. *In re E.I. DuPont de Nemours & Co. C-8 Personal Injury Litigation*, No. 22-0305, 2022 WL 4149090 (6th Cir. Sep. 9, 2022). In ruling on and granting the defendants' petition for review of the district court's certification ruling, a Sixth Circuit panel elucidated the standards governing the grant of interlocutory review under Federal Rule of Civil Procedure 23(f), and it previewed (and endorsed) the arguments against class certification that were advanced by the PFAS-manufacturer defendants in that case.

A firefighter for over 40 years, Kevin Hardwick filed suit against DuPont, 3M and other manufacturers of chemicals known as "PFAS," shorthand for per- and polyfluoroalkyl substances. Also known as "forever chemicals" – because the chemicals persist in the environment and accumulate within the human body – PFAS were first developed in the 1930s and 1940s and have been used by thousands of companies in a great variety of product applications. They are now so widespread that they can be found in the blood of virtually every person in the United States.

Mr. Hardwick alleged exposure to PFAS through his exposure to (among other things) aqueous film-forming foam, a liquid foam suppressant used to fight liquid fires. Alleging that exposure to PFAS increases the risk of contracting serious diseases such as cancer, Mr. Hardwick asserted nationwide tort claims and initially sought the certification of a nationwide class – a class including over 330 million Americans. Among other things, he sought an order requiring the defendants to establish and fund a "science panel" to study the human health effects of PFAS and also to provide "medical monitoring" to every class member. His request for a science panel was based on his uncertainty as to how PFAS made its way into his bloodstream, and also based on his uncertainty as to how harmful the PFAS in his blood was to his overall health (he claimed no specific health condition as a result of his exposure).

The district court granted certification of an Ohio injunctive relief class under Federal Rule 23(b)(2), a class consisting of almost 12 million residents of the State of Ohio, given that, in the court's view, medical monitoring was a remedy recognized under Ohio law. The district court further ruled that the Ohio class was just a start and expressed willingness to certify classes from other states recognizing the viability of the medical monitoring remedy.

The defendants sought interlocutory review of the district court's certification order. In a detailed order, a Sixth Circuit panel granted the petition, elucidating the standards that apply to a petition for Federal Rule 23(f) interlocutory review, and articulating why the panel believed the class defendants should

prevail in their appeal of the class certification ruling.

As the panel observed, granting an interlocutory appeal under Rule 23(f) is "an extraordinary procedure" and one that is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." 2022 WL 4149090, at *2-*3 (citation omitted). The standards are (1) whether certification amounts to the "death knell" of the litigation (in that case, a "reverse death knell" where certification imposes such enormous potential liability that a class defendant has no choice but to abandon meritorious defenses and settle the litigation); (2) whether certification "raises a novel or unsettled [Rule 23] question," (3) the petitioner's likelihood of success on the merits (whether the class defendant would likely prevail in reversing the certification order); and (4) the posture of the litigation (which would counsel against interlocutory review in the event the district court indicated a willingness to reconsider its certification decision). *Id*. at *3. As the panel further recognized, "[n]o single factor is dispositive, ultimately, and none is a prerequisite to granting review." *Id*.

In support of their petition, the defendants argued (among other things) that Mr. Hardwick did not have standing (he could not show an Article III injury-in-fact), the injunctive relief class was not cohesive (due to the multitude of individualized issues going to exposure and injury), and that the requested injunctive relief was not well-defined.

On the issue of standing, the panel doubted that Hardwick had Article III standing to press his class claims. First, the presence of PFAS in his bloodstream could conceivably constitute an injury-in-fact, analogous to a common law battery injury. But a science panel and medical monitoring could not *redress* such an injury, because those remedies would not remove PFAS from his bloodstream or otherwise prevent his future exposure to PFAS.

Whether the PFAS in his blood increased the risk that he would contract a disease in the future could conceivably be an Article III injury, but there was no indication that Mr. Hardwick faced such an "imminent and substantial" threat to justify the grant of injunctive relief. As the panel explained: "Therein lies what defendants assert is the circular nature of Hardwick's argument: he claims to be sufficiently likely to develop a disease to have Article III standing, but because he actually has no idea about his risk of future disease, he wants an injunction creating a science panel to tell him if he's at risk of developing a disease." *Id*. at *6.

The panel also addressed cohesion and specificity of relief, "finding them to be different sides of the same coin." *Id*. at *3. The panel first doubted the district court's ruling that the essential element of commonality was satisfied: "Plaintiffs here may all be able to ask a common question—whether exposure to PFAS is sufficiently harmful to warrant medical monitoring. But, as defendants note, that question having a common answer seems highly suspect. To the contrary, it would likely hinge on 'the type, amount, and timing of each of the millions of class members' exposures, as well as his or her background health risks related to age, gender, medical history, genetic predispositions, and lifestyle choices.' Moreover, the 11 million-plus class members were likely 'exposed in different ways, in different amounts, and at different times.'" *Id*. at *7.

The district court, moreover, conflated commonality and the requirement that an injunctive relief class be *cohesive*. The panel rejected Mr. Hardwick's argument that cohesion was not a requirement of Rule 23(b)(2) – six other circuits had adopted the cohesion requirement in precedential opinions – further concluding that the Sixth Circuit's failure formally to recognize the cohesion requirement was a reason to grant to the petition. And regarding specificity of relief, the panel doubted that Mr. Hardwick's vague

claims for creating a science panel or providing medical monitoring to every Ohio resident were specific enough to show "a viable injunctive remedy that could grant relief to the entire class in a single stroke." *Id*. at *5 n.3.

Finally, the panel found that the district court's ruling was a sufficient "death knell" to the class defendants – in terms of the enormous liability risk the decision presented – to authorize interlocutory review, and further concluded that the posture of the case – in terms of the district court's willingness to expand the class beyond the State of Ohio – likewise supported interlocutory review.

The panel summarized its ruling as follows: "when a district court certifies one of the largest class actions in history, predicated on a questionable theory of standing and a refusal to apply a cohesion requirement endorsed by seven courts of appeals, to authorize pursuit of an ill-defined remedy that sits uneasily with traditional constraints on the equity power and threatens massive liability, such a decision warrants further review." *Id*. at *10.