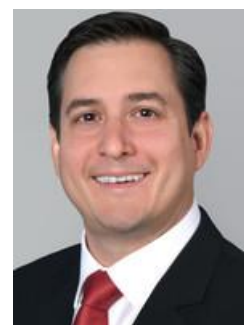


Individual Issues Predominate In Toxic Tort Class Actions

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The Eighth Circuit's decision in *Ebert v. General Mills Inc.*, 823 F.3d 472 (2016), reversing class certification in a vapor intrusion action builds on a long line of cases that illustrate the unavoidable difficulties in obtaining certification of a toxic tort class action. The panel determined that the district court had "essentially manufactured" a class by carving out many of the individualized issues and taking "painstaking steps" to substantially narrow others.

This "narrowing and separating of the issues," the Eighth Circuit found, "ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial." [1] In other words, the Eighth Circuit held that the individual issues overwhelmed the common questions, and that the district court abused its discretion by certifying the class. Since individualized issues of causation, exposure and damages are central to resolving every toxic tort case, *Ebert* further signals why the class action device is not a viable mechanism in the toxic tort arena.



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Ebert v. General Mills: A Prototypical Toxic Tort Action

From 1930 to 1977, General Mills owned and operated an industrial facility in a Minneapolis neighborhood. During this time, General Mills allegedly disposed of as much as 15,000 gallons of hazardous substances by burying them in perforated drums in the ground at the facility. In 1984, without admitting liability, General Mills signed a consent and remedial action plan agreeing to address the presence of trichloroethylene (TCE), if any, in the groundwater below and near the facility. After discovering TCE in soil vapor in October 2013, General Mills contractors sampled soil gas beneath building foundations. Wherever the TCE vapor concentration exceeded a particular threshold, General Mills installed vapor mitigation systems (VMSs) to prevent TCE intrusion into the homes above. General Mills installed VMSs in 118 homes in the neighborhood. They were not installed in the 327 homes that did not have detectable TCE concentrations.



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The plaintiffs in *Ebert* asserted five claims on a class basis: (1) violation of the Comprehensive Environmental Response, Compensation and Liability Act, (2) negligence, (3) private nuisance, (4) willful and wanton misconduct, and (5) violation of the Resource Conservation and Recovery Act. [2] And, according to the district court, the plaintiffs sought class certification of only the following "narrow" issues: First, whether General Mills "is liable to owners of the properties in the defined class area," and second, "whether injunctive relief is warranted to compel comprehensive remediation." [3]

The Key Question in Toxic Tort Class Actions

Do individual issues predominate over issues common to the class?

In Ebert, as in most toxic tort cases where plaintiffs seek class certification under Rule 23(b)(3), the fundamental issue is whether “questions of law or fact common to class members predominate over any questions affecting only individual members.”[4] This “predominance” requirement is not met if “individual questions ... overwhelm the questions common to the class.”[5]

An “individual question,” according to the U.S. Supreme Court, “is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.”[6] This predominance requirement “goes to the efficiency of a class action as an alternative to individual suits.”[7]

District Court’s “Painstaking Steps” to Certify a Class, Despite Individual Issues

In certifying the class in Ebert, “the district court took painstaking steps to delineate not only the issues to be determined, but the parties included in the class.”[8] Recognizing that “there are a number of individualized issues” in the case[9], the district court sought to narrow and limit the class to avoid them. For example, it carved out “questions of individualized exposure,” stating that such issues “will not be addressed as part of [the] questions for which the court will agree to certify the class.”[10]

The district court also narrowed the class questions at issue to “whether the defendant caused contamination of the area surrounding a single dump site, whether its actions violated the law, and thus whether the defendant is liable for contamination.”[11] The district court concluded that, after narrowing the questions at issue, “the predominance requirement has been met” because “[t]he individualized issues must predominate over the common ones, and they do not here.”[12]

The Eighth Circuit’s Reversal: Predominance Cannot Be “Manufactured”

The Eighth Circuit’s reversal of class certification in Ebert is a primer on why the class action is not a suitable mechanism in the toxic tort arena. The Eighth Circuit determined that the district court had “essentially manufactured a case that would satisfy the ... predominance requirement” by carving out from the class all “questions on individualized exposure,” and by “deliberate[ly] limiting” and “narrowing the question for which certification was sought.”[13] The Eighth Circuit identified numerous “individual issues that will predominate on the matters of liability and damages” and, most notably, will remain unresolved following the determination of the class-wide questions. For example, “[a]djudicating claims of liability will require an inquiry into the causal relationship between the actions of General Mills and the resulting alleged vapor contamination.”[14]

This causation analysis requires “a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills’ actions, and, if so, whether that contamination is wholly, or actually, attributable to General Mills in each instance.”[15] Such a “property-by-property assessment” would include an investigation of the “unique conditions and features” of each property as well as “whether (and to what extent) the groundwater beneath [each] property is contaminated, whether mitigation has occurred at the property, or whether each individual plaintiff acquired the property prior to or after the alleged diminution of value.”[16] And in terms of

damages, “[r]emediation efforts on each of the affected properties, should they be awarded, will be unique” because “some tested properties evidenced the existence of TCE soil vapors at widely varying levels and some did not.”[17] Put simply, whether “TCE [is] in breathable air” underpins this entire vapor intrusion action, but “its presence and effect differ by property.”[18]

These “myriad considerations on the issues of liability and damages,” the Eighth Circuit found, will “*still* need to be resolved household by household even if a determination can be made class-wide on the fact and extent of General Mills’ role in the contamination.”[19] Thus, “any limitations in the initial action are, at bottom, artificial or merely preliminary to matters that *necessarily* must be adjudicated to resolve the heart of the matter.”[20] In other words, even if plaintiffs were permitted to proceed as a class, the “myriad,” “highly individualized” issues would still have to be tried, negating any efficiencies gained by the class action.[21]

How Will Ebert Impact Future Toxic Tort Actions?

Since individualized issues of causation, exposure and damages are fundamental to resolving every toxic tort action, the Eighth Circuit’s rationale for rejecting the class in Ebert should preclude class certification in all toxic tort actions. Indeed, Ebert is an especially powerful precedent given the district court’s “painstaking” and “deliberate” efforts to narrow and limit the class questions to avoid individual issues. “[A]ll actions can be articulated so that there are common questions.”[22] But as the Eighth Circuit explained, an artificial “narrowing and separating of the issues” to obtain class certification is “problematic” where it “ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial.”[23]

Despite the unmistakable force of the Eighth Circuit’s reasoning, it is unlikely that Ebert will spell the end of plaintiffs’ attempts to certify toxic tort class actions. The substantial case management and cost benefits that plaintiffs obtain from class certification — i.e., the ability to obtain class-wide determinations based on the claims of a few representatives “to reap substantial amounts in fees and damages” instead of proceeding on an individual-by-individual basis — is likely reason enough for plaintiffs to continue to seek certification.[24] However, Ebert should erode plaintiffs’ confidence that this gambit will succeed.

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[1] Ebert, 823 F.3d at 479.

[2] *Id.*

[3] Ebert v. General Mills Inc., 2015 WL 867994, at *2 (D. Minn. Feb. 27, 2015).

[4] Fed. R. Civ. P. 23(b)(3).

[5] Ebert v. General Mills Inc., 823 F.3d 472, 478-79 (2016) (quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, --- U.S. ----, 133 S. Ct. 1184, 1196 (2013)).

[6] Tyson Foods Inc., v. Bouaphakeo, --- U.S. ----, 136 S. Ct. 1036, 1045 (2016).

[7] Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014).

[8] Ebert, 823 F.3d at 476.

[9] Ebert, 2015 WL 867994, at *15.

[10] Id. at *7.

[11] Id. at *15.

[12] Id.

[13] Ebert, 823 F.3d at 479.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at 481.

[18] Id. at 479.

[19] Id. at 479, 481 (emphasis in original).

[20] Id. at 479-80 (emphasis in original).

[21] Id. at 481.

[22] Id. at 479.

[23] Id.

[24] See Lawrence G. Cetrulo, 2 Toxic Torts Litigation Guide § 14:45 (2015) (“Plaintiffs favor class actions because the focus is on the conduct of the defendants, rather than the relative strengths and weaknesses of each plaintiff’s case ... Additionally, class actions offer significant financial incentive to the plaintiffs’ attorneys because the efficiency of grouping hundreds or thousands of claims into a single lawsuit allows them to reap substantial amounts in fees and damages.”)