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Why Calif. Courts Won't Certify Toxic Tort Class Actions

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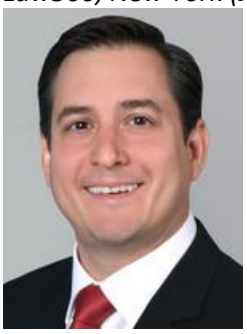
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In October 2015, residents of the Porter Ranch neighborhood in Los Angeles learned that a natural gas well near their community was leaking.[1] Residents have reported headaches and nausea, among other claims, prompting many to relocate and California Gov. Jerry Brown to declare a state of emergency.[2] Law firms representing thousands of plaintiffs have promised "an auspicious end game"[3] — but what are plaintiffs' options for litigating such a large, unwieldy toxic tort suit in California? Plaintiffs from Porter Ranch have opted to file a class action in the Los Angeles Superior Court.[4] But while a class action may seem appealing from a case management perspective, especially when dealing with thousands of individual plaintiffs and their particular claims, class certification of a toxic tort suit like this one is almost certain to fail in California.

Two California Supreme Court decisions, City of San Jose v. Superior Court[5] and Lockheed v. Carillo[6], have proven to be immovable roadblocks to certifying classes (or preserving a certified class on appeal) for the typical torts alleged in toxic tort cases — public and private nuisance, trespass, personal injury and medical monitoring — because, as the California Supreme Court has recognized, "liability can be established only after extensive examination of the circumstances surrounding each party."[7] Although the California Supreme Court has expressly declined to impose a "per se or categorical bar" on toxic tort class actions, the standard fare of toxic tort claims is no longer viewed by courts as susceptible to classwide resolution.[8] Indeed, these two precedential decisions have effectively curtailed plaintiffs' ability to wield the class action device in courts to extract large settlements from defendants in toxic tort actions such as Porter Ranch. This article examines the legacy of the City of San Jose and Lockheed cases, and considers alternatives for handling multiparty toxic tort litigation in California.

City of San Jose and Lockheed: Powerful Precedent

The bar for certifying toxic tort class actions — specifically with respect to property claims — was raised

over 40 years ago by City of San Jose v. Superior Court. There, the California Supreme Court ordered a trial court to decertify a class of plaintiffs who owned property located under the flight pattern of a municipal airport. Concerned the "restrictive tendency [of class actions] has dissipated as class actions have been utilized more extensively to meet the growing number of alleged 'group wrongs' in an increasingly complex society,"[9] the court added City of San Jose to a list of opinions "[]mindful of the ... limited scope within which these suits serve beneficial purposes."[10]

In finding an insufficient community of interest, which precluded class certification, the court reasoned: "An approaching or departing aircraft may or may not give rise to actionable nuisance ... depending on a myriad of individualized evidentiary factors. While landing or departure may be a fact common to all, liability can be established only after extensive examination of the circumstances surrounding each party. Development, use, topography, zoning, physical condition and relative location are among the many important criteria to be considered. No one factor ... will be determinative as to all parcels."[11] The court also rejected proposed subclasses as "incompatible with the fundamental maxim that each parcel of land is unique."[12] Thus, the holding made clear that differences in factual questions determinative of liability would bar class certification.

For decades, California courts have relied on the reasoning in City of San Jose to recognize that class actions for personal injuries in mass tort litigation present a multitude of problems. Namely, "[t]he major elements in tort actions for personal injury — liability, causation and damages — may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability."[13] If each plaintiff's right to recovery depends on facts peculiar to that plaintiff, individual questions predominate in determining liability, causation, damages and defenses, and the community of interest requirement for class certification is not satisfied.

In Lockheed, the California Supreme Court extended the reasoning of City of San Jose to medical monitoring claims. The court acknowledged that "the record on certification undoubtedly contains substantial evidence that many ... residents were exposed to toxic chemicals during the class period,"[14] but determined that evidence of exposure alone did not support a finding that medical monitoring was a reasonably necessary response, especially because plaintiffs failed to show "that the need for future monitoring is a reasonably certain consequence of the toxic exposure ... , i.e., that the plaintiff faces a significant but not necessarily likely risk of serious disease."[15]

Further, plaintiffs did not provide substantial evidence to resolve possible dosage issues with common proof because "each class member's actual toxic dosage would remain relevant to some degree" and "questions respecting each individual class member's right to recover ... appear so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants."[16] Nevertheless, the court refused to acknowledge any "per se or categorical bar" to a classwide medical monitoring claim susceptible to common proof.[17]

In the 13 years since Lockheed, trial courts have been wary of certifying multiparty toxic tort classes. For example, a year after Lockheed, a trial court held that common questions did not predominate among proposed class members alleging nuisance against a rock quarry for noise and vibration caused by blasting.[18] Relying on City of San Jose, the court of appeal affirmed, determining that "[r]ather than mere variations in the measure of damages, [the unique features of each plaintiff's parcel of land] are the keys to defendant Quarry's liability. ... Each resident would have to prove interference with the comfortable enjoyment of life or property and that the interference was 'substantial and unreasonable.'"[19]

More recently, a trial court declined to certify a class of some 300,000 persons raising property damage claims against utility providers accused of igniting three wildfires in San Diego County.[20] The court of appeal, also relying on City of San Jose, affirmed, reasoning that "[t]he surrounding circumstances of the fires, including weather, terrain and improvements nearby, require plaintiffs to supply predominantly individualized rather than common proof about the effects of the fires upon their unique real properties involved, as well as their owners' activities there."[21]

And trial courts certifying a class will face intense scrutiny on appeal. In Department of Fish and Game v. Superior Court, the trial court certified a class of property and business owners alleging that the California Department of Fish and Game's efforts to eradicate an invasive species of fish by poisoning a lake and its tributaries caused a decline in tourism negatively affecting their business income and property values.[22] The court of appeal reversed, holding that the claims, which included property and business torts, must all be resolved by analyzing individualized facts — e.g., the impact of the poisoning on property values would depend on the proximity of the properties in question to the lake "and the myriad other factors that go into valuation of real property."[23]

As these cases show, while City of San Jose and Lockheed may not have imposed a "per se or categorical bar" on a class action in toxic tort suits, the evidence required to prove duty, causation and damages necessarily turns on individualized facts, effectively disqualifying toxic tort suits from proceeding as class actions.

What Lies Ahead for Toxic Tort Litigants

As we have seen from the progeny of City of San Jose and Lockheed, the door to class certification is closed to plaintiffs in the Porter Ranch litigation. In the absence of a viable class action mechanism, toxic tort plaintiffs routinely rely on a case management procedure whereby "test" or "bellwether" plaintiffs are selected for trial before other plaintiffs.[24] This procedure allows the trier of fact to hear the parties' primary claims without confronting the daunting prospect of resolving every issue for every plaintiff. A "test case" also gives plaintiffs' counsel "the opportunity to discover how receptive the court and/or a jury may be to different factual or legal issues or theories of liability upon which the case may rest."[25] The streamlined resolution of issues often facilitates settlement of the remaining plaintiffs' claims, thus limiting the expenditure of resources by the courts and parties.[26]

The bellwether procedure is not without its drawbacks, however. An obvious concern for plaintiffs' counsel is an adverse precedent being set in an unsuccessful first trial.[27] Plaintiffs' counsel also claim that test cases fail to resolve key causation issues, favor particular claimants whose cases are selected for early resolution, and may "lose for the plaintiffs whatever advantage seems to accrue from getting before the jury all the plaintiffs, whose very number may aid in deciding causation or lend sympathy to the plaintiffs' side by virtue of the tragedy of the numbers injured."[28] Defense counsel claim a test trial does not preclude future actions if the first trial results in a defense verdict, and it allows plaintiffs to educate themselves as to trial strategies that will ultimately be effective with juries.

While parties will rely on the bellwether procedure to litigate most toxic tort cases in California, plaintiffs' counsel may look to other states for innovative approaches to bring multiparty toxic tort suits in state courts. As one example, in State of Vermont v. Atlantic Richfield Co. et al.,[29] Vermont's attorney general together with several firms hired on a contingency basis sued U.S. gasoline refiners for groundwater contamination. Instead of bringing the case as a class action, the state brought the suit on its own behalf by teaming up with plaintiffs' firms capable of handling large-scale, multiparty toxic tort

litigation. While this approach also has its challenges, plaintiffs' firms may seek a similar arrangement to bring toxic tort suits to the courts.

Ultimately, the decision to seek certification is a strategy call to be made by plaintiffs and their counsel. As the decisional law shows, however, class certification is almost sure to be a losing battle for the plaintiffs' attorneys representing persons from Porter Ranch who have sued.

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[1] Katie Reilly, California Residents Fear Long-Term Impact of Gas Leak, Time (Jan. 11, 2016), http://time.com/4173516/california-gas-leak-resident-reaction.

[2] Id.; Tony Barboza, Brown declares state of emergency at Porter Ranch amid massive gas leak, LA Times (Jan. 6, 2016), http://www.latimes.com/local/lanow/la-me-ln-brown-declared-emergency-at-porter-ranch-amid-massive-gas-leak-20160106-story.html.

[3] Louis Sahagum, Anxious Porter Ranch residents weigh legal response to massive gas leak, LA Times (Dec. 19, 2015), http://www.latimes.com/local/california/la-me-1219-gas-leak-20151219-story.html.

[4] Class Action Lawsuit Filed Over SoCalGas Leak in Porter Ranch, Globe Newswire (Dec. 2, 2015), http://globenewswire.com/news-release/2015/12/03/792500/0/en/Class-Action-Lawsuit-Filed-Over-SoCalGas-Leak-in-Porter-Ranch.html.

[5] City of San Jose v. Superior Court, 12 Cal. 3d 447 (1974).

[6] Lockheed v. Carillo, 29 Cal. 4th 1096 (2003).

[7] City of San Jose, 12 Cal. 3d at 461.

[8] Lockheed, 29 Cal. 4th at 1105.

[9] City of San Jose, 12 Cal. 3d at 458.

[10] Id. at 459 (citations omitted).

[11] Id. at 461.

[12] Id.

[13] Kennedy v. Baxter Healthcare Corp., 43 Cal. App. 4th 799, 810 (1996) (citation omitted).

[14] Lockheed, 29 Cal. 4th at 1108.

[15] Id. at 1109 ((internal quotation marks omitted).

[16] Id. at 1109, 1111.

[17] Id. at 1105.

[18] Frieman v. San Rafael Rock Quarry, 116 Cal. App. 4th 29 (2004).

[19] Id. (citation omitted).

[20] Downing v. San Diego Gas & Electric Co., No. D055820, 2010 WL 4233033, at *2 (Cal. Ct. App. Oct. 27, 2010).

[21] Id. at *3.

[22] Department of Fish and Game v. Superior Court, 197 Cal. App. 4th 1323 (2011).

[23] Id. at 1358.

[24] See, e.g., Reyes v. Chevron U.S.A. Inc., 2008, No. H031843, WL 2690048 (Cal. Ct. App. July 10, 2008); City of Modesto Redevelopment Agency v. Dow Chemical Co., 2005, Nos. 999345, 999643, WL 1171998 (Cal. Ct. App. April 11, 2005).

[25] Lawrence G. Cetrulo, 2 Toxic Torts Litigation Guide § 11:27 (2015).

[26] See Paul D. Rheingold, Litigating Mass Tort Cases § 10:47 (2015).

[27] Cetrulo, § 11:27.

[28] Id.

[29] See State v. Atlantic Richfield Co., No. 340-6-14, 2015 WL 5176775 (Vt. Super. Jan. 15, 2015).