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CERTIFICATION

PRODUCT LIABILITY

Recent case law, including the U.S. Supreme Court ruling in *Wal-Mart v. Dukes*, provides a road map for the manufacturers of building products on how to prevent and defend against potential product liability and class action litigation, say attorneys Mark Raffman and Andrew Hudson in this BNA Insight. The authors offer practical advice on litigation strategy, including how manufacturers can develop and use individualized evidence to convince a court not to certify a putative class.

Dukes Provides New Tools to Fight Class Certification in Building Products Cases

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Manufacturers of building products must increasingly defend the safety and efficacy of their products in putative class actions. Because the class action dramatically increases the financial risk of an adverse verdict, it is typically in the defendant's strategic interest to oppose the certification of a class. This strategic imperative may turn on the company's ability to show that the claims of different claimants turn on different facts, such that the class action device will achieve neither judicial economy nor fairness.

Recently-filed lawsuits regarding spray polyurethane foam insulation (''SPF'') provide an opportunity to examine how manufacturers can develop the evidence that will convince a court not to certify a potential class, especially in light of recent Supreme Court decisions emphasizing the evidence-based focus of the certification decision, and how they can better position themselves for this task through litigation strategy in both putative class actions and individual lawsuits.

Spray Polyurethane Foam Insulation

SPF is a building insulation product that has come into increasing use in residential and commercial construction because it is both energy efficient and environmentally friendly. SPF is manufactured as two substances, which are kept in separate containers until installation. The installer sprays them together onto the

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surface to be insulated, where they combine, creating a foam that hardens as it ''cures.''

In most SPF products, one of the two substances (the ''A side'') contains chemicals called ''isocyanates'' (and frequently a particular isocyanate known as ''MDI''). The Environmental Protection Agency has cautioned installers of SPF that ''exposures to [SPF's] key ingredient, isocyanates such as 'MDI,' and other SPF chemicals that may be found in vapors, aerosols, dust or on surfaces during and for a period of time after installation may cause adverse health effects such as asthma.''[1]

Accordingly, the industry has long directed that installers take appropriate precautions to avoid exposure when installing SPF products. It has widely been understood, however, that once SPF products have cured (generally within 24 hours) the products are inert and pose no health risk.[2]

SPF Suits

In March 2012, a published report suggested that exposure to SPF could cause harm to a building's occupants as well as SPF installers. In a letter published in a medical journal, two doctors detailed the case of a couple who had entered their home a few hours after SPF was applied, apparently before it had finished curing. They reportedly experienced respiratory difficulties, and were later diagnosed with asthma, allegedly induced by the exposure.[3]

Within months, a putative nationwide class action had been filed against the SPF manufacturer identified in the doctors' letter. The complaint alleges that the SPF never becomes ''inert and nontoxic,'' as it is supposed to, but instead continues ''to emit chemicals . . . after installation,'' either because of faulty installation or because SPF will never ''become inert and nontoxic even under optimal conditions.''[4] Two months later, a second suit was filed against a different SPF manufacturer, using a lightly-edited version of the first complaint.[5] These and other plaintiffs' lawyers continue to agitate on the issue, suggesting that more suits, targeting other manufacturers, may soon follow.[6]

Class Certification

Under Federal Rule of Civil Procedure 23 and similar state-law procedural rules, the claims of many people can be addressed in a single proceeding by allowing one or more ''representative'' plaintiffs to proceed on behalf of an entire class of absent litigants. The certification of a class greatly increases the stakes of the litigation and, in so doing, exerts pressure on defendants to settle even meritless claims rather than face even a small risk of ''potentially ruinous liability.''[7] Consequently, avoiding class certification should be an important strategic goal for manufacturers, even before a putative class action is filed.

Class actions seeking money damages must satisfy four threshold requirements under Rule 23(a) and the additional requirements of Rule 23(b)(3). The four threshold requirements of Rule 23(a) are: (1) the members of the putative class are so numerous it would not be practical to join them all as plaintiffs in a single lawsuit, (2) there is at least one question of law or fact common to the claims of all putative class members, (3) the claims of the plaintiff are typical of the claims of the other putative class members, and (4) the plaintiff will fairly and adequately protect the interests of the other putative class members. Under Rule 23(b)(3), the plaintiff must also show that (1) common questions predominate over questions that affect only the claims of individual class members, and (2) a class action is superior to other methods of adjudication.

The linked ''commonality'' and ''predominance'' inquiries are often the linchpin to whether a court decides to certify a class. The Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* explained that analysis of the commonality and predominance requirements is not an academic exercise, but turns on the nature of the evidence that would be used at trial and its practical effects on the trial's efficiency.[8] Specifically, the *Dukes* Court explained that a ''common question'' must be a question that (1) is provable by common evidence (and so will have the same answer for all class members), and (2) is ''central to the validity'' of the claim.[9] Both clarifications implement a policy of supporting certification where a trial will focus on classwide evidence, and preventing certification where a trial would require significant individualized evidence to drive a resolution.

Thus, as a practical matter, manufacturers can anticipate the certification fight by developing evidence to demonstrate that important questions bearing on the functionality or safety of their products turn on individualized evidence. Demonstrating sufficiently important ''non-common'' questions should preclude certification.

The iterative nature of the relationship between building products manufacturers and the end users of their products provides a unique opportunity to develop this kind of evidence. Consumers of building products—including ''do-it-yourselfers'' and those who rely on contractors or installers—make use of the products in different settings and over long periods of time. When problems arise, there are multiple opportunities for contact and communication between and among the

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[1] http://www.epa.gov/dfe/pubs/projects/spf/spray_polyurethane_foam.html.

[2] http://www.epa.gov/dfe/pubs/projects/spf/exposure_potential.html (''After spray foam is applied and cured, it is considered to be relatively inert . . . .'').

[3] Tsuang, Wayne, and Huang, Yuh-Chin T., ''Asthma Induced by Exposure to Spray Polyurethane Foam Insulation in a Residential Home,'' 54 *J. Occup. & Environ. Med.* 3, 272-73 (March 2012).

[4] *See Haas vs. Demilec (USA) LLC*, No. 9:12-cv-81160 (S.D. Fla.) (*complaint filed* Oct. 19, 2012).

[5] *See Slemmer v. NCFI Polyurethanes*, No. 2:12-cv-06542 (E.D. Pa.) (*complaint filed* Nov. 20, 2012).

[6] *See* http://www.seegerweiss.com/news/seeger_weiss_investigates_toxic_spray_polyurethane_foam_insulation_manufactured_by_demilec_usa_llc; http://www.yourlawyer.com/topics/overview/Spray-Foam-Insulation-Health-Issues-Class-Action-Lawsuit; http://www.allfela.com/News/SprayFoamInsulationNews.aspx.

[7] Advisory Committee's Notes on Fed. R. Civ. P. 23(f). *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (''Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.'').

[8] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

[9] *Id.*

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customer, the installer, and the manufacturer. This combination provides a fertile opportunity for feedback on the performance of the products under different conditions. Tracking and analyzing patterns in this feedback can also suggest new information about a product—for example, that a product's function is affected by certain specific environmental or other factors in a specific way, including the installation process or specific facts about the individual's dwelling. To the extent this iterative process generates an increasingly-differentiated data set of product-use outcomes based on differing circumstances, and communications between and among manufacturers, installers, and homeowners, it has great potential to generate the kind of individualized evidence that should prevent class certification.

Certification in the Building Products Context

Where manufacturers have been able to give substantive, concrete examples of individualized evidence that could affect the outcome of the case, courts in building products cases have recognized that the practical difficulty of addressing such evidence on a classwide basis precludes class certification. By the same token, when courts have found that consideration of individualized evidence would not drive the outcome of a case, they have granted certification even in cases involving building products.

For example, in a recent California case against a roof tile manufacturer, the class plaintiff alleged that, contrary to the manufacturer's statements, the coloring in the tiles did not last for 50 years.[10] The trial court denied certification because the representations actually made to the class members, as well as their possible reliance on any such representations, was necessarily individualized. The appellate court, however, reversed the trial court's ruling because it saw the issue as a uniform failure to disclose and held that reliance could be inferred under state law. Although the continuing application of this decision—at least in the federal courts—is undermined by the Supreme Court's more recent decision in *Dukes*,[11] it still shows that a court's view of the importance of individualized evidence directly affects the class certification decision.[12]

In a case against a window manufacturer in federal court, the class plaintiff claimed that the manufacturer's use of ''breather tubes'' to equalize pressure in certain of its double and triple glazed windows caused the windows to deteriorate faster than other windows that it sold.[13] The trial court denied certification because it found that a number of the issues would require individualized evidence, including the likely decrease in the windows' useful life, and the representations, if any, made to the customer.

In an earlier case in federal court against a manufacturer of a stucco-type product, the class plaintiff claimed that, contrary to the manufacturer's statements, the product was not an effective moisture barrier when applied to exterior walls.[14] The courts focused on the manufacturer's defense that any moisture problem was due to faulty installation. The trial court certified the class because it believed the installation issue could be litigated in a separate action between the manufacturer and the installers, which would keep the individualized evidence about each installation out of the homeowners' class action. The appellate court vacated the certification order because state law required the installation issue to be litigated in the homeowners' action, meaning a class trial would have to address the individualized evidence about each claimant's installation.[15]

In each case, certification turned on the nature of the evidence that would be presented at a trial of the underlying claims—and, in particular, on the significance of individualized evidence to the resolution of the claims presented.

Certification of SPF Claims

As in the cases discussed above, if SPF manufacturers can draw a court's attention to significant individualized evidence, they should be able to defeat class certification. A court is more likely to focus on individualized evidence if confronted with substantive, concrete examples, and a clear explanation of how that evidence could change the outcome of the case. In the case of SPF, manufacturers have a number of potential avenues they can employ to make this showing. For example, manufacturers might take one or more of the following steps to develop significant individualized evidence:

- Employ experts to take detailed measurements of the actual nature and quantity of any alleged emissions in a claimant's home, including laboratory tests of the product that quantify emissions.

- Diligently explore other potential causes for the problems about which the claimant complains, including other potential causes of ''odors'' or ''off-gassing'' alleged by the claimant. To the extent that the claimant

[10] *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 178 (Cal. App. 3d Dist. 2010).

[11] Specifically, even though the California state appellate court agreed with the trial court that two of the elements of the claim would require individualized evidence—(1) that affirmative representations were made that rendered the omission misleading, and (2) the amount of damages, if any, sustained—the appellate court still found certification appropriate. *Id*. This reasoning is hard to square with the *Dukes* Court's indication that certification should be denied if a trial would turn largely on individualized evidence.

[12] After the appellate court remanded the case, a jury found for plaintiffs. But the trial court then excluded expert testimony that was key to both class certification and the jury's verdict, and so vacated the verdict and released the manufacturer from liability. No. SCV 16410 (Cal. Super. Ct. Jan. 28, 2013).

[13] *Porcell v. Lincoln Wood Prods.*, 713 F. Supp. 2d 1305, 1316-17 (D.N.M. 2010).

[14] *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001).

[15] *See also Simeon v. Colley Homes, Inc.*, 818 So. 2d 125 (La. Ct. App. 2001) (denying certification in a similar case because ''[i]ndividual inquiries would have to be made into the source of water entry and the severity of the damage. These 'house specific' issues would implicate testimony from a host of different builders, contractors, subcontractors, installers and material suppliers.''); *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923-24 (Cal. Ct. App. 2001) (denying certification of negligence and products liability claims as to product that allegedly caused cracks in foundations, as claims would require individualized evidence of damage and causation).

alleges personal injuries (e.g., respiratory symptoms), other potential causes of such conditions should also be explored.

■ Compare the quality of the SPF actually installed in a plaintiff's home to a lab sample of correctly-installed SPF. To the extent that differences exist—for instance, due to unique errors in application—that would support a showing that individual circumstances are critical to understanding the claims presented.[16]

■ Interview the installers, inspect other sites where they have installed SPF, and compare their work to that of installers known to use correct application methods.

Allegations of Health Effects From Exposure Are Special Barrier to Certification

Based on the class action complaints filed to date against SPF manufacturers, another particularly strong argument against class certification is called into play because the gravamen of the claim is that exposure to ''off-gassing'' from SPF products has given rise to actual or potential health effects based on individual experiences of exposure to SPF. Even without resorting to the individualized evidence listed above, the importance of these alleged health effects to the plaintiffs' claims differentiates SPF cases from the building products cases discussed above in which certification was granted, where no allegations related to health effects were presented. Indeed, it will be virtually impossible for a claimant to show that he or she was harmed by exposure to SPF without presenting individualized evidence to support such a claim. Each claimant would at least need evidence of (a) the nature and duration of his or her exposure, and (b) testimony from a medical professional who had examined the claimant that the claimant suffers from some particular detrimental health effect, and that the particular SPF exposure he or she experienced is more likely than not the cause of such effects. Presenting and analyzing individualized evidence of this magnitude and significance would overwhelm a trial and is simply not compatible with class certification.

The centrality of the alleged health effects to the SPF claims presents would-be class action plaintiffs with a difficult choice. On the one hand, they could baldly assert that a class trial would not be bogged down in individualized evidence, despite the extensive necessary individualized evidence just discussed. This is the path taken by the two filed complaints noted above. These plaintiffs will face an uphill battle in attempting to persuade a court to certify a class for a trial that includes claimed health effects.

Alternatively, plaintiffs may attempt to avoid that fight entirely by recasting their complaints to seek damages only for economic harm, such as the alleged diminution in the value of class members' properties or the cost of replacing the SPF. But this choice poses a different, equally serious obstacle to class certification. The basis of the suit is the allegation that exposure to SPF causes detrimental health effects. Once a class's claims are adjudicated, *res judicata* will prevent class members from filing additional lawsuits against the manufacturer to recover for such alleged physical injuries, if based on the same installations of SPF.[17] Thus, class members will lose their claims for alleged physical injury if the class plaintiff does not pursue them.[18] It will be an equally uphill battle to persuade a court that a class plaintiff who would deprive class members of such potentially significant claims nevertheless meets the fourth threshold requirement for certification—that he or she will adequately protect the interests of the other class members. Indeed, numerous courts have ruled that when a class plaintiff proposes to abandon class members' claims of physical injury, he or she is not an adequate representative.[19]

Conclusion

Recent case law has provided a road map for potential product liability defendants to prepare against the possibility that they may become involved in class action litigation. Given the strategic importance of defeating class certification, manufacturers can and should work to develop and use the kinds of individualized evidence described above, in advance of a class action filing.

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[16] This evidence may be further supported by the EPA's guidance, which suggests that unique, site-specific conditions may affect off-gassing, such as ''temperature and humidity,'' ''[i]mproper workplace practices,'' and ''[p]oor applicator technique.'' http://www.epa.gov/dfe/pubs/projects/spf/quick_safety_tips.html.

[17] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (if the court has jurisdiction over the members of a plaintiff class and adjudicates their claims, *res judicata* will bar the class members from filing new suits against the defendant regarding the same matter). *See also San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336 n. 16 (2005) (''Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'') (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

[18] *See Nafar v. Hollywood Tanning Sys., Inc.*, 339 Fed. App'x 216, 224 (3d Cir. 2009) (where plaintiff claimed tanning beds posed undisclosed health risk, and sought refund of fees but not recovery for physical injuries on behalf of the class, the court found that both potential claims ''arise from the same set of facts and transactions,'' and that ''[b]y seeking only partial relief, [the class plaintiff] may be engaging in claim splitting, which is generally prohibited by the doctrine of *res judicata*.'').

[19] *See Nafar*, 339 Fed. App'x at 224-25 (citing cases). *See, e.g.*, *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923-24 (E.D. Pa. 1984) (cited in *Nafar*; ''the plaintiffs' efforts to certify a class by abandoning some of the claims of their fellow class members have rendered them inadequate class representatives.'').

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