Legal Opinion Letter
Vol. 33 No. 5 February 23, 2024

Washington Legal Foundation
Advocate for Freedom and Justice®
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Appeals Court Rejects PFAS-Related Class Action Without Addressing Unsettled Rule 23 Issues

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Among the class certification issues that have remained subject to controversy or disagreement to various degrees are class cohesion under Fed. R. Civ. P. 23(b)(2), class ascertainability, and the strength of the commonality requirement. Every federal Court of Appeals to consider the question except for the Ninth Circuit has adopted a cohesion or cohesiveness requirement for certification under Rule 23(b)(2). The Ninth Circuit rejected it on the ground that the rule does not expressly mention cohesiveness, with the perplexing result that the standard for certifying non-opt-out classes under Rule 23(b)(2) appears to be lower than the predominance standard of Rule 23(b)(3). The Sixth Circuit has endorsed the cohesion requirement in one case, *Romberio v. UnumProvident Corp.*, 385 F. App'x 423 (6th Cir. 2009), but the issue has not been further developed in that court.

Hardwick v. 3M Co. (*In re E.I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*), 87 F.4th 315 (6th Cir. 2023), was widely watched for its potential to produce consequential rulings on class cohesion and several other major issues. In the end, however, the ambitious nature of the case which drew so much attention led to its downfall in the narrowest possible ruling. The Sixth Circuit panel held that Hardwick lacked standing, but it declined to address issues of commonality, cohesion, or ascertainability of the class.

Background

Litigation concerning health effects of per- and polyfluoroalkyl substances (PFAS) has been developing in recent years, following shortly behind and sometimes, as in this case, attempting to leap far ahead of the developing science. PFAS are man-made chemical compounds, many of which are widely dispersed in the environment, having been used for decades in a wide range of manufactured products. There are an estimated 5,000–10,000 different PFAS compounds. It is believed that almost everyone has trace amounts of PFAS in their blood. Questions about their potential health effects have drawn increased attention.

The Litigation in *Hardwick v. 3M Co.*

Hardwick was widely recognized as perhaps the most ambitious and expansive putative class action in history. The sole plaintiff, Hardwick, is an Ohio resident who worked for over forty years as a firefighter, a profession that has been associated with exposure to various PFAS-containing products. Hardwick alleged that he had traces of five PFAS chemicals in his blood and sued ten companies as allegedly responsible for his exposure.

He proposed a class of all individuals in the United States with a minimum blood level of 0.05 parts per trillion (ppt) of a particular PFAS (PFOA) and at least one other PFAS. He proposed a subclass of all such persons whose claims would be "subject to Ohio law," as well as a subclass of such persons subject to the laws of other states that would recognize that blood-PFAS level as an injury.

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Hardwick did not claim to have actually been injured or even that he was at greater risk of injury. He instead claimed that he *could be* at risk of injury and was seeking *to learn* whether he was at risk. The relief he sought was funding of a "Science Panel" to conduct a court-administered, open-ended scientific investigation of health effects of the entire class of PFAS compounds. He also provisionally sought medical monitoring relief for all individuals meeting the 0.05 ppt threshold, depending on whether the study results indicated that they were at risk of injury.

The proposed class definition was problematic for a number of reasons, one of which was that the 0.05 ppt threshold is far lower than the capability of even the most sensitive existing blood-testing technology. Therefore, not only was the proposed class extraordinarily broad and large, but current testing technology would be incapable of reliably identifying members.

In essence, Hardwick sought to put a single federal judge in charge of the developing field of research about health effects of all PFAS and to dole out medical monitoring to Americans in the future based on the results of that court-supervised research. Although the scientific method is open-ended and does not reach static conclusions, Hardwick sought to have the findings of the proposed Science Panel "deemed definitive and binding on all the parties."

The District Court Certified a Class of Nearly 12 Million

The United States District Court for the Southern District of Ohio denied all of the defendants' motions to dismiss, including a motion to dismiss for lack of standing and subject-matter jurisdiction. Although Hardwick's complaint did not plead any injury beyond his allegedly having trace amounts of five PFAS in his blood, the court held that those allegations sufficed to allege injury for purposes of Article III. The court relied on Sixth Circuit precedent predicting Ohio "medical monitoring" law without addressing the key difference that Hardwick did not allege that he *was* at increased risk of disease but only that he *might be* at risk. In fact, the premise underlying Hardwick's proposed relief was that he could not know whether he was at any increased risk without further scientific investigation.

After briefing, the District Court then certified a class of an estimated 11.8 million individuals—essentially the entire population of Ohio, plus any nonresidents whose putative claims would be subject to Ohio law. The court again found that Hardwick sufficiently pleaded standing and rejected all the defendants' arguments concerning defects in the class definition and proposed relief. The court acknowledged that *Romberio* recognized cohesiveness as a requirement under Rule 23(b)(2) but reasoned that nothing in the precedent or the rule suggested that this standard is any higher than the commonality or predominance standards and found that Hardwick satisfied it "to the extent it is required." 589 F. Supp. 3d 832, 867 (S.D. Ohio 2022).

The Sixth Circuit Reversed Class Certification

A Sixth Circuit motions panel granted the defendants' Rule 23(f) petition for interlocutory appeal in an opinion that took issue with the District Court's analysis of issues of standing and class cohesion. It concluded that "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." No. 22-0305, 2022 WL 414900, at *10 (6th Cir. Sept. 9, 2022).

After briefing and argument, the merits panel issued a 3–0 opinion authored by Judge Kethledge on November 27, 2023. The first sentence of the opinion left little doubt about the direction the panel was going: "Seldom is so ambitious a case filed on so slight a basis." 87 F.4th at 318. Dashing the hopes of many for a broader decision, however, the panel ruled narrowly on the question of standing. Indeed, it ruled solely on the element of traceability, not addressing the elements of injury or redressability.

Hardwick's allegations failed to establish traceability for two reasons. First, the court found that Hardwick's complaint treated the ten defendants collectively as producers of PFAS generally. It simply alleged that "'[d]efendants' manufactured PFAS and 'released such PFAS materials into the environment.'" *Id.* at 320. Second, the allegations were conclusory. Given the 5,000–10,000 different PFAS compounds, the bare allegation that the ten defendants manufactured and released PFAS of *some* fashion did not plausibly allege that any of them were responsible for the specific molecules in Hardwick's blood. The court concluded, "Hardwick has not alleged facts supporting a plausible inference that any of these defendants caused these five particular PFAS to end up in his blood." *Id.* at 321. It vacated the certification order and remanded with instructions to dismiss the case for lack of subject-matter jurisdiction. Hardwick's motion for rehearing en banc was later denied.

Takeaways

The sheer scope and ambition of *Hardwick* brought it attention, and the extent to which it sought to push the boundaries of standing, class cohesion, commonality, class ascertainability, and injunctive relief led to many expectations of a broad, clarifying decision pushing those boundaries back on multiple fronts. That was not to be. The court's ruling did reinvigorate Article III standing and the traceability requirement in particular in the Sixth Circuit, but the remaining issues affecting certification under Rule 23 remain to be clarified another day.

