

Eighth Circuit Reverses Class Certification Where Class Members Not Commonly Injured by Contamination on Their Property

Article By:

Caitlyn E. Haller

On September 15, the ***Eighth Circuit*** reversed the district court's order certifying a class of property owners who sought nuisance based damages and injunctive relief. In [*Smith v. ConocoPhillips Pipe Line Co.*, No. 14-2191, 2015 WL 5332450 \(8th Cir. Sept. 15, 2015\)](#) the Court concluded that there was no evidence showing that class members were commonly affected by contamination on their property. This decision has important implications for defeating class certification on commonality grounds in toxic tort cases where the class fails to have any proof of widespread contamination throughout the class's property.

A leak in an existing pipeline was discovered in a small Missouri town in 1963 and repaired, but one hundred barrels of leaded gasoline leaked and had not been recovered from the site. In 2002, a town resident contacted defendant, the successor in interest, about gasoline odors in his home. An investigation of well water used by residents showed the presence of certain chemicals at levels three times above the permissible limit. The defendant purchased the homes on and around the contamination site and began working with the Missouri Department of Natural Resources to identify and fence in the contamination. The defendant later demolished the homes on contaminated properties, removed 4000 cubic yards of soil, and set up a monitoring system to track the spread of contamination.

Property owners within a 1.1 mile radius of the contamination site filed a lawsuit seeking nuisance damages and injunctive relief for one putative class and medical monitoring expenses for a second putative class. The district court refused to certify a medical monitoring class because plaintiffs offered no evidence of actual exposure to toxic chemicals. The district court certified the first class based on evidence that a pollutant was found at a property 0.25 miles from the contamination site, despite the fact that the pollutant found had not been present at the contamination site.

The defendant argued the class could not state a nuisance claim without actual proof of contamination on the class members' property. To determine whether the putative class suffered a common injury to sustain a nuisance claim, the Eighth Circuit relied on the Fourth Circuit's decision in [*Adams v. Star Enter.*, 51 F. 3d 417 \(4th Cir. 1995\)](#) (finding fears of contamination spread and decrease in property values insufficient to recover for nuisance claim). The discovery and testing

conducted on the putative class's property did not support the class's fear of contamination spreading and harming property values. The court concluded that the class fear of contamination spreading, without any proof, was not a sufficient injury to support a nuisance claim. Finding the district court abused its discretion, the 8th Circuit reversed the class certification order and remanded for further proceedings.

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National Law Review, Volume V, Number 271

Source URL: <https://natlawreview.com/article/eighth-circuit-reverses-class-certification-where-class-members-not-commonly-injured>