

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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KATHLEEN McHUGH and
DEANNA SCHNEIDER, individually
and on behalf of all persons similarly situated,

Plaintiffs,

v.

MADISON-KIPP CORPORATION,
CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY,
UNITED STATES FIRE INSURANCE COMPANY
and ABC INSURANCE COMPANIES 1 – 50,

Defendants.

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ORDER

11-cv-724-bbc

In this case under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, and state common law, plaintiffs Kathleen McHugh and Deanna Schneider allege that their houses have been contaminated by toxic vapors released from a manufacturing facility operated by defendant Madison-Kipp Corporation. On April 16, 2012, I granted plaintiffs' motion for class certification under Fed. R. Civ. P. 23, and certified the following class for the limited purposes of determining Madison-Kipp's responsibility for the alleged contamination, the geographical scope of the contamination and the appropriateness of classwide injunctive relief:

Owners and residents of the residential property located on South Marquette Street (property addresses ranging from 102 through 230 South Marquette Street) and Waubesa Street (property addresses ranging from 233 through 269 Waubesa Street) in Madison, Wisconsin.

Dkt. #72. I directed the parties to consult and file a joint proposed class notice or an explanation of their disagreements and respective positions regarding notice with the court by April 30, 2012.

Now before the court is defendant Madison-Kipp's motion for clarification of the court's certification order, dkt. #73, and plaintiffs' motion for a protective order. Dkt. #51. (Plaintiffs also filed a motion to file a reply brief, along with a reply brief, in support of their request for a protective order, dkt. #60. I have considered the reply brief and will grant leave to plaintiffs to file it. Also, I will grant defendant United States Fire Insurance Company's motion to join defendants Continental Casualty Company's and Columbia Casualty Company's brief in opposition to the protective order. Dkt. #59.)

In its motion for clarification, defendant Madison-Kipp contends that it cannot determine whether plaintiffs' proposed notice is acceptable until the court clarifies exactly what issues will be decided on a classwide basis, whether these issues will be decided by the court or a jury, how the case will proceed after the classwide issues are resolved and whether defendant can obtain discovery from class members at this stage of the case. (The insurance company defendants have not joined Madison-Kipp's motion for clarification. Thus, I will refer to Madison-Kipp as "defendant.")

Defendant does not explain how these issues affect the class notice or defendant's

ability to consult with plaintiffs regarding the class notice, as directed by the court. Nonetheless, I will clarify the certification order for the benefit of all parties involved and will grant defendant an extension of time in which to file any objections to plaintiffs' proposed class notice.

The court certified a class for the purpose of resolving discrete questions that are common to all class members' claims and do not require individualized inquiries. In the certification order, I described these questions broadly as "whether and to what extent defendant Madison-Kipp Corp. caused contamination by releasing toxic vapors from its Madison, Wisconsin facility and whether classwide injunctive relief is appropriate." Dkt. #72 at 16. With respect to plaintiffs' claim under the Resource Conservation and Recovery Act, common questions include:

- whether defendant has generated solid or hazardous waste;
- whether defendant has caused or contributed to the handling of this waste;
- whether the waste presents an imminent and substantial danger to health or the environment; and
- whether injunctive relief is appropriate.

Albany Bank & Trust v. Exxon Mobile Corp., 310 F.3d 969, 972 (7th Cir. 2002) (listing elements of prima facie case under Resource Conservation and Recovery Act). For plaintiffs' common law negligence, nuisance and trespass claims, common questions include:

- whether there has been contamination in the class area;
- the geographic scope of that contamination; and

- whether defendant caused the contamination.

Questions related to whether defendant caused damages to particular class members, and the extent of those damages, will not be resolved on a classwide basis.

Defendant is correct that some of these questions are legal issues to be resolved by the court, while others may be factual issues that must be resolved by a jury. In particular, classwide factual issues related to plaintiffs' common law claims will be decided by a jury, while plaintiffs' claim for injunctive relief under Resource Conservation and Recovery Act will be decided by the court. Additionally, genuine factual disputes relevant to individual issues of causation and damages will be resolved by a jury.

However, the fact that some issues must be resolved by the court and some by the jury is not a bar to class certification and would not violate the Seventh Amendment's reexamination clause, as defendant suggests. Bifurcation of the trial into separate phases does not mean that different juries would be deciding overlapping questions. If this case proceeds to trial, it will be presented to one jury panel that will resolve classwide issues, as well as individual issues of causation and damages, while the court would resolve questions that are equitable in nature, including whether injunctive relief is appropriate.

This leads to another question raised by defendant, namely, whether class members will have to pursue their claims for damages and individualized injunctive relief as separate lawsuits after the classwide issues are resolved. The answer is no. It would be extremely inefficient to resolve only a few classwide issues in this case and then require class members

to file 80 separate lawsuits to resolve their claims.

The only issue remaining is whether defendant can seek discovery from individual class members. Plaintiffs contend in their motion for a protective order that such discovery is premature, relates only to damages and should not commence until after the classwide, non-damages issues are resolved. Plaintiffs are incorrect. Although I granted the insurance companies' motion to bifurcate and stay insurance coverage issues, I did not stay any issues related to the underlying dispute between plaintiffs, class members and defendant Madison-Kipp. In addition, I will not hold two separate trials on classwide and individual issues. Although the trial may have separate phases, the parties must be prepared to resolve all issues in this case during the same trial. Thus, there will not be separate discovery periods for liability and damages issues. Defendant is entitled to take discovery from class members related to classwide and individual questions. Therefore, I am denying plaintiffs' motion for a protective order.

ORDER

IT IS ORDERED that

1. The motion for a protective order filed by plaintiffs Kathleen McHugh and Deanna Schneider, dkt. #51, is DENIED.
2. Plaintiffs' motion for leave to file a reply brief, dkt. #60, is GRANTED.
3. The motion to join defendants Continental Casualty Company's and Columbia

Casualty Company's brief in opposition filed by defendant United States Fire Insurance Company, dkt. #59, is GRANTED.

4. Defendant Madison-Kipp Corporation may have until May 7, 2012 to file any objections to plaintiffs' proposed class notice.

Entered this 3d day of May, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge