

IN THE COURT OF COMMON PLEAS  
OF PHILADELPHIA COUNTY

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PURSUANT TO Pa.R.C.P. 236(b)

JUL 22 2008

CIVIL TRIAL DIVISION

JUDICIAL DISTRICT OF PA

DONALD BROPHY, ET AL. : JANUARY TERM, 2004  
vs. :  
PHILADELPHIA GAS WORKS, ET AL. : NO. 197

DOCKETED

JUL 22 2008

G. HART  
CIVIL ADMINISTRATION

**ORDER**

AND NOW, this 21st day of July, 2008, upon consideration of Plaintiff's Motion for Class Certification, it is hereby ORDERED that said motion is GRANTED. This action shall be maintained as a class action in accordance with Pennsylvania Rules of Civil Procedure 1701 et seq.

1. A class is hereby certified and defined as follows:

a. Class I ("Site Testing")

Class I shall consist of all individuals or entities who currently own or occupy property in Philadelphia from which PGW has removed a Mercury Regulator.

b. Class II ("Medical Testing")

Class II shall consist of all individuals, including but not limited to those in the Site Testing Class, who have been exposed to mercury from Defendants' removal of a Mercury Regulator.

c. Class III ("Mercury Regulatory Removal")



Class III shall consist of all individuals or entities who currently own or occupy property in Philadelphia at which PGW has installed, but not yet removed, a Mercury Regulator.

2. There are questions of law and/or fact common to the Class.
3. The claims of Plaintiff Donald Brophy are typical of the claims of the Class.
4. Plaintiff and his counsel will fairly and adequately protect the interests of the Class.
5. A class actions is a fair and efficient method of adjudicating this controversy for the following reasons:
  - a. The common questions of law or fact predominate over any question affecting only individual members of the Class.
  - b. There are no difficulties likely to be encountered in the management of the action as a class action.
  - c. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would confront the defendant with incompatible standards of conduct.
  - d. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

- e. This Court is an appropriate forum for the litigation of the claims of the Class.
- f. In view of the complexities of the issues and the expenses of litigation, the separate claims of individual Class members are not sufficient in amount to support separate actions; and

It is further

ORDERED, that Plaintiff Donald Brophy is certified as Class representative; and

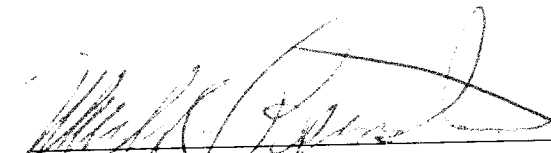
it is further

ORDERED, that the firm of Feldman, Shepherd, Wohlgelernter, Tanner, Weinstock & Dodig, shall serve as Class Counsel; and it is further

ORDERED, that Plaintiff shall submit a proposed form of notice to the Class within thirty (30) days of entry of this Order.

Discovery for trial may commence.

BY THE COURT:



Mark I. Bernstein, J.

IN THE COURT OF COMMON PLEAS  
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

DONALD BROPHY, ET AL. : JANUARY TERM, 2004  
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**OPINION**

Plaintiffs in this lawsuit seek class action relief upon the claim that the negligent manner in which defendant Philadelphia Gas Works (“PGW”) removed mercury regulators from the homes of approximately 12,000 customers has created an unreasonable risk of mercury contamination. Although plaintiffs claim a serious and significant risk of mercury exposure in homes which have had their mercury regulators removed and a continuing threat to those customers whose regulators have yet to be removed, no testing or other sampling of homes in Philadelphia to determine the extent of this risk has ever been conducted.<sup>1</sup>

The testimony presented at the Class Certification hearing, however, revealed that sampling performed in homes in Detroit, Michigan and Chicago, Illinois, where mercury regulators had been similarly removed, found that mercury spills had occurred in 0.5% of the homes.<sup>2</sup> No analysis, sampling or testing has been performed to determine whether the spill percentages in Detroit and Chicago are comparable to Philadelphia, or whether Philadelphia personnel were more or less careful in performing the removal or more or

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1. No testing has ever been done to determine whether the named representative plaintiff’s own home has any detectible mercury.

2. It is understood that the .5% results obtained in Detroit and Chicago did not include those homes where removal personnel knew of a spill, reported it and appropriately performed prompt and timely clean up.

less diligent in reporting minor spills. If the Philadelphia experience is comparable, 60 homes have had previously undiscovered mercury spilled during removal. Defendant PGW knows of and has cleaned 33 homes where mercury spills occurred and were reported by removal personnel.

It is clear that all members of the removal Class present the exact claim and all members of the Class of people whose mercury regulator remain to be removed likewise present identical claims.

Donald Brophy filed this action against Philadelphia Gas Works ("PGW") and Philadelphia Facilities Management Corporation (referred to collectively as "Defendant"), concerning Defendants' removal of gas regulators from homes in Philadelphia. Many homes in Philadelphia contain PGW gas regulators with mercury. These regulators contain approximately 135 grams (or two teaspoons) of liquid mercury, a known toxic substance. Mr. Brophy claims that PGW's procedures for removing Mercury Regulators are deficient and have created an unreasonable risk of mercury released by spilling when regulators are removed. Mr. Brophy brought this action, for himself and others similarly situated to obtain testing to determine whether or not mercury was spilled when PGW removed the regulators.

Since 1980 Defendants have been replacing mercury regulators with non-mercury regulators. Over 11,000 such mercury seal gas pressure regulators have been removed and replaced with non-mercury regulators. The process of removing mercury gas regulators continues. Plaintiff seeks class certification to obtain a remedy for violations of the HFCA 35 Pa. Statute Section 620.701(a). Plaintiff seeks court ordered testing of every building from which defendant removed a mercury regulator and remediation and

medical monitoring for residents of every home where the presence of mercury is detected. Plaintiff seeks these remedies as “response costs” under the HFCA.

Plaintiff seeks certification of three classes:

- (1) The “Site Testing Class” consisting of all individuals or entities who currently own or occupy property in Philadelphia from which PGW has removed a Mercury Regulator;
- (2) The “Medical Testing Class” consisting of all individuals, including but not limited to those in the Site Testing Class, who have been exposed to mercury from Defendants’ removal of a Mercury Regulator;
- (3) The “Mercury Regulatory Removal Class” consisting of all individuals or entities who currently own or occupy property in Philadelphia at which PGW has installed, but not yet removed, a Mercury Regulator.

A proposed settlement was preliminarily approved by the Court.<sup>3</sup> However, the parties appealed. The Superior Court affirmed the Trial Court’s decision. By the time of remand to the Court of Common Pleas, conditions had sufficiently changed to require renegotiation of material elements of the settlement. When no subsequent agreement could be reached, all parties agreed that a ruling on certification was required.

The Certification Hearing occurred on March 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> of 2005.<sup>4</sup> Plaintiffs called Michael Handwork, Edward Murphy, Clayton A. Bock, and Michael A. Wolfson, M.D. as witnesses at the Certification Hearing. The defense called Gary N. Bigum, Patrick Sheehan, M.D., Jeffrey Mandel, M.D., Donald Brophy and Gary Edwards. The testimony revealed that more than 11,300 Philadelphia homes have had mercury meters removed over the last 20 years. The common question presented is whether the procedure employed in these replacements threatened a release of mercury. Brophy, the Class Representative, is a member of the class having had his mercury meter removed in

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3. See Order dated March 14, 2005.

4. No decision was rendered on this Certification Hearing because prior to issuing a decision the parties filed a Petition to Approve Settlement.

1997 and remains as a member of the class due to the uncertainty as to whether or not any mercury had been released during the replacement.<sup>5</sup> The defense claims that 98.2% of all homes had successful removal without any release.<sup>6</sup> Accordingly, the defense concedes that 1.8% of the homes had an unreported release of mercury, an acknowledged hazardous substance. 1.8% of 11,300 homes, which have thus far had their regulator replaced, is 203. Accordingly, the defense concedes that 203 homes have had toxic substances released into their homes as a result of the PGW removal program.

The removal of the regulators and the resulting spills fall under the Pennsylvania Hazardous Sites Cleanup Act.<sup>7</sup> 35 P.S. § 6020.702 says: “A person who is responsible for a release or threatened release of a hazardous substance from a site as specified in section 701 is strictly liable.” 35 P.S. § 6020.701 says: “[A] person shall be responsible for a release or threatened release of a hazardous substance from a site when any of the following apply... The person generates, owns or possesses a hazardous substance and arranges by contract, agreement or otherwise for the disposal, treatment or transport for disposal or treatment of the hazardous substance.” Mercury qualifies as a hazardous substance under the Act. The definition of “hazardous substance” in 35 P.S. § 6020.103 includes: “defined or designated as a hazardous substance pursuant to the Federal Superfund Act.” The definition of “hazardous substance” in the Federal Superfund Act, part of the Comprehensive Environmental Response, Compensation, and Liability Act, includes “any hazardous air pollutant listed under section 112 of the Clean Air Act.” 42 U.S.C. 103 § 9601. The Clean Air Act, 42 U.S.C. 7412, lists mercury under “hazardous air pollutants.”

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5. No testing has been performed on Mr. Brophy’s house.

6. N.T. March 3, 2005, page 25.

7. 35 P.S. § 6020.101, et. al.

## Discussion

The sole issue before this court is whether the prerequisites for certification are satisfied. The purpose behind class action suits is “to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate.” DiLucido v. Terminix Intern, Inc., 676 A.2d 1237, 1239 (Pa. Super. 1996). For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;
- (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]

a) Where monetary recovery alone is sought, the court shall consider

- (1) whether common questions of law or fact predominate over any question affecting only individual members;
- (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
- (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of:
  - (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
  - (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to

the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden “is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made.” Cambanis v. Nationwide Ins. Co., 501 A.2d 635, 637 (Pa. Super. 1985). The moving party need only present evidence sufficient to make out a *prima facie* case “from which the court can conclude that the five class certification requirements are met.” Debbs v. Chrysler Corp., 810 A.2d 137,153-154 (2002) (quoting Janicik v. Prudential Ins. Co., 451 A.2d 451, 455 (Pa. Super. 1982).

In other contexts, the *prima facie* burden has been construed to mean “some evidence,” “a colorable claim,” “substantial evidence,” or evidence that creates a rebuttable presumption that requires the opponent to rebut demonstrated elements. In the

criminal law context, “the *prima facie* standard requires evidence of the existence of each and every element.” Commonwealth v. Martin, 727 A.2d 1136, 1142 (Pa. Super. 1999), *alloc. denied*, 745 A.2d 1220 (1999). However, “The weight and credibility of the evidence are not factors at this stage.” Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001).

In the family law context, the term “‘*prima facie* right to custody’ means only that the party has a colorable claim to custody of the child.” McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. 2000). Similarly, in the context of employment law, the Commonwealth Court has opined that a *prima facie* case can be established by “substantial evidence” requiring the opposing party to affirmatively rebut that evidence. *See, e.g., Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm.*, 512 A.2d 1339 (Pa. Commw. 1986).

Courts have consistently interpreted the phrase “substantial evidence” to mean “more than a mere scintilla,” but evidence “which a reasonable mind might accept as adequate to support a conclusion.” SSEN, Inc., v. Borough Council of Eddystone, 810 A.2d 200, 207 (Pa. Commw. 2002). In Grakelow v. Nash, 98 Pa. Super. 316 (Pa. Super. 1929), a tax case, the Superior Court said: “To ordain that a certain act or acts shall be *prima facie* evidence of a fact means merely that from proof of the act or acts, a rebuttable presumption of the fact shall be made;...it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question.”

Class certification is a mixed question of fact and law. Debbs v. Chrysler Corp., 810 A.2d 154 (Pa. Super. 2002). The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707 (c). In determining whether the

prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs' right to recover are excluded from consideration. 1977 Explanatory Comment to Pa. R. Civ. P. 1707. Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, "courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice." Janicik, 451 A.2d at 454,455. Accordingly, this court must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

"The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden." Professional Flooring Co. v. Bushar Corp., 61 Pa. D&C 4<sup>th</sup> 147, 153, 2003 WL 21802073 (Pa. Com. Pl. Montgo. Cty. Apr. 14, 2003), citing Debbs v. Chrysler Corp., 810 A.2d 137, 153-54 (Pa. Super. 2002); Janicik v. Prudential Inc. Co. of America, 451 A.2d 451, 455 (Pa. Super. 1982). *See also* Baldassari v. Suburban Cable TV Co., 808 A.2d 184, 189 (Pa. Super. 2002); Cambanis v. Nationwide Insurance Co., 501 A.2d 635 (Pa. Super. 1985). The *prima facie* burden of proof standard at the class certification stage is met by a qualitative "substantial evidence" test. The burden of persuasion and the risk of non-persuasion however, rests with the plaintiff.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action. Weismer by Weismer v. Beech-Nut

Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). *See also* Janicik, 451 A.2d at 454, *citing and quoting* Esplin v. Hirschi, 402 F.2d 94, 101 (10<sup>th</sup> Cir. 1968) (“in a doubtful case... any error should be committed in favor of allowing the class action”).

Likewise, the Commonwealth Court has held that “in doubtful cases any error should be committed in favor of allowing class certification.” Foust v. Septa, 756 A.2d 112, 118 (Pa. Commw. 2000). This philosophy is further supported by the consideration that “[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied.” Janicik, 451 A.2d at 454.

Within this context, the court will examine the requisite factors for class certification.

### **I. Numerosity**

To be eligible for certification, Appellant must demonstrate that the class is "so numerous that joinder of all members is impracticable." Pa.R.C.P. 1702(1). A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually." Temple University v. Pa. Dept. of Public Welfare, 374 A.2d 991, 996 (1977) (123 members sufficient); ABC Sewer Cleaning Co. v. Bell of Pa., 438 A.2d 616 (1981) (250 members sufficient); Ablin, Inc. v. Bell Tel. Co. of Pa., 435 A.2d 208 (1981) (204 plaintiffs sufficiently numerous). Appellant need not plead or prove the actual number of class members, so long as he is

able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." Janicik, 451 A.2d at 456.

12,000 homes have residents who are members of the "Site Testing Class." PGW acknowledges that 1.8% of the homes where mercury regulators have been removed (203 homes) have had mercury releases as a result of the PGW removal program. 203 homes, some of which containing multiple people, presents a minimum class of well over 200 individuals constituting the "Medical Testing Class." The "Mercury Regulatory Removal Class" constitutes all homes in Philadelphia, which still have mercury regulators. The numerosity requirement of Rule 1702(1) has been met.

## **II. Commonality**

The second prerequisite for class certification is that "there are questions of law or fact common to the class." Pa. R. Civ. P. 1702(2). Common questions exist "if the class members' legal grievances arise out of the 'same practice or course of conduct on the part of the class opponent.'" Janicik, supra. 133, 451 A.2d at 457. Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all." Weismer by Weismer v. Beechnut Nutrition Corp., 615 A.2d 428 (Pa. Super. 1992). However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist. Janicik, supra. at 457.

"While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding." D'Amelio v. Blue Cross of Lehigh Valley,

487 A.2d 995, 997 (Pa. Super. 1985). In examining the commonality of the class' claims, a court should focus on the cause of injury and not the amount of alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." See Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis. Cook v. Highland Water and Sewer Authority, 530 A.2d 499, 504 (Pa. Cmwlt. 1987).

Common questions of law and fact exist. The facts surrounding each of the plaintiff's claims are the same. Every potential plaintiff either currently has a mercury regulator or has had one removed by PGW. The issues of this case are common to all potential plaintiffs. The effectiveness of the removal procedures, the appropriateness of testing, and PGW's liability are commonalities among all potential plaintiffs. The commonality requirement of Rule 1702(2) is met.

### **III. Typicality**

The third step in the certification test requires the plaintiff to show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that pursuit of their interests will advance those of the proposed class members.

DiLucido v. Terminix Intern, Inc., 676 A.2d 1237, 1242 (Pa. Super. 1996).

The claims of all potential plaintiffs arise out of PGW's removal of the regulators. Plaintiff Brophy is bringing this suit as a customer of PGW who had a regulator removed. As an individual who had the regulator removed, Brophy is capable of representing the classes in this case. All potential plaintiffs' claims are consistent with his claims and present identical and remedy issues. The typicality requirement has been satisfied.

#### **IV. Adequacy of Representation**

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class." Pa. R. Civ. P. 1702

(4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

- “(1) whether the attorney for the representative parties will adequately represent the interests of the class,
- (2) Whether the representative parties have a conflict of interest in the maintenance of the class action, and
- (3) Whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed.” Rule 1709.

“Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession.” Janicik, 451 A.2d at 458. Here, defendants do not challenge plaintiffs' counsels' skill and therefore, the court presumes that counsel is skilled in their profession.

“Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict.” Janicik, 451 A.2d at 458. Here, defendants do not present any conflicts of interest related to the plaintiffs' counsels'

representation in this case, nor is adequacy of representation seriously challenged. The Adequacy of Representation requirement of Rule 1702 (4) has been met.

## **V. Fair and Efficient Method of Adjudication**

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. Rule 1708 sets forth criteria noted above.

A class action provides a fair and efficient method for adjudication in this case. Indeed it presents the only method of adjudication, except for individual personal injury actions, for disastrous injury due to mercury exposure.<sup>8</sup> All members of the classes present common question of law and fact. Certifying the classes does not present an undue administrative burden. The buildings that still contain regulators and the buildings from which regulators have been removed are known.

This court is an appropriate forum for the litigation for the entire class. PGW serves the Philadelphia area and all potential class members are residents of Philadelphia. A class action is a fair and efficient means of litigating the claims presented.

### **1. Predominance of Common Questions of Law and Fact**

The most important requirement in determining whether a class should be certified under Rules 1702(5) and 1708(a)(1) is whether common questions of law and fact predominate over any question affecting only individual members. In addition to demonstrating the existence of common questions of law and fact, plaintiffs must also

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<sup>8</sup> It is precisely this disastrous injury due to toxic mercury exposure which plaintiff class hopes to avoid by this action.

establish that the common issues predominate. The analysis of predominance under Rule 1708(a)(1) is closely related to that of commonality under Rule 1702(2). Janick, supra. 451 A.2d at 461. The court adopts and incorporates its analysis of commonality. Common questions of law and fact exist. The requirement of predominance has been satisfied.

## **2. The Existence of Serious Management Difficulties**

Under Pa. R. Civ. P. 1708(2), a court must also consider the size of the class and the difficulties likely to be encountered in the management of the action as a class action. While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight. Problems of administration alone ordinarily should not justify the denial of an otherwise appropriate class action for to do so would contradict the policies underlying this device. Yaffe v. Powers, 454 F.2d 1362 (1<sup>st</sup> Cir. 1972). Rather, the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring. Id. (citing Buchanan v. Brentwood Federal Sav. and Loan Ass'n, 320 A.2d 117, 131 (Pa. 1974)).

Certifying the plaintiff's classes does not present serious managerial difficulties. The potential plaintiffs are identifiable as any individuals or entities in buildings that contain mercury regulator or had mercury regulators removed by PGW. Plaintiffs claim that PGW's procedures are inadequate. Whatever other management problems remain, this court will rely upon the ingenuity and aid of counsel and upon the courts plenary authority to control the action. Janicik, 305 Pa. Super. at 142, 451 A.2d 462.

a court must analyze whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate amounts. Pa. R. Civ. P. 1708(a)(6). Alternatively, the rules ask the court to analyze whether it is likely that the amounts which may be recovered by individual class members will be so small in relation to the expense and effort of the administering the action as not to justify a class action. Pa. R. Civ. P. 1708(a)(7). This criteria is rarely used to disqualify an otherwise valid class action claim. See Kelly v. County of Allegheny, 546 A.2d 608, 609 (Pa. 1988) (Trial court erred in refusing to certify a class on the grounds that the class members' average claim was too small in comparison to the expenses incurred.). However, in Klusman v. Bucks County Court of Common Pleas, 128 Pa. Cmwlth. 616 (Pa. Cmwlth. 1989), the court refused to certify a class whose average recovery would have been \$3.55. The Commonwealth Court said: "Where the issue of damages does not lend itself to a mechanical calculation, but requires separate mini-trials of a large number of individual claims, courts have found that the staggering problem of logistics make the damage aspect of the case predominate and renders the class unmanageable as a class action. State of Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309 (5<sup>th</sup> Cir. 1978).

The amounts which may be recovered by individual class members are insufficient to warrant individual actions unless catastrophic injury occurs. The costs of medical testing and testing for mercury levels in homes is under one thousand dollars per plaintiff. A proposed settlement, which was preliminarily approved by the Court on March 14, 2005, contained mercury testing provisions for individuals at a cost of only

\$300 per plaintiff. Separate claims cannot be pursued except if catastrophic injuries, which this lawsuit is intended to present, do in fact occur.

Having weighed the Rule 1702 requirements, this court finds that a class action is a fair and efficient method for adjudicating plaintiff's claim and an appropriate Order is issued herewith.

### **Conclusions of Law**


1. The class is sufficiently numerous that joinder of all its members is impracticable.
2. There are questions of law and fact common to the class.
3. The claims of Plaintiff are typical of the class claims.
4. Plaintiffs will fairly and adequately assert and protect the interests of the class.
5. Allowing class claims provides a fair and efficient method for adjudication of the criteria set forth in Pa. R. Civ. P. 1708.


### **CONCLUSION**

For these reasons, this court grants Plaintiffs' Motion for Class Certification. Plaintiffs' counsels are appointed as counsel for the Class. The parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order.

A contemporaneous order consistent with this Opinion is filed.

BY THE COURT:

  
Date

  
Mark I. Bernstein, J.