

## Class Certification Denied in Plant Explosion Case

December 20, 2011 by [Sean Wajert](#)

A Massachusetts federal court last week declined to certify a class in a suit against chemical company Ashland Inc., in a dispute over a factory explosion. [Riva et al. v. Ashland Inc.](#), No. 1:09-cv-12074 (D. Mass.).

Plaintiffs alleged that the defendant negligently maintained certain highly explosive chemicals at a Danvers, MA, facility in such a way that caused an explosion in 2006. At the time of the explosion, Ashland was the primary provider of chemicals to C.A.I., a manufacturer of commercial printing inks, and Arnel Co., Inc. a manufacturer of paint products. C.A.I. and Arnel both operated from the Danvers facility. There was an incident that destroyed the Danvers facility and caused property damage to the surrounding Danversport community. The named plaintiffs claimed that Ashland, among other things: did not inquire or determine whether C.A.I. or Arnel had a license or permit to maintain the quantities and types of chemicals Ashland provided; failed to warn about the scope and magnitude of the explosive risks and hazards of the chemicals and chemical mixtures that it was providing; delivered chemicals into inappropriate containers and vessels. Ashland prepared a vigorous defense. Plaintiffs sued under theories of strict liability, negligence, nuisance, and breach of implied warranty of merchantability.

As is typical with mass disasters, multiple law suits were filed, including a *Borelli* matter. Ashland was not named as a defendant in *Borelli* or in any of the additional suits brought against C.A.I., Arnel and its insurers. In connection with the *Borelli* action, certain households and businesses in the Danversport area in close proximity to the site of the explosion created the Danversport Trust for the benefit of those whose real estate Property was directly impacted by the explosion and fire at the Danvers facility. The state court eventually certified the *Borelli* class and approved a comprehensive settlement agreement. It gets a little complicated because not all *Borelli* class members were Trust beneficiaries, and the settlement agreement also contained an indemnification provision which applied to Trust beneficiaries and certain other settling parties, but not all of them. Specifically, this indemnification provision did not require *Borelli* class members who were not in the Trust or in a "Subrogated Group" of claimants to indemnify the released defendants from future claims. Rather, the settlement agreement provided that the remaining *Borelli* class members expressly reserved the right to initiate individual, class, or collective actions against any or all non-released parties.

And that is how this case came to be filed against Ashland. *Borelli* class members, including the named plaintiffs in the present action, received compensation resolving their claims in that matter. Named plaintiff Riva alleged that her residence and personal property in Danvers were destroyed by the explosion. Although Riva was not a Trust beneficiary, she was a member of the *Borelli* class and received money from the Claims Review Committee to resolve her claims in that matter. Named plaintiff Corrieri alleged that his uninsured boat was damaged in the explosion while it was stored at Liberty Marina in Danvers. Corrieri was neither a Trust beneficiary nor was he asserting individual claims for damages to real property. He

received a settlement payment in the prior class action for damage to the same boat for which he now asserted claims against Ashland.

The plaintiffs moved for class certification, and the court's analysis focused on the typicality and adequacy prongs, particularly in light of the prior class settlement.

The requirements of typicality and adequacy focus on the class representatives, Fed. R. Civ. P. 23(a)(3) & 23(a)(4), and in the eyes of some courts “tend to merge.” *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 22 (D. Mass. 2008). Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” The class representatives’ claims are “typical” when their claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory. The class members’ claims here did appear to arise from the same event (the accident), but despite these similarities, the court found that the named plaintiffs had not shown that their interests in proving liability were aligned with those of the class to meet the typicality requirement.

The indemnification provision of the prior settlement required the “Subrogated Group” and Trust beneficiaries to individually defend, hold harmless, and indemnify C.A.I. for any and all claims in the nature of third-party claims for indemnity or contribution which might be brought by Ashland. Since Ashland, a non-released party, had indeed brought a third-party claim for indemnification and contribution against C.A.I., a released party in *Borelli*, the impact of this indemnification provision on class members who were Indemnitors (i.e., Trust beneficiaries or members of the Subrogated Group), was in the eyes of the court a “live issue in this case.” The indemnification provision did not apply to the other class members who are neither Trust beneficiaries nor members of the Subrogated Group. So the indemnification provision could affect the Indemnitor and non-Indemnitor class members differently, i.e., if the case was certified as a class action and the class prevailed, the Indemnitors in the class could become obligated to indemnify C.A.I., but other class members would not.

The court predicted that a substantial number of putative class members would be Indemnitors. But the named plaintiffs were all non-Indemnitors and therefore would not be bound by the indemnification provision. As non-Indemnitors, the named plaintiffs had a clear interest in proving Ashland’s liability and maximizing damages. The majority of the class, the Indemnitors, on the other hand, would not have the same goal since, according to the indemnification provision, they might be required to pay certain damages over to C.A.I. Thus, it could not be said that the interests of the class representatives were typical of the class in this respect.

The adequacy requirement demands a similar inquiry into whether the putative representative plaintiff’s interests are aligned with other class members and whether the plaintiff is in a position to vigorously protect the class’ interests. Adequacy requires that the representative parties will fairly and adequately protect the interests of the class. To be adequate class representatives, plaintiffs must show that: (1) the interests of the representative party will not conflict with the interests of the class members; and (2) counsel chosen by the representative

party is qualified, experienced and able to vigorously conduct the proposed litigation. Here, an apparent conflict of interest exists between the non-Indemnitors (i.e., the named plaintiffs) and the Indemnitors (i.e., most of the class). The Indemnitors' interest in shielding themselves from liability over indicated they would pursue tactics contrary to the named plaintiffs' objectives in both proving liability and maximizing all kinds of damages against Ashland.

The court noted that the fact that the class representatives have suffered the same injury as the Indemnitors and non-Indemnitors in the class was insufficient to show that the adequacy requirement was met. Class representatives must also "possess the same interests" as other class members.

Class certification denied.