

ANSWER TO QUESTION NO. 12

1. Jurisdiction of civil claims lies with the circuit court. MCL 600.604. MCL 600.1629 provides for where venue lies in a tort action. Specifically, pursuant to MCL 600.1629(1)(a), venue lies in the county in which the original injury occurred if the defendant resides, has a place of business, conducts business, or has a corporate registered office in that county.

A proper analysis includes identification of the actual place of occurrence of the damage or injury that gives rise to the plaintiffs' cause of action. Here, the proper answer, with the limited facts given, is that the injury occurred with the exposure to lead in Happy Heights County.

Smelly Smelter conducts business in Happy Heights County satisfying MCL 600.1629(1)(a)(i). The attorney should advise his clients that he is filing the complaint in Happy Heights County circuit court.

2. In Michigan, the prerequisites for certifying a class are listed in MCR 3.501(A)(1)(a)-(e). The prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority. *Henry v Dow Chemical Company*, 484 Mich 483 (2009). Once in state court, the plaintiffs are required to provide the certifying court with "information sufficient to establish that each prerequisite for class certification is, in fact, satisfied. The pleadings alone may set forth sufficient information. If not, the certifying court must look to additional information." *Id.* at 502.

The following prerequisites must be analyzed:

(1) Numerosity. Analysis of whether the class is sufficiently well-defined and a reasonable estimate of the members can be determined *Hill v City of Warren*, 276 Mich App 299 (2007). Also to consider is whether joinder of the proposed class would be impracticable. *Zine v Chrysler Corp*, 236 Mich App 261, 288 (1999). Here, the geographical area of Sara Sibling's hometown is well-defined and allowed the attorney to estimate 2,000 members which is a sufficiently large class of which joinder would be impractical.

(2) Commonality. Analysis includes whether "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class

member." *Hill v City of Warren*, 276 Mich App 299 (2007) (citations omitted). Here, the different years and lengths of exposure to residents at different ages, coupled with the variety in the health issues would require evidence unique to each class member so commonality is not present. An acceptable analysis could conclude that the property damage claims of loss of property value may be considered common enough to satisfy this prong of class certification but because of differing valuations, age of homes, repairs undertaken over the years, etc., it is likely this factor is not satisfied.

() **Typicality.** Analysis of whether the class members' claims share a legal theory and a "core of allegation." *Hill v City of Warren*, 276 Mich App 299 (2007) (citations omitted). Here, the members share legal theories of negligence, nuisance, and trespass because of the release of lead into the neighborhood surrounding the smelter.

(4) **Adequacy.** Analysis of whether the named plaintiff's counsel is qualified to sufficiently pursue the putative class action and whether the members of the class may not have antagonistic or conflicting interests. *Neal v James*, 252 Mich App 12, 22 (2002) (citations omitted). A fair analysis here is that because the attorney had previously and successfully handled an asbestos class action and immediately undertook the appropriate investigation, the attorney is qualified. There is no suggestion in the hypothetical that the proposed members have antagonistic or conflicting interests.

(5) **Superiority.** Analysis of whether a class action, rather than individual suits, would be the most convenient way to decide the legal questions presented. It is a practicality test and a question of "convenient administration of justice." *Hill v City of Warren*, 276 Mich App 299 (2007) (citations omitted). Because the claims are so fact specific, requiring different medical testimony for each injury or ailment, a class action may not be a superior way to promote the convenient administration of justice.

Here, the attorney should advise his clients that even though the prerequisites of numerosity, typicality, and adequacy likely would be satisfied, it is unlikely that the plaintiffs could have a class certified because of the lack of commonality in both the personal injury and property damage claims, and arguably because of the lack of superiority.

3. The attorney should explain to his clients that, if the class is certified, the next step would be to satisfy the requirements for notifying the class as provided in MCR 3.501(C):

(1) Notice shall be given to persons who are included in the class. Here, all residents of the neighborhood from 1970 to present;

(2) Plaintiff is responsible for making the proposal regarding notification in the motion for certification or state reasons why the determination cannot be made and offer a proposal of when it should be made;

(3) The court shall determine how, when and by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent; and,

(4) The plaintiff bears the cost of notification.

4. The defendant could file a counterclaim against Sara Sibling even if the class was certified. MCR 3.501(H) provides that counterclaims may be filed as in any other action against the class or an individual class member. There is no limitation on the type of counterclaim or the type of recovery sought. *Adair v City of Detroit*, 198 Mich App 506 (1993). Thus, the proper answer would be that a counterclaim can be filed against Sara as she is the only plaintiff, the class not being certified.