

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| IN RE: WELDING FUME PRODUCTS      | ) | Case No. 1:03-CV-17000         |
| LIABILITY LITIGATION              | ) |                                |
|                                   | ) | (MDL Docket No. 1535)          |
| _____                             | ) |                                |
|                                   | ) | Honorable Kathleen M. O'Malley |
| This Document Relates To:         | ) |                                |
|                                   | ) |                                |
| <i>Steele v. A.O. Smith Corp.</i> | ) |                                |
|                                   | ) |                                |
| _____                             | ) |                                |

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants submit this Notice of Supplemental Authority in opposition to plaintiffs' motion for certification of a medical monitoring class.

As set forth below, the Appellate Division of the Superior Court of New Jersey recently issued a decision in *Buynie v. Airco, Inc.*, Dkt. No. A-3193-05T1, 2007 WL 2275013 (N.J. Super. App. Div. Aug. 10, 2007) (attached as Ex. 1), supporting defendants' position that plaintiffs' proposed medical monitoring class is uncertifiable because individual variations among the putative class members' claims would overwhelm any common questions of fact or law. The *Buynie* decision bears directly on this case, both because plaintiffs have moved for medical monitoring on behalf of a class of New Jersey plaintiffs (*see* Am. Compl. ¶¶ 261-267) and because the Court has expressed concern about the supposed disparity in federal and state court treatment of proposed medical monitoring class actions. (Tr. 220:9-13, Apr. 24, 2007 ("state after state after state is certifying these class actions. So what my problem is is why do the individualized issues you point to not prevent those certifications?").)

In *Buynie*, plaintiffs sought to certify a medical monitoring class of workers employed by

a single manufacturer of polyvinyl chloride products at a single plant. Plaintiffs claimed that, as a result of their exposure to vinyl chloride, they were put at an increased risk for certain diseases, including brain and liver cancer, and therefore required medical monitoring. *See Buynie*, 2007 WL 2275013, at \*1. The trial court rejected plaintiffs' certification motion, finding that the proposed class was not cohesive because, *inter alia*, the requested medical monitoring relief would require an examination of each plaintiff's exposure history. *Id.* at \*3. The New Jersey Appellate Division affirmed the denial of class certification because: (1) the proposed class lacked the cohesiveness required for class certification; (2) plaintiffs had not demonstrated that the monitoring program they sought would be effective; and (3) plaintiffs could not establish that every proposed class member had the same need for medical monitoring above and beyond what would normally have been prescribed.

The proposed medical monitoring class in this case fails for the same reasons.

*First*, the *Buynie* court found that individualized issues related to each plaintiff's exposure barred a finding of cohesiveness. In its decision, the New Jersey Appellate Division held that the "absence of the requisite cohesion" for class certification "is manifest when we examine the nature of the [medical monitoring] remedy sought by plaintiffs." *Id.* at \*6. As the court recognized, the question "whether medical intervention in the form of a medical surveillance program is reasonable depends on several factors, including the likelihood of disease, the significance and extent of exposure to a toxic substance, the toxicity of the substance, the seriousness of the diseases associated with exposure to the substances, and the value of early diagnosis." *Id.* According to the court, these factors are highly individualized in industrial exposure cases, where "the exposure history and the personal habits that bear on causation vary so markedly within the class that the proposed class lacks the requisite cohesion

to allow the matter to proceed.” *Id.* The same is true here. As set forth in more detail in defendants’ prior briefing, in order to succeed on their medical monitoring claims, each purported class member would have to establish – among many other things – that he or she was overexposed to welding fumes as a result of defendants’ conduct and that he or she sustained a significantly increased risk of neurological injury over what might have been suffered absent welding fume exposure. This inquiry will inevitably vary from class member to class member because each welder’s exposure to welding fumes depends on the specific circumstances of his or her welding work. Similarly, each welder’s claimed risk of injury varies according to his or her personal risk factors, medical history, and family history. As a result, the proposed class in this case, just like the class in *Buynie*, “lacks the requisite cohesion” necessary for certification. *Id.*

Indeed, the medical monitoring class proposed here is even less cohesive than the class rejected in *Buynie*. In that case, the court upheld the denial of class certification even though the potential class members were all exposed to vinyl chloride *at a single plant* in New Jersey. *See id.* at \*2. Here, in contrast, plaintiffs seek certification of a single nationwide class of thousands of welders who claim exposure to welding fumes from numerous different products at *thousands of different locations operated by thousands of different employers*. If the *Buynie* plaintiffs lacked the necessary cohesion for class certification, there is no way that the plaintiffs in this case can make it over that critical class certification hurdle.

*Second*, the New Jersey court also rejected the proposed class in *Buynie* because plaintiffs could not prove that an effective medical monitoring program could be devised. *Id.* at \*7. According to the New Jersey appellate court, plaintiffs’ experts were unable to establish that there was an effective medical monitoring program capable of detecting and preventing the

illnesses allegedly caused by vinyl chloride exposure. *Id.* at \*8. Moreover, plaintiffs' experts testified that there was "no known screening test for early detection" of some of the injuries alleged. *Id.* at \*7. In addition, because some of the alleged injuries had a high rate of mortality, there was evidence that "early detection [of injury] is not likely to alter the outcome." *Id.* In this case, just as in *Buynie*, plaintiffs are unable to prove "that the relief they seek can be fashioned to meet the needs of the purported class." *Id.* For starters, plaintiffs have not been able to show that their proposed medical monitoring regime would actually be able to diagnose the neurological conditions for which they claim increased risk. (*See* Decl. of Paul Moberg and Paul Lees-Haley at 4 (plaintiffs offer no guidelines to determine whether any proposed neuropsychological testing has any degree of sensitivity or specificity in either detecting a current neuropsychological deficit or in predicting any health outcome in the future).) Moreover, even if early detection of the alleged neurological injuries plaintiffs attribute to welding exposure were possible, plaintiffs have not established that there is any medical benefit to early detection. Indeed, plaintiffs cannot even demonstrate on a classwide basis that welders diagnosed with neurological disorders would seek medical treatment if the Court were to authorize medical monitoring in this case. As defendants have previously noted, approximately 70 percent of welders diagnosed with neurological injury at plaintiffs' screenings never sought follow-up care. Thus, plaintiffs cannot possibly prove the benefits of monitoring on a classwide basis.

*Third*, the New Jersey Appellate Division indicated that individual issues related to each proposed class member's need for the requested monitoring also precluded certification. The court noted that the record in that case demonstrated that the risk of liver cancer "is not confined solely to plaintiffs' occupational exposure and that personal habits, such as alcohol use, and personal medical history, such as a history of hepatitis, enhance the risk of liver damage."

*Buynie*, 2007 WL 2275013, at \*8. According to the Appellate Division, “[t]hese facts raise not only individual causation issues, but also demonstrate that a separate screening program to detect liver injury is not required” for the entire class. *Id.* As defendants explained in their briefing and at oral argument, the same is true here. One of the many reasons that welding plaintiffs’ medical monitoring claims cannot proceed on a classwide basis is that each welder’s supposed need for medical monitoring above and beyond what would normally be prescribed varies. Just as in *Buynie*, each welder’s claimed risk of neurological injury varies according to that individual’s welding habits. In addition – as explained in defendants’ prior briefing – because some welders likely have pre-existing risk factors for neurological injury wholly unrelated to their exposure to welding fumes, or already receive neurological tests or treatment in connection with an unrelated condition, plaintiffs cannot prove that all welders have the same need for a court-ordered medical monitoring program. (*See* Defs.’ Opening Br. at 93-94 (noting that named plaintiffs suffered from numerous susceptibilities and pre-existing neurological conditions including past head injuries, back problems and stroke).)

For these reasons, and all the reasons set forth in defendants’ prior briefing, defendants respectfully urge the Court to deny plaintiffs’ motion for class certification.

Dated: August 22, 2007

Respectfully submitted,

s/ John H. Beisner  
John H. Beisner  
Stephen J. Harburg  
Jessica Davidson Miller  
O’MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, DC 20006-4001  
(202) 383-5300

COUNSEL FOR DEFENDANTS A.O.  
SMITH CORPORATION, THE BOC  
GROUP, INC., F/K/A AIRCO, INC.,

BOHLER THYSSEN WELDING USA,  
INC., THE ESAB GROUP, INC.,  
EUTECTIC CORPORATION, HOBART  
BROTHERS COMPANY, THE LINCOLN  
ELECTRIC COMPANY, LINCOLN  
GLOBAL, INC., PRAXAIR, INC., TDY  
INDUSTRIES, INC., UNION CARBIDE  
CORPORATION AND CBS  
CORPORATION F/K/A VIACOM. INC.  
SUCCESSOR BY MERGER TO CBS  
CORPORATION F/K/A  
WESTINGHOUSE ELECTRIC  
CORPORATION