IP 00-0718-C H/K Ostler v. Level 3 Comm.
Judge David F. Hamilton Signed on 8/27/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

OSTLER, JERRY L., OSTLER, PATRICIA A., FLORA, GEORGE R., FLORA, PEGGY J., RUCH, OTIS E., RUCH, DONNA S., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, vs. LEVEL 3 COMMUNICATIONS, INC., LEVEL 3 COMMUNICATIONS, LLC, LEVEL 3 TELECOM HOLDINGS, INC., Defendants.	CAUSE NO. IP00-0718-C-H/?

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY L. OSTLER, PATRICIA A. OSTLER, GEORGE R. FLORA, PEGGY L. FLORA, OTIS E. RUCH, DONNA S. RUCH, H. LLOYD WHITIS, SALLY WHITIS, VIRGAL and CAROL SHAFFER, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 00-0718-C H/K
LEVEL 3 COMMUNICATIONS, INC., a Delaware corporation, LEVEL 3 COMMUNICATIONS, LLC, a Delaware limited liability corporation, and LEVEL 3 TELECOM HOLDINGS, INC., a Delaware corporation,	)	
Defendants.	)	

ENTRY ON MOTION FOR CLASS CERTIFICATION

Defendant Level 3 Communications, Inc. and related entities installed about 465 miles of buried fiber optic cable near or in rights-of-way for public roads in several counties in Indiana. Plaintiffs Jerry and Patricia Ostler, George and Peggy Flora, Otis and Donna Ruch, H. Lloyd and Sally Whitis, and Virgal and Carol Shaffer own land adjacent to roads along which Level 3 laid its cable.

Plaintiffs contend that Level 3 violated their property rights by laying cable on land that belongs to them, where Level 3 has no legal authority to lay its cable. In this diversity action, plaintiffs have asserted claims against Level 3 for trespass, slander of title, unjust enrichment, and statutory conversion. Plaintiffs seek monetary and declaratory relief under Indiana law.

Plaintiffs have moved to certify a statewide plaintiff class of landowners who live along Level 3's fiber optic cable corridor in Indiana. For the reasons explained below, the plaintiffs' motion for class certification is denied. Under the principles announced in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002), and *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001), the plaintiffs' proposed class does not satisfy Federal Rule of Civil Procedure 23(b)(3) because individual questions about the property owners' and Level 3's respective property rights predominate over common questions of law and fact. Also, a class action is not superior to other available methods for the fair and efficient adjudication of this controversy. No other portion of Rule 23(b) applies to this action because the damages plaintiffs seek are not merely incidental to other relief they seek.

Factual Background

Level 3 has constructed a nationwide telecommunications cable network, including approximately 465 miles of fiber optic cable in Indiana. Level 3 claims that it obtained permits to install its cable from the relevant authorities, including the Indiana Department of Transportation and individual county highway departments. Indiana law authorizes public utilities to install their equipment along public roads as long as they obtain proper permits to do so, and so long as they do not interfere with the public use of the road. Ind. Code §§ 8-20-1-28 & 8-23-6-6.

The plaintiffs contend that the permits from state and county authorities could not and did not authorize Level 3 to install fiber optic cable beyond the scope of the rights-of-way. According to the plaintiffs, absent a conveyance to or condemnation by the State of Indiana, a public right-of-way is limited to the traveled portion of the road. See, *e.g.*, *Contel of Indiana, Inc. v. Coulson*, 659 N.E.2d 224 (Ind. App. 1995). Thus, under plaintiffs' theory, the right-of-way would not include the land to the side of the road where Level 3 has installed cable, even if that land lies within the apparent right-of-way of the road, such as areas between the paved road surface and fences or utility poles along the road.

Discussion

To certify a class under Rule 23, plaintiffs must first satisfy all four elements of Rule 23(a): (1) the class is too numerous to join all members; (2) there are questions of law or fact common to the class; (3) the claims or defenses of representative parties are typical of those of the class members; and (4) the representative parties will fairly and adequately represent the class. Fed. R. Civ. P. 23(a). Once these requirements are satisfied, the plaintiffs must also satisfy at least one of the subsections of Rule 23(b). The parties seeking class certification bear the burden of proof in establishing each of the requirements under Rule 23. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977). A plaintiff's failure to satisfy any one of these elements precludes certification. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

In deciding whether to certify a class, the court is not required to accept the allegations in the complaint as true. The court should make any factual and legal inquiries that are needed to ensure that the prerequisites and requirements for class certification are satisfied, even if the underlying considerations overlap the merits of the case. See *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001); *In re Bromine Antitrust Litigation*, 203 F.R.D. 403, 407 (S.D. Ind. 2001).

The plaintiffs initially sought to define a class in terms of all adjoining landowners in Indiana whose property rights were violated by Level 3's installation of fiber optic cable.[1] Defendants objected to the proposed class as too indefinite.

The plaintiffs' original proposed class would have been an impermissible "fail-safe" or "one-way intervention" class because the definition based class membership on the ability to bring a successful claim on the merits. See *Isaacs*, 261 F.3d at 681-82. Such a definition is inconsistent with Rule 23(c)(3), which provides in part that a judgment adverse to the class will bind all class members. *Id.*, citing *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999).

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[1]Plaintiffs initially offered the following language to define the class:

> All current owners of land in the State of Indiana (the "burdened land") which (1) adjoins a highway or other road which LEVEL 3 has entered and installed or intends to enter to install or maintain fiber optic cable on the property outside the traveled portion of the highway or other road without obtaining the consent of the landowner and without payment of compensation to the landowner, and (2) which lies outside the defined boundaries of a valid right-of-way and on which LEVEL 3 has entered to install or intends to install or maintain its fiber optic cable without obtaining the consent of the landowner and without payment of compensation to the landowner.

Pl. Mem. at 3.

Where such a decision on the merits of a person's claim is needed to determine whether a person is a member of a class, the proposed class action is unmanageable virtually by definition. See *Noon v. Sailor*, 2000 WL 684274, *4 (S.D. Ind. March 14, 2000) (denying certification of class defined as any arrestee subjected to a strip search under circumstances rendering the search unconstitutional); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S. D. Ind. 1997) (denying certification where determining class membership would require individualized determination on the merits of each claim); *Indiana State Employees Ass'n v. Indiana State Highway Comm'n*, 78 F. R. D. 724, 725 (S.D. Ind. 1978) (same); *Dafforn v. Rousseau Associates, Inc.*, 1976-2 Trade Cas. ¶ 61,219, 1976 WL 1358 (N.D. Ind. 1976) (denying certification of proposed fail-safe class defined as all persons who paid illegally fixed brokerage fees); see also *Adashunas v. Negley*, 626 F. 2d 600, 604 (7th Cir. 1980) (affirming denial of class certification where class was unmanageable; determining whether any individual child was a member of proposed class would require extensive battery of educational and psychological tests).

In response to defendants' objection, plaintiffs have proposed certification of the following class:

> All current owners of land in the State of Indiana which adjoins a highway or other road where LEVEL 3 has entered and installed or

> maintained, or intends to enter and install or maintain, fiber optic cable on the roadway or on the adjoining property.

Pl. Reply Br. at 30. In response to plaintiffs' redefinition of the class to avoid the fail-safe or one-way intervention problem, defendants object that the revised class is now over-inclusive because it includes persons without standing to sue. Although defendants use the jurisdictional term "standing," defendants really mean only that they believe they can easily defeat claims by many members of the proposed class because those members will not be able to show a fee simple interest in the relevant portion of the right-of-way. See Def. Surreply Br. at 2-3. The short and practical answer to this objection is that defendants cannot have it both ways. Defendants were right the first time, when they objected to the fail-safe class. As long as the proposed class definition attempts a reasonably close fit to those persons believed to have valid claims, the fact that not all members will have valid claims should not defeat class certification. The court considers the plaintiffs revised class definition under Rule 23(a) and then Rule 23(b).

A. *Rule 23(a) Requirements*

1. *Numerosity*

To meet the numerosity requirement, the class must be so large "that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no

magic number needed, and a plaintiff need not demonstrate the exact number of class members so long as a conclusion is apparent from good-faith estimates. See *Peterson v. H & R Block Tax Serv.*, 174 F.R.D. 78, 81 (N.D. Ill. 1997) (court can use common sense in evaluating numerosity). The defendants agree that the proposed class satisfies Rule 23(a)(1)'s numerosity requirement. Although class members have not yet been identified, under the plaintiffs' theory, the class would include at least hundreds and probably several thousand owners of property parcels alongside the 465 miles of Level 3 cable installed throughout Indiana. The proposed plaintiff class meets the numerosity requirement.

2. *Commonality*

To meet the commonality requirement under Rule 23(a)(2), a plaintiff must show the presence of questions of law or fact common to the class. "A common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). This element can be satisfied by showing that there is "at least one question of law or fact common to the class." *Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 164 F.R.D. 659, 663 (N.D. Ill. 1996). Commonality does not require that all questions of fact or law be identical as long as "the class claims arise out of the same legal or remedial theory." *Johns v. De Leonardis*,

145 F.R.D. 480, 483 (N.D. Ill. 1992); accord, *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998) (affirming class certification despite some variations: "Common nuclei of fact are typically manifest where . . . the defendants have engaged in standardized conduct towards members of the proposed class . . . ."); *Rosario,* 963 F.2d at 1017 (affirming class certification; factual variation among class members does not defeat a finding of commonality).

Plaintiffs' proposed class satisfies the commonality requirement under Rule 23(a)(2). Plaintiffs have come forward with evidence that Level 3 engaged in a common course of conduct directed toward all of the potential class members, which presents common issues of fact. Also, because the potential class members would be asserting the same causes of action against Level 3, common issues of law would be present.

3. *Typicality*

Rule 23(a) also requires plaintiffs to show that "the claims . . . of the representative parties are typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983), quoting H. Newberg, Class Actions § 1115(b) at 185 (1977).

The typicality requirement, although closely related to the question of commonality, focuses on the class representatives and whether the representatives will, by pursuing their own claims, work for the benefit of the entire class. See *In re Prudential Ins. Co. Sales Practices Litig.*, 148 F.3d 283, 311 (3d Cir. 1998); *Whitten v. ARS Nat. Services, Inc.*, 2001 WL 1143238, *4 (N.D. Ill. Sept. 27, 2001). "Typical does not mean identical, and the typicality requirement is liberally construed." *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996).

The fact that Level 3 may be able to raise different defenses against the claims of different class members does not necessarily defeat typicality. See

Riordan v. Smith Barney, 113 F.R.D. 60, 63 (N.D. Ill. 1986), citing *Coleman v. McLaren*, 98 F.R.D. 638 (N.D. Ill. 1983) ("Rule 23(a)(3) mandates the typicality of the named plaintiffs' claims – not defenses."); see also *Patrykus v. Gomilla*, 121 F.R.D. 357, 362 (N.D. Ill. 1988) ("The fact that defendants hypothetically may assert individualized defenses does not undercut the significant similarities of plaintiffs' claims.").

The typicality requirement is satisfied because the named plaintiffs' claims arise from the same alleged course of conduct by Level 3. Although the named plaintiffs are differently situated in terms of the nature and sources of their individual property rights, as discussed below, these differences do not raise questions about the plaintiffs' competence or motivation to represent the proposed class, and the differences are not so great as to defeat typicality. By pursuing their own claims, the named representatives will work for the benefit of the proposed class.

4. *Adequacy of Representation*

The final requirement under Rule 23(a) is that the named representatives fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The adequacy standard involves two elements. First, a class representative must

have a sufficient stake in the outcome to ensure zealous advocacy and must not have claims antagonistic to or conflicting with claims of other class members. Second, counsel for the named plaintiffs must be experienced, qualified, and generally able to conduct the litigation on behalf of the class. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977).

Defendants do not dispute the ability of plaintiffs' counsel to represent the prospective class. Plaintiffs' counsel in this case have extensive skill and experience in litigating class actions and, in particular, in litigating claims by landowners based on the installation of fiber optic cable along claimed easements and rights-of-way without permission of neighboring property owners.

Regarding the adequacy of representation by the named plaintiffs, defendants argue that the different sources of the plaintiffs' property rights make them inadequate representatives. The court disagrees. Although the individual questions at issue ultimately defeat class certification in this case, it is not because the named plaintiffs could not adequately represent the proposed class. There is no indication that the named plaintiffs have interests antagonistic to or conflicting with the other members of the proposed class. In addition, the court is not persuaded that having different sources of property rights would affect the

named plaintiffs' motivation to litigate the matter vigorously. The plaintiffs are fair and adequate representatives of the class under Rule 23(a)(4).

B. *Requirements of Rule 23(b)*

After satisfying Rule 23(a), plaintiffs must also satisfy the criteria of one of the subsections in Rule 23(b). Plaintiffs contend that they can satisfy Rule 23(b)(1), (2), and (3). Because they seek substantial monetary compensation, however, Rule 23(b)(3) with its opt-out procedure is best suited for this case. See *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (if money damages sought by the plaintiff class are more than incidental to equitable relief sought, district court should either certify the class under Rule 23(b)(3) for all purposes or bifurcate the proceedings – certifying a Rule 23(b)(2) class for equitable relief and a Rule 23(b)(3) class for damages); accord, *Lemon v. International Union of Operating Engineers, Local No. 139*, 216 F.3d 577, 581 (7th Cir. 2000) (claims for monetary damages in employment discrimination case were not incidental to injunctive or declaratory relief where individual hearings would be needed on entitlement to and amount of individual damages); *O'Brien v. Encotech Const. Services, Inc.*, 203 F.R.D. 346, 351 (N.D. Ill. 2001) (class certification under Rule 23(b)(2) generally not appropriate when party primarily seeks monetary relief).[2]

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[2]Rule 23(b)(1) applies to situations where the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent judgments or would, as a practical matter, be dispositive of the interests of other class members not parties to the litigation. Rule 23(b)(1) does not apply because, as discussed below, apart from precedential effects that are (continued...)

Under Rule 23(b)(3), the court must determine whether the common questions of fact or law predominate over issues affecting the individual members, and whether a class action is superior to other available methods for fair and efficient adjudication of the controversy. Relevant factors include the interests of individual class members in controlling prosecution of their cases; the extent and nature of any pending litigation of the controversy; the desirability or undesirability of concentrating the litigation in the particular forum; and the difficulties likely to be encountered in managing a class action.

All but the last of these factors weigh in favor of certification here. The monetary claims of individual class members are relatively modest, and they do

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[2](...continued)
common whenever multiple plaintiffs assert similar claims against the same defendants, the resolution of any one particular member's claims is unlikely to control other members' claims because of the different sources of the parties' property rights. There is no apparent risk of inconsistent judgments with respect to any single parcel of real estate.

In *Lemon*, the Seventh Circuit interpreted *Jefferson* and instructed district courts to consider three options when both monetary and equitable relief are sought on a classwide basis. 216 F.3d at 581-82. The first option is a Rule 23(b)(3) certification, which the court rejects for reasons explained in detail in this entry. The second option is a divided certification, under Rule 23(b)(2) for claims for equitable relief and under Rule 23(b)(3) for claims for damages. The second option would not make sense here because an individual class member's entitlement to declaratory or injunctive relief would require precisely the same inquiry on the merits that renders the Rule 23(b)(3) class unmanageable. The third option in *Lemon* is certification under Rule 23(b)(2), but with individual notice and opt-out rights for each class member. The third option offers no advantages for purposes of this case.

not appear to involve subject matter that would present powerful reasons for individual control, such as claims involving significant personal injuries. Compare, *e.g.*, *In re Dalkon Shield IUD Product Liability Litigation*, 693 F.2d 847, 856 (9th Cir. 1982) (persons pursuing personal injury claims have substantial interest in controlling litigation and in being represented by counsel of their own choosing), with *Noon v. Sailor*, 2000 WL 684274, at *3 (S.D. Ind. March 14, 2000) (finding that persons asserting claims for unconstitutional strip searches in county jail did not have strong interest in individual control of claims, but denying class certification on other grounds). In addition, there is no indication here that other cases involving class members and Level 3 are pending elsewhere. The court also believes it would be desirable for the federal and state courts generally, as well as for the parties, to have claims of the proposed class concentrated in one forum. The relatively modest value of individual claims may mean that if the litigation is not concentrated, at least for the most part, litigation costs could dwarf potential recoveries.

But the decisive factor here is whether the proposed class litigation is manageable. Plaintiffs' theory is that class members were all harmed by a common course of conduct by Level 3. Thus, plaintiffs contend that "each putative class member has virtually the same claims against Level 3 and must litigate and resolve the same issues." Pl. Mem. at 17-18. In response, the

defendants contend that individualized questions about the scope of each landowner's rights render the proposed class unmanageable because individual questions would predominate over common questions. The court agrees with defendants, at least for purposes of a litigation class, as distinct from a settlement class.

For example, the defendants have pointed out the differences between the claims of the named plaintiffs. The property of H. Lloyd and Sally Whitis adjoins a road constructed on a right-of-way granted to the State of Indiana by the Whitis' predecessors in interest. Def. Ex. 1. A determination of the Whitis' rights therefore would require: (1) a title search to locate the recorded document conveying land to the State of Indiana; (2) a legal interpretation of the particular conveyance language used in that document; and (3) a determination of the precise location of Level 3's cable. Resolution of those questions would do little to advance the resolution of other class members' claims.

In contrast, there is no recorded conveyance or easement in the chain of title of Otis and Donna Ruchs, who also own property alongside a public highway where Level 3 has installed cable. There, the highway right-of-way apparently was established by prescription. Thus, the scope of the right-of-way would be determined by the scope of the public's use. See *Contel of Indiana, Inc. v.*

Coulson, 659 N.E.2d 224, 227 (Ind. App. 1995). This determination would be fact intensive for different highways and even for different stretches of the same highway. The determination would depend on factors including the locations of INDOT right-of-way markers, the locations of fence lines, the presence of other utilities within the rights-of-way, property tax credits for the paved road and right-of-way, and other evidence of the public's regular use of areas adjacent to the paved portion of the roadway. See, *e.g.*, *Contel*, 659 N.E.2d at 228-29. Again, the results of those fact-intensive inquiries would do little to resolve claims of other class members.

There is a third scenario along the old Michigan Road, which is currently known as U.S. Highway 421. According to the defendants, that right-of-way was established long ago by a treaty between the United States and the Pottawattamie tribe. The treaty ceded to the United States a strip of land 100 feet in width for the construction of a road. Under Indiana law, each landowner adjoining Michigan Road is charged with constructive notice of the 100 foot right-of-way, even though a title search of the particular landowner's property at the county recorder's office would not reveal a recorded easement. See *McRoberts v. Vogel*, 195 N.E. 417, 418-420 (Ind. App. 1935).

The plaintiffs argue that the differences in potential class members' claims highlighted by the defendants can and should be dealt with by a claims administration process after the court has resolved common issues. Disputes in the claims administration process then would be reviewed by the court.

Two recent Seventh Circuit decisions make clear that a common course of conduct by a defendant is not sufficient to sustain a class action under Rule 23(b)(3) where the scope of prospective class members' rights depend on such extensive individual legal and factual determinations. In *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001), the Seventh Circuit reversed the certification of a nationwide class action against another set of fiber optic cable defendants. The district court had certified a class of landowners who lived next to the railroad corridors where fiber optic cable was installed. The Seventh Circuit observed:

> The case involves different conveyances by and to different parties made at different times over a period of more than a century (railroading began in the United States in the 1830s) in 48 different states (plus the District of Columbia) which have different laws regarding the scope of easements, compare *Mellon v. Southern Pacific Transport Co.*, 750 F. Supp. 226 (W.D. Tex. 1990), with *Buhl v. U.S. Sprint Communications Co.*, 840 S.W.2d 904 (Tenn. 1992) – laws moreover that have changed over the period embracing the grant of property rights to railroads, *Great Northern Ry. v. United States*, 315 U.S. 262, 273-74 (1942), and whose application involves intricate legal and factual issues illustrated by *Davis v. MCI Telecommunications Corp.*, 606 So.2d 734, 737 (Fla. App. 1992) (per

> curiam), making it unlikely that common issues predominate over individual-claim issues. See *Szabo v. Bridgeport Machines, Inc.*, supra, 249 F.3d at 677-78; *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 1302 (7th Cir. 1995); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741-44 (5th Cir. 1996).

Isaacs, 261 F.3d at 682. The court continued with the next sentence, in words this court could not ignore: "*This is a nightmare of a class action*." *Id.* (emphasis added).

One focus of *Isaacs* was the problems posed by a nationwide class for claims arising under many states' laws. But the decision has clear implications even for classes limited to one state, at least in a nearly identical case like this one. The problems of law changing over time, of grants of property rights under a host of different explicit conveyances, prescriptions, and even treaties, all governed by different statutes and common law principles, with "intricate" issues of application to a particular property, are all posed by a statewide class asserting these claims under just one state's law.

The Seventh Circuit emphasized these problems with even statewide classes in a more recent case. In *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002), the court reversed certification of a nationwide class of owners and lessees of Ford Explorers or Firestone tires that had experienced an

abnormally high failure rate, but that had so far performed properly for the class members. The class members sought compensation for the risk of injury and the related reduction of their property value. The court explained that individual questions regarding the particular tires that plaintiffs owned made a class treatment unworkable, both as a nationwide class and on a statewide basis:

> Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable. Lest we soon see a Rule 23(f) petition to review the certification of 50 state classes, *we add that this litigation is not manageable as a class action even on a statewide basis.* About 20% of the Ford Explorers were shipped without Firestone tires. The Firestone tires supplied with the majority of the vehicles were recalled at different times; they may well have differed in their propensity to fail, and this would require sub-subclassing among those owners of Ford Explorers with Firestone tires. Some of the vehicles were resold and others have not been; the resales may have reflected different discounts that could require vehicle-specific litigation. Plaintiffs contend that many of the failures occurred because Ford and Firestone advised the owners to underinflate their tires, leading them to overheat. Other factors also affect heating; the failure rate (and hence the discount) may have been higher in Arizona than in Alaska. Of those vehicles that have not yet been resold, some will be resold in the future (by which time the tire replacements may have alleviated or eliminated any discount) and some never will be resold. Owners who wring the last possible mile out of their vehicles receive everything they paid for and have claims that differ from owners who sold their Explorers to the second-hand market during the height of the publicity in 2000. Some owners drove their SUVs off the road over rugged terrain, while others never used the "sport" or "utility" features; these differences also affect resale prices.
>
> Firestone's tires likewise exhibit variability; that's why fewer than half of those included in the tire class were recalled. The tire class includes many buyers who used Firestone tires on vehicles other than Ford Explorers, and who therefore were not advised to

> underinflate their tires. (Note that this description does not reflect any view of the merits; we are repeating rather than endorsing plaintiffs' contention that Ford counseled "underinflation.") The six trade names listed in the class certification order comprise 67 master tire specifications: "Firehawk ATX" tires, for example, come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly. Plaintiffs say that all 67 specifications had three particular shortcomings that led to excess failures. But whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform. There are other differences too, but the ones we have mentioned preclude any finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

In re Bridgestone/Firestone, 288 F.3d at 1018-19 (initial emphasis added).

Similarly, here the prospective class members' claims cannot be litigated to a resolution of the merits on a class basis simply because the putative class might be able to state identical legal claims against the defendants. Because each of the property owners' claims requires an individualized determination of the owner's rights and Level 3's rights with respect to the particular parcel of land at issue, common questions do not predominate. The proposed class cannot be certified under Rule 23(b)(3).

Plaintiffs argue that this analysis of the proposed class is "upside-down," focusing improperly on individual issues first rather than on the common issues: "The only way to deal effectively and economically with hundreds or thousands of individual landowners stretched across Indiana is to treat them as a group, making broad determinations of the common issues affecting the group and implementing those decisions to effect an efficient result." Pl. Reply Br. at 5. Plaintiffs also rely on the Seventh Circuit's instruction that class actions should not be defeated "because the prospective refunder has taken so much from so many that complexities arise." *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 139 (7th Cir. 1974) .

These points have considerable force, at least in this case. In the absence of a class certification, property owners will face a choice between either abandoning their relatively modest individual claims or pursuing individual cases through some less complete form of consolidation, such as coordinated discovery, the use of test cases, and the like. As a practical matter, in the absence of a settlement on a classwide basis or some form of class certification for litigation, the denial of class certification is likely to ensure that most potential class members' claims will never be pressed at all, no matter how valid they might be as a matter of fact and law. Plaintiffs have not offered any convincing basis, however, for this court to depart from the clear messages in *Isaacs* and

Bridgestone/Firestone. Also, plaintiffs' problem is that any individual plaintiff's proof would need to start with evidence of the plaintiff's own title and with evidence of the creation of the relevant right-of-way for the public road. The evidence of each item will be specific to a single property or to a small group of properties. There is no way to avoid such individualized proof in establishing any liability on the part of Level 3.[3]

Conclusion

For the reasons discussed above, plaintiffs' Motion For Class Certification under Rule 23 is hereby denied.

So ordered.

Date: August 27, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

[3]The court's analysis of the class issue in this case would not necessarily extend to a settlement class of the same definition. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620 (1997) (citation omitted). In fact, this court has certified several statewide settlement classes in very similar cases involving fiber optic cable laid by AT&T along abandoned railroad corridors, as part of a multidistrict litigation, *In re AT&T Fiber Optic Cable Litigation*, MDL No. 1313.

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Minneapolis, MN 55402

James D. Moore
Ryan Moore Cook & Hunter
257 South Main Street
Frankfort, IN 46041

Henry J. Price
Price Potter Jackson & Mellowitz, PC
The Hammond Block Building
301 Massachusetts Avenue
Indianapolis, IN 46204

Joseph E. Jones
Fraser Stryker Vaughn Meusey Olson
Boyer & Bloch
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102

David O. Tittle
Bingham Summers Welsh & Spilman

10 West Market Street
2700 Market Tower
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