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# I. CLASS ACTIONS

## Supreme Court Holds That Federal Rule 23 Preempts New York Class Action Law

In a 5-4 ruling that may encourage plaintiffs to pursue class actions in federal rather than state courts, the United States Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure preempts a New York law prohibiting class actions that seek to recover penalties or a minimum recovery set by statute. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008 (Mar. 31, 2010), *available at* http://www.supremecourt.gov/opinions/09pdf/08-1008.pdf.

The appellant, Shady Grove Orthopedic Associates, P.A., filed a class action in federal district court in New York pursuant to the Class Action Fairness Act of 2005 ("CAFA") seeking penalties for interest on claims Allstate Insurance Co. allegedly paid late. *Shady Grove*, Slip Op. at 2, 3 n.3. Under CAFA, federal jurisdiction lies where (i) the proposed class consists of at least 100 plaintiffs, (ii) the plaintiffs are minimally diverse from the defendants (i.e., any plaintiff is a citizen of a different state from any defendant), and (iii) plaintiffs seek a minimum of $5 million in damages. 28 U.S.C. § 1332(d). Shady Grove could recover only $500 in penalties, but the aggregated amount of interest penalties for the entire class was greater than $5 million, thereby creating federal jurisdiction under CAFA. *Shady Grove*, Slip Op. at 2, 3 n.3. The New York law at issue, N.Y. Civ. Prac. Law Ann. § 901(b), prohibits class actions "to recover a penalty, or minimum measure of recovery created or imposed by statute." *Id*. at 2 n.1.

The Eastern District of New York held that § 901(b) deprived the court of jurisdiction. *Id*. at 3. The Second Circuit affirmed, finding that the two provisions did not conflict because Rule 23 addresses the certifiability of putative classes, whereas § 901(b) addresses eligibility of particular types of claims for class treatment. *Id.* The Second Circuit also noted that a federal rule adopted in compliance with the Rules Enabling Act, 28 U.S.C. § 2072, would control if it conflicted with § 901(b). *Id*. Finding no federal rule on point, the Second Circuit held that § 901(b) must be applied by federal courts sitting in diversity because it is "substantive" within the meaning of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Id*.

The Supreme Court reversed, allowing Shady Grove's suit to proceed on the grounds that the distinction between class certifiability under Rule 23 and class eligibility under § 901(b) was "entirely artificial" as "[b]oth are preconditions for maintaining a class action." *Id*. at 5. The majority further held that Rule 23 was valid under the Rules Enabling Act, which provides that the federal rules "shall not abridge, enlarge, or modify any substantive right," *id*. at 12 (citing 28 U.S.C. § 2072), because Rule 23 governs only the method of enforcing litigants' rights, at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants. *Id*. at 13–22.

Justice Stevens filed a concurrence, in which he concluded that § 901(b) was not part of New York's substantive law and therefore should not control in diversity cases under *Erie*. *Id*. at 1–22 (Stevens, J., concurring). In the dissent, Justice Ginsburg, joined by Justices Kennedy, Breyer, and Alito, noted that the majority ruling frustrates the intent of CAFA by allowing a proposed class of plaintiffs to meet CAFA's amount in controversy requirements even where state law would not, thereby making it possible to pursue class actions in federal court that would not qualify for class action status in state court. *Id*. at 1–25 (Ginsburg, J., dissenting).

## Seventh Circuit Holds *Daubert* Analysis Must Precede Class Certification Ruling

In a decision with potentially significant implications for products liability and toxic tort cases

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involving putative classes, the U.S. Court of Appeals for the Seventh Circuit vacated a district court's certification of a class, holding that the court should have rendered a decision on the admissibility of an expert opinion that was essential to class certification prior to deciding whether to certify the class. *See American Honda Motor Co. v. Allen*, No. 09-8051 (7th Cir. Apr. 7, 2010), *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=09-8051_001.pdf. In the case, a putative class of motorcycle owners claimed that a design defect caused their motorcycles to shake excessively. *American Honda*, Slip Op. at 2. The linchpin of the plaintiffs' case was an expert's report on the alleged design defect, which the defendants challenged as unreliable pursuant to *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). *American Honda,* Slip. Op. at 2–3.

The district court denied the defendant's motion to exclude the expert's testimony without prejudice and granted class certification, stating that it had serious reservations about the reliability of the expert's testimony but would not exclude the testimony at that early stage of the proceedings. *Id*. at 3–4. The Seventh Circuit allowed an interlocutory appeal to address the question of "whether a district court must resolve a *Daubert* challenge prior to ruling on class certification if the testimony challenged is integral to the plaintiffs' satisfaction of Rule 23's requirements." *Id*. at 4.

The Court of Appeals answered in the affirmative, holding that "when an expert's report or testimony is critical to class certification, as it is here, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *Id*. at 6 (internal citations omitted). In this case, the expert's testimony was necessary to show that the plaintiffs' claims were capable of resolution on a class-wide basis and that the common defect in the motorcycle predominated over the class members' individual issues. *Id*. at 7–8. The Seventh Circuit held that the district court committed reversible error when it failed to reach a conclusion about whether the expert's report was reliable enough to support the plaintiffs' class certification request and therefore vacated the certification order and remanded the case for further proceedings. *Id*. at 8, 13.

## Seventh Circuit Upholds Federal Jurisdiction Under CAFA Following Denial of Class Certification

The Seventh Circuit held that a federal court can retain subject-matter jurisdiction of a case properly removed to federal court under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), even if class certification is denied. *See Cunningham Charter Corp. v. Learjet, Inc.*, No. 09-8042 (7th Cir. Jan. 22, 2010), *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=09-8042_001.pdf. Cunningham Charter Corporation filed an action against Learjet, Inc. in Illinois state court, asserting breach of warranty and products liability on behalf of itself and other purchasers of Learjets. *Cunningham*, Slip. Op. at 1. The defendant removed the case to federal district court under CAFA, and the plaintiff subsequently sought certification of two classes. *Id.* at 1–2. The district court denied the plaintiff's motion on the ground that neither proposed class satisfied the criteria for certification set forth in Rule 23 of the Federal Rules of Civil Procedure. *Id*. at 2. The district judge then ruled that the denial of class certification eliminated subject-matter jurisdiction under CAFA and remanded the case to state court. *Id*.

The Seventh Circuit reversed, holding that denial of class certification does not deprive a court of CAFA jurisdiction established at the time of filing. *Id*. at 5–6. Writing for the majority, Judge Posner reiterated the general principle that "jurisdiction once properly invoked is not lost by developments after a suit is filed," *id*. at 4, and stressed that, if possible, a case should stay in the system that first acquired jurisdiction in order to minimize expense and delay. *Id*. at 5. The court also observed that the district court's remand would result in the continuation of the case as a class action in state court and therefore defeat the purpose of CAFA, which is to "relax[]

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the requirement of complete diversity of citizenship so that class actions involving incomplete diversity can be litigated in federal court." *Id*. at 4. In April, the Eleventh Circuit likewise held that federal court jurisdiction under CAFA does not depend upon certification of a class. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009).

## First Circuit Orders Court to Reconsider Denial of Class Certification in Oil Spill Case

The U.S. Court of Appeals for the First Circuit reversed a district court's denial of class certification for more than 1,000 waterfront property owners alleging damages from defendants' fuel-barge oil spill. *See Gintis v. Bouchard Transp. Co.*, No. 09-1717 (1st Cir. Feb. 23, 2010), *available at* http://www.ca1.uscourts.gov/pdf.opinions/09-1717P-01A.pdf. The plaintiffs sought recovery of alleged property damages under Massachusetts laws imposing both strict liability for vessel oil spills and double damages for negligent discharge of petroleum, as well as common law nuisance. *Gintis*, Slip Op. at 3. The defendants contested liability to individual plaintiffs and argued that available records would be insufficient to prove causation and damages for individual parcels. *Id*. at 4. The U.S. District Court for the District of Massachusetts denied class certification based on *Church v. General Electric Co.*, 138 F. Supp. 2d 169 (D. Mass. 2001), in which the court denied certification of a proposed class of downstream landowners seeking damages for contamination from a single defendant's toxic discharge due to parcel-by-parcel questions of injury and damages. *Gintis*, Slip. Op. at 4.

Writing for the First Circuit majority, retired Supreme Court Justice David H. Souter, clarified that *Church* "does not support a general rule that pollution torts charged against a single defendant escape class treatment," and that other courts have adjudicated multiple-plaintiff cases involving a single tortfeasor as class actions. *Id*. at 5–6. The First Circuit remanded to the district court for a more "searching" reconsideration of plaintiffs' claim that common evidence will suffice to prove injury, causation, and compensatory damages. *Id*. at 6.

According to the court, the sufficiency of the evidence is a substantive issue common to the entire proposed class and therefore may be better addressed in a single action involving the entire class. *Id*. at 7. The court also postulated that class litigation may be superior to resolve aggregated claims because individual awards may be too small to justify the litigation costs for each plaintiff. *Id*. at 8.

## District Court Rejects Certification of Medical Monitoring Class Lacking Common Level of Exposure

The U.S, District Court for the Eastern District of Pennsylvania denied certification of proposed medical monitoring and property-damage classes for plaintiffs that were unable to establish a common minimum level of exposure to vinyl chloride. *See Gates v. Rohm & Haas Co.*, No. 06-1743 (E.D. Pa. Mar. 5, 2010), *available at* http://www.paed.uscourts.gov/documents/opinions/10D0210P.pdf. Residents of McCollum Lake Village, Illinois alleged that operation of a Rohm & Haas facility contaminated a shallow aquifer with vinyl chloride, which volatilized and, they claimed, led to an increase in brain cancer among the citizens of the village. *Gates*, Slip Op. at 1–2, 21–22. To certify a class with respect to a claim for medical monitoring, plaintiffs must be able to present common proof that each member of the class was exposed to the hazardous substance at a level (i) greater than background levels, and (ii) sufficient to significantly increase each plaintiff's risk of contracting a latent disease. *Id*. at 20–24, 33.

The court's denial focused on the plaintiffs' failure to satisfy Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires that questions of law or fact common to class members predominate over questions affecting only individual members. Plaintiffs attempted to demonstrate exposure above background levels with evidence of the minimum average daily

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exposure rate within the village. *Id*. at 24. The court found that average exposure did not suffice as common proof that every proposed class member was exposed to a level of vinyl chloride above the background level. *Id*. at 24–32.

The court held that plaintiffs failed to demonstrate significant risk of disease for two reasons. First, they failed to use a proper methodology in determining the "danger point" — the point at which the risk of harm became significant. *Id*. at 33–36. Plaintiffs argued that a local health agency's safe level of exposure constituted the threshold for a significant risk of harm. *Id*. at 34. The court found that the "safe" level is not the same as the point above which exposure significantly increases the risk of illness and held that the plaintiffs had failed to establish the "danger point." *Id*. at 34–36. Second, even if the plaintiffs established a valid "danger point," they did not demonstrate exposure to a level of vinyl chloride above that point for each class member because they offered only evidence of average exposure. *Id*. at 36. The court also held that these inadequacies prevented class certification under Rule 23(b)(2) for lack of cohesiveness. *Id*. at 41–44.

## II. EXPERTS

### District Court Rejects Expert Testimony on Causation for Benzene Exposure at Refinery

A federal district court awarded summary judgment to defendant Chevron USA, Inc. after excluding the testimony of a plaintiffs' expert as not sufficiently reliable to prove causation for illnesses allegedly caused by airborne benzene exposure from a former oil refinery. *See Baker v. Chevron USA, Inc.*, No. 05-227 (S.D. Ohio Jan. 6, 2010). Gulf Oil operated the facility between 1930 and 1985; Chevron merged with Gulf Oil in 1985 and closed the facility one year later. *Baker*, Slip Op. at 2. Two of the plaintiffs' experts testified on the amount of benzene released from the Gulf Oil refinery and each plaintiff's cumulative exposure to benzene. The plaintiffs' third expert offered the medical opinion that each plaintiff's exposure was sufficient to cause illness. *Id*. at 4. The defendants moved both (i) to exclude the third expert's opinion on medical causation under *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993), and (ii) for summary judgment on causation.

The court found that none of the studies cited by the third expert supported his opinion that the plaintiffs' exposure to small amounts of benzene caused their diseases; to the contrary, many of the studies involved subjects exposed to much higher levels of benzene than the plaintiffs. *Id*. at 46-47. The court held that "[t]he mere fact that Plaintiffs were exposed to benzene emissions in excess of mandated [regulatory] limits is insufficient to establish causation." *Id*. at 27. For these reasons, the court granted the motion to exclude the third expert's testimony. *Id.* at 46–47. Without the proffered expert testimony, the court held that the plaintiffs could not sustain the causation element of their personal injury claims and granted summary judgment. *Id.* at 47.

### District Court Excludes Expert Report Associating Insecticide with Cancer

A federal district court excluded the testimony of a plaintiff's expert that attempted to link the plaintiff's non-Hodgkins Lymphoma (NHL) to Dursban, which is the trade name for a group of insecticide products sold and manufactured by the defendants. *Pritchard v. Dow Agro Sciences,* No. 07-1621 (W.D. Pa. Mar. 11, 2010). Asserting claims of negligence and strict liability, the plaintiff offered an expert report to establish general and specific causation based in part on a differential diagnosis (i.e., the elimination of possible causes to identify a likely cause). *Pritchard*, Slip. Op. at 2–5. The defendants moved to exclude the expert's opinion under *Daubert*

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*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Pritchard*, Slip. Op. at 1–2.

In granting the defendants' motion, the court held that the expert's methodology was not reliable and that his testimony did not meet the *Daubert* "fit" requirement as recognized in the Third Circuit. On general causation, the court rejected the expert's opinion that Dursban can cause NHL because the epidemiological studies relied on by the expert were not statistically significant (i.e., the results could have occurred by chance) and because the expert ignored published studies demonstrating a lack of an association between chlorpyrifos — an active ingredient in Dursban — and NHL. *Id*. at 20–30.

On specific causation, the court also rejected the expert's opinion as unreliable because he failed to review much of the plaintiff's medical records, discovery responses, deposition testimony, application records, or other evidence regarding the plaintiff's exposure to chlorpyrifos or other pesticides. *Id.* at 30–35. Significantly, the court also found unreliable (i) the expert's failure to address the widely accepted view that the cause of NHL is unknown, and (ii) the overwhelming input of plaintiff's counsel in preparing the report, which the expert signed without alteration. *Id*. at 29, 39–40.

## III. DAMAGES

### West Virginia High Court Cuts Punitive Damage Award by $98 Million

The Supreme Court of Appeals of West Virginia reduced from $196 million to $98 million a punitive-damage verdict against E.I. DuPont de Nemours and Co. and other companies for contamination at a former zinc-smelting plant, holding that punitive damages may not be awarded to claimants seeking future medical monitoring from past toxic exposure. *See Perrine v. E.I. DuPont de Nemours and Co.*, Nos. 34333, 34334, and 34355 (W. Va. Mar. 26, 2010), *available at* http://www.state.wv.us/wvsca/docs/Spring10/34333.pdf. Residents in the vicinity of the zinc-smelting plant filed a class action for alleged off-site migration of arsenic, cadmium, and lead from the smelter facility. *Perrine*, Slip Op. at 18. The plaintiffs sought property damages, medical monitoring, and punitive damages. *Id*. Following trial, the defendants were found to be liable to class members for approximately $382 million, including $196 million in punitive damages. *Id*. at 1.

The Supreme Court of Appeals of West Virginia reduced the punitive damage award to $118 million because punitive damages may not be awarded on a cause of action for medical monitoring. *Id*. at 129–36. The court further reduced the punitive damage award by $20 million, the amount that DuPont spent to remediate the smelter site. *Id*. at 163–65. In addition to the reductions, the court ordered a new trial solely on the issue of whether the suit was filed within the two-year statute of limitations based on when the plaintiffs knew of the alleged harm. *Id*. at 172–73. If the jury finds that the suit was filed within the statute of limitations, the reduced total award of $283 million will stand; if the jury finds the plaintiffs violated the statute of limitations, the award will be vacated altogether. *Id.*

### District Court Vacates $100 Million Punitive Damage Award

A federal district court set aside a jury's punitive damage award of $100 million to ten plaintiffs for workplace exposure to a refinery gas leak. *See Garner v. BP Amoco Chem. Co.*, No. 07-221 (S.D. Tex. Mar. 16, 2010). More than 100 individuals filed suit against BP Amoco, alleging that the defendant released an unidentified toxic substance into the atmosphere at its refinery and caused personal injuries to workers. *Garner*, Slip Op. at 1. At the trial of the first set of ten refinery worker-plaintiffs, the jury found that a toxic substance was released at the defendant's refinery due to the negligence of the defendant and that the defendant's negligence was a proximate cause of the plaintiffs' injuries. *Id*. at 2. In addition to a compensatory award,

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the jury awarded $10 million in punitive damages to each plaintiff. *Id*. at 4. The defendant challenged the punitive damage awards, asserting, among other things, that the plaintiffs did not prove gross negligence, which is required to impose punitive damages under Texas law. *Id*. at 5–6.

The court held that the evidence failed to establish a legal connection between the leak and a known, extreme risk sufficient to support gross negligence and the punitive damage awards. *Id*. at 12–13. Given that refinery work subjects workers to toxic odors, the court found that the evidence did not show a high probability that the injuries were associated with each exposure event or that there was a high probability of exposure from the same source. *Id*. at 12. The court further held that the plaintiffs had not demonstrated the specific intent element of gross negligence because the defendant implemented safety precautions, such as requiring each worker to wear a monitor to detect the most toxic chemicals present at the refinery. *Id*.

### District Court Holds Stigma Damages to Property May Be Recovered Under South Carolina Law

The U.S. District Court for the District of South Carolina denied Defendant AVX Corporation's motion for summary judgment, holding that a plaintiff may recover for alleged stigma damages from the presence of trichloroethene ("TCE") on its property. *AVX Corp. v. Horry Land Co., Inc.*, No. 4:07-3299 (D.S.C. Feb. 22, 2010). Plaintiff Horry Land Company, Inc. ("Horry Land") alleged that AVX's manufacturing activities caused TCE contamination at Horry Land's neighboring property. *AVX*, Slip Op. at 2. Horry Land claimed that the value of its property was diminished by more than $5 million as a result of the contamination. *Id*. at 3.

AVX argued that Horry Land could recover only for temporary loss of use of the land, not for its diminished value, because Horry Land's property could be remediated in a fixed period of time. *Id*. at 5. Due to conflicting evidence regarding the feasibility of successful remediation, the court found a disputed issue of fact with respect to whether the damage to the property was temporary or permanent and denied AVX's motion for summary judgment. *Id*. at 7.

AVX also argued that, under South Carolina law, a property owner cannot recover stigma damages, such as damages for harm to the reputation of the property. *Id*. at 5, 8. After concluding that South Carolina lacked clear guidance on the issue, the court looked to other jurisdictions that allow stigma damages. *Id*. at 8–10 & n.3. The court concluded that Horry Land may be entitled to stigma damages and denied AVX's motion for summary judgment on this ground as well. *Id*. at 11.

## IV. COMMON LAW

### District Court Dismisses Action over Gas Leak from Train Derailment

A federal district court in South Carolina dismissed a putative class action in which plaintiffs asserted public and private nuisance, negligence, and strict liability claims against a railroad operator for alleged property damage in connection with a 2005 train derailment. *See Sanders v. Norfolk S. Corp.*, No. 08-2398 (D.S.C. Jan. 20, 2010). Chlorine gas escaped from a tanker as a result of the derailment. *Sanders*, Slip Op. at 2. Property owners within a five-mile radius of the release sought class certification for alleged interference with the use of their property, specifically "chaos, fear, evacuation, chemical exposure and other damages," and the "evacuat[ion of] their residences as a direct result of a perceived risk of harm from the chlorine chemical release." *Id*. at 2–3. The plaintiffs did not claim damages for personal injury. *Id*. at 3.

The court dismissed the public nuisance claim because the plaintiffs failed to show that the chlorine gas impacted or invaded their property. *Id*. at 4–5. Even assuming that the mere threat

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of chlorine exposure could constitute an unwarranted interference with the use of property, the court determined that such a threat — which lasted only a matter of hours before the gas dissipated — was insufficient to constitute the substantial interference necessary to support a private nuisance claim. *Id.* Likewise, the court dismissed the negligence claim because the plaintiffs were not within the "zone of danger" created by the derailment, and therefore the defendants did not owe the plaintiffs a legal duty. *Id.* at 6-7. Finally, the court dismissed the strict liability claim, noting that strict liability claims regarding transportation of hazardous materials are preempted by the Hazardous Materials Transportation Act and the Federal Railroad Safety Act. *Id.* at 7.

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