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I. Nuisance / Climate Change

Losing En Banc Quorum, Fifth Circuit Dismisses Climate Change Appeal

Following the recusal of the eighth of its 16 judges on April 30, 2010, the en banc U.S. Court of Appeals for the Fifth Circuit determined that it had lost the requisite quorum to decide the climate-nuisance case *Comer v. Murphy Oil USA* and, on that basis, dismissed the appeal. *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. May 28, 2010), *available at* http://www.bdlaw.com/assets/attachments/Fifth%20Circuit%20Opinion%2005-28-10.pdf. In the fall of 2009, the *Comer* appellate panel reversed the district court and held that a class of Gulf Coast private plaintiffs could assert public nuisance claims against oil companies, utilities, and chemical companies on allegations that greenhouse gases they released injured the plaintiffs by contributing to the severity of Hurricane Katrina. In its May 28 order, a majority of the non-recused judges on the Fifth Circuit found they could not reinstate the prior ruling of the three-judge panel and instead restored the district court's dismissal of the case. *Comer*, Slip Op. at 2-4. The plaintiffs' only recourse is to petition the U.S. Supreme Court for certiorari.

The Fifth Circuit's decision presents several implications for potential Supreme Court review. The unusual posture and procedural issues presented in *Comer* may allow the Supreme Court to avoid the more difficult merits questions, such as whether plaintiffs have standing to sue greenhouse gas emitters for their alleged contribution to large-scale injury-causing events that plaintiffs contend are exacerbated by climate change. Moreover, Supreme Court review of the district court's decision may be foreclosed if a sufficient number of Justices similarly recuse themselves, which is typically due to ownership of stock in one of the corporate parties to the action.

II. Common Law

Federal Court Approves $712.5M Settlement for WTC Responders

In one of the largest mass tort actions in U.S. history, a federal judge in the Southern District of New York approved a revised settlement that would provide up to $712.5 million from WTC Captive Insurance Co. to more than 10,000 rescue and recovery workers injured during the September 11, 2001 attacks and aftermath. *See* Order Approving Modified and Improved Agreement of Settlement, 21 MC 100, 21 MC 102, and 21 MC 103 (S.D.N.Y. June 23, 2010). In March, the court rejected an earlier proposed settlement after finding that the percentage of attorneys' fees sought by plaintiffs' counsel was excessive and that WTC Captive Insurance was not paying enough to the workers.

The settlement requires the participation of 95 percent of claimants by September 30, 2010 to take effect. *See* World Trade Center Litig. Settlement Process Agreement, at 19 (June 10, 2010), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540. Claimants' individual recoveries will be based on the severity of their injuries, among other considerations. *Id*. at 32-36. Attorneys' fees will be capped at 25 percent of the settlement amount, which is estimated to save plaintiffs more than $50 million. *Id*. at 14-16.

III. Punitive Damages

Fearing That Third-Party Harm Drove $100M Award, Oregon High Court Orders New Trial

The Oregon Supreme Court affirmed the dismissal of a $100 million punitive award and ordered a new trial on punitive damages on the grounds that the jury may have considered harm to third

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parties in reaching its massive punitives result. *Schwarz v. Philip Morris Inc.*, SC S053644 (Or. June 24, 2010), *available at* http://www.publications.ojd.state.or.us/S053644.htm. Defendant Philip Morris argued that uniform jury instructions improperly allowed the jury to award punitive damages based on harms to non-parties. *Schwarz*, Slip Op. at 4. In 2002, the jury awarded $150 million to the plaintiff, the estate of a woman who claimed that the defendant deceived her about the danger of low-tar cigarettes, which allegedly caused her fatal lung cancer. The trial court judge reduced the jury's punitive damages award to $100 million, and an appellate court later dismissed the award altogether. *Id*. at 5-6.

Since the trial court's ruling, the U.S. Supreme Court in two cases — *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) — has clarified how a jury may constitutionally consider harm to non-parties when weighing punitive damages. *Id*. at 5, 6, 9. In these cases, the Court held that evidence of harm to non-parties may be used only in a jury's assessment of reprehensibility and not to impose punishment for harm to non-parties. *Id*. Because the trial court's instructions did not include this distinction, the Oregon Supreme Court affirmed the appeals court decision and remanded the case for a new trial on punitive damages. *Id*. at 9-10.

IV. Property Damage

Florida High Court Allows Fishermen's Claims for Purely Economic Loss

The Supreme Court of Florida held that, under Florida law, commercial fishermen may assert both statutory and common law causes of action against alleged polluters for purely economic losses associated with injury to marine life. *See Curd v. Mosaic Fertilizer, LLC,* No. SC08-1920 (Fla. June 17, 2010), *available at* http://www.floridasupremecourt.org/decisions/2010/sc08-1920.pdf. A group of commercial fishermen alleged that the defendant's storage of pollutants and hazardous substances contaminated the waters of Tampa Bay and affected the marine life upon which the plaintiff fishermen relied for their livelihoods. *Id*. at 2-3. An appellate court affirmed the trial court's dismissal of both statutory and common law claims because "the fishermen did not sustain bodily injury or property damage." *Id*. at 3.

The Florida Supreme Court reversed based on the plain language of a Florida statute that allows a person to "bring[] a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution," which the court held allowed for economic damages. *Id*. at 4-10. Relying on a string of cases from various jurisdictions, the court also held that commercial fishermen have an economic interest in the marine life that qualifies as a protectable property interest. *Id*. at 13-22. In terms of causation, the defendant owed a duty of care to the fishermen because it was foreseeable that the release of defendant's hazardous contaminants into public waters would affect the fishermen's unique interests. *Id*. at 22-25. Florida plaintiffs will likely rely on this decision in ongoing litigation relating to the Gulf of Mexico oil spill.

V. Class Actions

Seventh Circuit Allows Multiple Complaints to Avoid Federal CAFA Jurisdiction

The U.S. Court of Appeals for the Seventh Circuit remanded four nearly identical class actions with fewer than 100 plaintiffs to state court, allowing plaintiffs to avoid federal jurisdiction under the Class Action Fairness Act ("CAFA"). *Anderson v. Bayer Corp.*, No. 10-8003 (7th Cir. June 22, 2010). CAFA allows defendants to remove mass actions to federal court when they involve

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more than 100 plaintiffs, at least $5 million in alleged damages, and minimal diversity between the parties. Plaintiffs originally filed five separate but nearly identical cases in Illinois state court for personal injuries allegedly caused by a prescription medication. *Anderson*, Slip Op. at 3. Defendants removed the actions under CAFA, but the plaintiffs sought and achieved a remand back to state court for four cases with fewer than 100 plaintiffs. *Id.* Bayer sought review of the district court's remand, arguing that plaintiffs' five separate pleadings were "a transparent attempt to circumvent CAFA, and, as such, should be treated as a single mass action." *Id.* at 1, 5.

In upholding the district court's remand, the Seventh Circuit distinguished *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405 (6th Cir. 2008), in which the Sixth Circuit overturned a district court's decision to remand because the plaintiffs attempted to avoid triggering CAFA's $5 million jurisdictional amount by dividing otherwise identical nuisance claims to cover consecutive six-month periods. *Id.* at 5. The Seventh Circuit noted that *Freeman* did not address the mass action provision of CAFA and that CAFA states "the term 'mass action' shall not include any civil action in which the claims are joined upon motion of a defendant." *Id.* at 6 (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(II)). The court found that Congress contemplated that some potential mass actions would remain, by plaintiff's choice, outside the scope of CAFA. *Id.* The Seventh Circuit's ruling was consistent with a similar Ninth Circuit case, *Tanoh v. Dow Chemical Co.*, 561 F. 3d 945 (9th Cir. 2009), in which the court decided that seven similar cases, each with fewer than 100 plaintiffs, should not be treated as a single mass action under CAFA. *Id.* at 6-7. (*See* Beveridge & Diamond, P.C., Toxic Tort & Product Liability Quarterly, Vol. V at 2, *available at* http://www.bdlaw.com/assets/attachments/Toxic_Tort__Product_Liability_Quarterly_(April_10,_2009).pdf).

The Seventh Circuit left open the possibility that future actions by the plaintiffs in state court, such as a proposal by plaintiffs to try these cases jointly, may render the claims removable under the mass action provision of CAFA. *Id.* at 7-8. Nevertheless, the opinion is likely to be relied upon by plaintiffs who seek to remain in state court by dividing their cases into multiple actions of fewer than 100 plaintiffs each.

VI. Medical Monitoring

Third Circuit Holds Genetic Markers Necessary for Medical Monitoring Claims

The U.S. Court of Appeals for the Third Circuit affirmed the dismissal of two proposed classes and held that a plaintiff must show a genetic predisposition toward developing beryllium-related lung disease as a prerequisite to pursuing a medical monitoring claim under Pennsylvania law. *Sheridan v. NGK Metals Corp*. and *Anthony v. Small Tube Mfg. Corp.*, Nos. 08-4373 and 08-4374 (3d Cir. June 7, 2010), *available at* http://www.ca3.uscourts.gov/opinarch/084373p.pdf.

One proposed medical monitoring class consisted of residents living in close proximity to a plant where beryllium-containing products were manufactured and the other class consisted of employees of a plant where such products were manufactured. *Sheridan*, Slip Op. at 14-22. Both plaintiff classes claimed exposure to dust that allegedly increased the risk for contracting chronic beryllium disease ("CBD") and requested medical monitoring. *Id.* The plaintiffs' experts opined that anyone who had lived or worked in the area surrounding these plants was at "a significantly increased risk" due to the levels of beryllium emissions in and around the facility. *Id.* at 19.

The Third Circuit affirmed the dismissal of both claims under Pennsylvania law based on *Pohl v. NGK Metals Corp.*, 936 A.2d 43 (Pa. Super. Ct. 2007). *Id.* at 25-33. In *Pohl*, the Pennsylvania Superior Court held that a similar proposed class of residents living near a beryllium plant had not demonstrated a significantly increased risk of developing CBD because, among other

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things, they did not have a genetic predisposition or sensitization toward developing CBD. *Id.* at 25-27. Plaintiffs argued that *Pohl* was "fact-specific" and did not require plaintiffs to show a genetic predisposition to maintain their medical monitoring claims. *Id.* at 28. The Third Circuit disagreed and held that *Pohl* "was based on plaintiffs' failure to meet the requisite threshold for establishing significantly increased risk due to (1) the undisputed facts about beryllium exposure . . . and CBD, and (2) plaintiffs' inability to demonstrate a significant increase in risk before sensitization." *Id.* at 32. The opinion may be significant in future medical monitoring cases where plaintiffs have not developed any objective indicia of physical harm or change as a result of an alleged exposure.

VII. Experts

Eighth Circuit Excludes as Speculative Causation Testimony in Gas Exposure Case

Finding the testimony at issue to be speculative, the U.S. Court of Appeals for the Eighth Circuit affirmed the exclusion of plaintiffs' causation experts in a hydrogen sulfide gas exposure case. *See Barrett v. Rhodia, Inc.*, No. 09-3115 (8th Cir. May 24, 2010), *available at* http://www.ca8.uscourts.gov/opndir/10/05/093115P.pdf. Asserting defective products and failure-to-warn claims, the plaintiffs offered four experts to establish general and specific causation. *Barrett*, Slip Op. at 4. The defendant moved to exclude the experts' opinions under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and for summary judgment on causation. *Id.* at 6. The U.S. District Court for the District of Nebraska granted defendant's motion to exclude as it pertained to specific causation and, as a result, granted defendant's motion for summary judgment. *Id.*

The Eighth Circuit held that the district court did not abuse its discretion because the testimony was "excessively speculative or unsupported by sufficient facts." *Id.* at 9. The court noted a lack of scientific testing, verification, or elimination of alternative causes. *Id.* at 9-12. Because Nebraska law requires expert testimony to establish both general and specific causation, the Eighth Circuit also determined that the district court properly granted defendant's summary judgment motion. *Id.* at 12-14. The decision is a victory for corporate defendants looking to ensure that plaintiffs' expert testimony is grounded in reliable science.

VIII. Environmental Crimes

State Grand Jury Issues Indictment for Chemical Dumping in Fox River Tributary

In a rare case of criminal charges for water pollution, the grand jury for the Illinois Circuit Court, Kane County, returned a criminal indictment against a small recycling firm and two employees, including the company's CEO, for their alleged roles in a chemical dumping incident. *See Illinois v. Zheng*, No. 01-CF-1409 (Ill. Cir. Ct. June 4, 2010). The indictment alleges that an individual poured industrial detergent into a storm drain that flows into the Fox River. The cleaner (alkylbenzene sulfonic acid anionic surfactant) is highly toxic to fish and caused the formation of foam in a tributary of the Fox River.

The company and individuals were each charged with one felony count and one misdemeanor count of water pollution under the Illinois Clean Water Act. Maximum penalties could include up to three years in prison and a fine of $25,000 for each day of violation.

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