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Editors:

Daniel M. Krainin
477 Madison Avenue
15th Floor
New York, NY 10022
(212) 702-5417
dkrainin@bdlaw.com

Mackenzie S. Schoonmaker
477 Madison Avenue
15th Floor
New York, NY 10022
(212) 702-5415
mschoonmaker@bdlaw.com

Contributors:

Benjamin E. Apple
Edward M. Grauman
Sarah E. Wegmueller
Nicole B. Weinstein
Toren M. Elsen

TABLE OF CONTENTS

I. CAUSATION

Colorado Appeals Court Rejects *Lone Pine* Order in Fracking Case

In a decision that may make it easier for certain plaintiffs to maintain a toxic tort case in Colorado, a Colorado appellate court ruled that a trial court could not order a small number of plaintiffs in a toxic tort case to present prima facie evidence before discovery begins in support of their claims of exposure due to hydraulic fracturing (or "fracking") operations. S*ee Strudley v. Antero Res. Corp.*, No. 12CA1251 (Colo. App. July 3, 2013), *available at* www.bdlaw.com/assets/attachments/Strudley.pdf.

Plaintiff property owners sued Defendant gas companies in tort claiming injuries allegedly caused by the Defendants' natural gas drilling operations within close proximity to their home. *Strudley*, slip op. at 1-2. Shortly after initial disclosures were filed, Defendants moved for entry of a so-called *Lone Pine* order, which would require Plaintiffs to "present prima facie evidence to support their claims before full discovery could commence." *Id.* at 3-4. The trial court granted Defendants' request, and issued an order requiring Plaintiffs to submit expert opinions with supporting data and facts that identified the hazardous substances each Plaintiff was exposed to from the companies' activities, along with a host of other facts. *Id.* at 4-5. Plaintiffs submitted some evidence, but the trial court found it insufficient and dismissed all of the Plaintiffs' claims with prejudice, holding they had failed to prove a prima facie case, specifically in relation to causation. *Id.* at 5-7. (For further discussion of trial court ruling, *see Colorado Court Dismisses Fracking-Related Tort Claims for Lack of Causation Evidence*, Toxic Tort and Product Liability Quarterly, July 18, 2012, *available at* http://www.bdlaw.com/newsletter-21.html.)

In a case of first impression, the Colorado Court of Appeals reversed, noting that, absent extraordinary circumstances, requiring a showing of a prima facie case before allowing discovery on matters central to a plaintiff's claims is disfavored. *Id.* at 11-12. Although the initial disclosures provided Plaintiffs in this case with some information related to their claims, the disclosed information was insufficient to allow them to respond to a *Lone Pine* order. *Id.* at 19. The court noted: "[E]ven if we assume that the revisions to the Colorado Rules of Civil Procedure [allow the orders], . . . [u]nlike in the majority of cases allowing Lone Pine orders, this was not a mass tort case. Rather, it involved four family members suing four defendants," and involved only a single parcel of land. *Id.* at 24. The court further advised that other procedural protections, such as motions to dismiss and motions for summary judgment, could sufficiently protect against meritless claims, thus obviating the need for a *Lone Pine* order here. *Id.* at 26-27.

California Trial Court Rejects Defense Argument That State Must Establish Locations with Specificity in Statewide Lead Paint Suit

Refusing to require plaintiffs in a state-wide action to identify specific sites at issue, a California Superior Court judge denied summary judgment to certain paint manufacturers in a pending nuisance action for abatement of lead-based paint in homes and buildings throughout the State of California. *California v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Sup. Ct., Santa Clara Co., May 31, 2013), *available at* www.bdlaw.com/assets/attachments/Atlantic%20Richfield.pdf.

The court rejected the manufacturers' argument that the State would have to identify specific locations contaminated with lead, reasoning that allegations that lead remains in buildings in specified cities, supported by government records, was sufficient to overcome summary judgment in light of allegations that the manufacturers promoted and sold lead-containing paints in the state with knowledge of the danger. *Atlantic Richfield*, slip op. at 1-2, 5-6. The court similarly rejected Defendants' arguments that the State had not demonstrated a "pervasive, imminent health risk" given the significant harm of childhood exposure to lead and the risks involved with deterioration of lead-based paint. *Id.* at 6-7. The court found triable issues of fact as to the

Back to Top

causation element based on the paint manufacturers' alleged knowledge of the hazards. *Id.* at 8.

The court also denied summary judgment on constitutional grounds, finding no due process violation involving California's public nuisance law. Defendant argued that at the time of its alleged actionable conduct, a nuisance theory would lie against one who controlled or maintained the nuisance, and therefore, the State's theory expanded public nuisance theory beyond which the Defendant had fair notice. *Id.* at 9. The court rejected this assertion fully, noting that it has long been the law in California that the party who maintains, creates or assists in the creation of a nuisance is responsible for the ensuing damages. *Id.*

Los Angeles County Nuisance Claim Survives on Grounds that Defendant Cities "Generated" Stormwater Runoff

In a decision that may facilitate certain nuisance suits against municipalities, a California appellate court held that the County of Los Angeles may pursue its nuisance claim against two municipalities for discharging a "toxic soup" of urban and stormwater runoff into County waters. *See County of Los Angeles v. City of Downey*, No. B238386 (Cal. Ct. App. Apr. 30, 2013), *available at* www.bdlaw.com/assets/attachments/Downey.PDF. The court reversed a trial court's dismissal of the County's claims, holding that the County stated a cause of action "at least to the extent" that it alleged that municipalities "generated the toxic pollution they discharged" and that the discharges interfered with the use of the County's flood control facilities. *County of Los Angeles*, slip op. at 5-6 (emphasis added).

On appeal, the defendant cities argued that nuisance requires more direct and active causation than their drainage systems' mere conveyance of polluted water. The appellate court rejected that argument on the grounds that "at least to the extent the County alleges that Cities' facilities generated the toxic pollution they discharged, and didn't simply pass through the pollution created by others, the County states a cause of action … for nuisance." *Id.* at 6.

The appellate court also held that the County had pled sufficient facts for injunctive relief, and rejected the Cities' contention that the County has an adequate remedy at law. *Id.* 6-7. Although the Cities may reimburse the County for its pollution control expenses, the court held that the "continuing and recurrent" nature of the alleged nuisance and the possibility of a "multiplicity of suits" adequately support a claim for injunctive relief. *Id.* at 7-8.

Testimony that Worker Used Product Sufficient to Defeat Manufacturer's Summary Judgment Motion in Exposure Case

Testimony by a coworker that he personally observed Plaintiff's husband using Defendant's products at work was sufficient to survive a summary judgment motion in an action alleging that a worker's exposure to such product caused leukemia, according to a California appeals court. *See Gregorio v. Rust-Oleum Corp.*, No. 30-2007-00031378 (Cal. Ct. App. Apr. 19, 2013), *available at* www.bdlaw.com/assets/attachments/Gregorio.pdf.

Plaintiff's husband worked for 19 years as a tool and die maker and manager at various manufacturing facilities, and subsequently died from acute myelogenous leukemia. *Gregorio*, slip op. at 2. Plaintiff alleged that her husband's leukemia was caused in part by his exposure to significant concentrations of benzene and other toxic chemicals in products manufactured by Defendant Rust-Oleum. *Id.* at 2-4. Plaintiff brought suit against Rust-Oleum, and other chemicals manufacturers, for negligence, strict liability, fraudulent concealment, and breach of implied warranties, alleging that her husband's exposure to Rust-Oleum's products was the proximate cause of his injuries. *Id.* at 2-3.

Back to Top

The trial court granted Rust-Oleum's motion for summary judgment based on its argument that Plaintiff failed to establish Rust-Oleum's products caused the injuries to the decedent. *Id.* at 4. The appellate court found that testimony from the decedent's coworker that he observed the decedent using some Rust-Oleum products was sufficient to raise a triable issue of material fact, rejecting Rust-Oleum's arguments that the co-worker's testimony was flawed because he could not identify pictures of the specific products at issue. *Id.* at 7-14. Notably, Rust-Oleum included a deposition transcript of the co-worker's testimony in the appellate record, but failed to include any legible exhibits of the product pictures it showed the coworker. *Id.* at 13-14.

II. PRODUCTS LIABILITY

Indiana Court Presumes Lack of Defect Due to Manufacturer's Compliance with Federal Pesticide Law

Compliance with federal pesticide law and state labeling requirements entitles a pesticide registrant to a presumption that the product is not defective under Indiana law, according to the Indiana Court of Appeals. *See Gresser v. Dow Chemical Co.*, No. 79A02-1111-CT-1014 (Ind. Ct. App. Apr. 30, 2013), *available at* www.bdlaw.com/assets/attachments/Gresser.pdf.

Plaintiffs, a homeowner family, filed product liability claims against Dow and negligence claims against an extermination company alleging that a Dow termiticide, with which the exterminator had treated Plaintiffs' home 13 months prior to their purchase, had caused Plaintiffs health problems. *Gresser*, slip op. at 3-4. The trial court granted summary judgment to Dow on Plaintiffs' failure to warn claim under Indiana Product Liability Act ("IPLA"), but denied Dow's summary judgment motion based on Plaintiffs' failure to satisfy IPLA requirements for proving that a product was defective. *Id.* at 7.

The appellate court found that Plaintiffs' failure to warn and defective product claims were inextricably linked and thus considered these claims together. *Id.* The appellate court found persuasive a provision of Indiana law that provides compliance with all applicable state and federal law creates a rebuttable presumption that the product is not defective and the manufacturer or seller of the product is not negligent. *Id.* at 8. Because the Dow termiticide used was properly registered under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and in compliance with state law labeling requirements, the court found Dow was entitled to a statutory presumption against liability and granted summary judgment to Dow on the product liability claims. *Id.* at 8-11.

As for the extermination company, the court allowed the suit to move forward on all issues, finding, among other grounds, that applying state tort law to further the dissemination of pesticide label information to persons at risk "facilitates rather than frustrates the objectives of FIFRA." *Id.* at 22 (citation omitted).

III. CLIMATE CHANGE

Fifth Circuit Upholds Dismissal of Katrina Global Warming Suit on Res Judicata Grounds

Continuing a spate of rulings against plaintiffs claiming injury from climate change, the U.S. Court of Appeals for the Fifth Circuit on May 14 affirmed a lower court's dismissal of a lawsuit brought by a group of Mississippi Gulf Coast residents and property owners who alleged that greenhouse gas emissions from defendant energy companies' facilities contributed to global warming, which intensified Hurricane Katrina, which, in turn, damaged their property. *See Comer v Murpy Oil USA, Inc.*, No. 12-60291 (5th Cir. May 14, 2013), *available at* www.bdlaw.com/assets/attachments/Comer.pdf. The Fifth Circuit held that Plaintiffs' claims were barred by

Back to Top

the doctrine of res judicata, which bars the re-litigation of a claim that has been decided on the merits in a prior action. *Comer*, slip op. at 11.

The case presented an unusual procedural situation. Plaintiffs originally brought their claims in Mississippi federal court in 2005. *Id.* at 3. The district court dismissed the case, and a panel of the Fifth Circuit reversed and remanded, in part, the district court's decision. *Id.* Although seven of the court's 16 active judges were recused from the case, six of the nine remaining judges voted to rehear the case en banc, thus vacating the panel's opinion. *Id.* at 4. However, before the en banc court reheard the case, an additional judge was recused, leaving the Fifth Circuit without a quorum. *Id.* Because it lacked a quorum, the court dismissed the appeal, effectively reinstating the district court's dismissal. *Id.* (For further discussion of 2010 dismissal, *see Losing En Banc Quorum, Fifth Circuit Dismisses Climate Change Appeal*, Toxic Tort and Product Liability Quarterly, July 16, 2010, *available at* http://www.bdlaw.com/assets/attachments/Toxic%20Tort%20Product%20Liability%20Quarterly%20July%2016%202010.pdf.)

After unsuccessfully seeking Supreme Court review, Plaintiffs filed a new complaint asserting substantially similar claims in the same district court in 2011. *Id.* at 5. The district court dismissed the claims on several grounds, including res judicata. *Id.* The Fifth Circuit affirmed, holding that although the original district court decision was never subject to meaningful appellate review, it still constituted a final judgment on the merits for purposes of res judicata. *Id.* at 7-11.

IV. CLASS ACTIONS

State Corporation Website Insufficient to Establish Citizenship of Corporate Class Members in Pollution Class Action

Striking a blow to plaintiffs trying to remand an action back to state court, the Northern District of Georgia found that office address information from a state's corporation website is not sufficient to establish citizenship of corporations or partnerships for the purposes of showing class members' residency under the "local controversy" provision of the Class Action Fairness Act (CAFA). *See Anderson v. King Am. Finishing, Inc.*, No. 1:11-cv-2258-JEC, (N.D. Ga. Mar. 25, 2013), *available at* www.bdlaw.com/assets/attachments/Anderson.pdf.

Plaintiffs, two Georgia residents and a putative class, alleged that King America Finishing, Inc. released a toxic chemical into the Ogeechee River in May 2011, subsequently injuring Plaintiffs' property and health. *Anderson*, slip op. at 1–2. After Defendants removed to federal court, Plaintiffs filed a motion to remand back to state court under CAFA's "local controversy" provision, a three-pronged requirement of which only one was in question—whether two-thirds of the class members are citizens of the state in which the action was originally filed. *Id.* at 3-5.

To meet this two-thirds residency burden for an alleged class of 932 members, Plaintiffs included as residents 57 corporate class members they determined to be Georgia citizens by cross-referencing tax assessment records to the secretary of state's corporation website. *Id.* at 6-7. In finding Plaintiffs failed to meet the residency requirement, the court focused on the 57 corporate entities and ruled that tax and incorporation records proved neither the "principal place of business" of corporations nor the residency of LLC and partnership members. *Id.* at 9–10. The court also took issue with the Plaintiffs' methodology for determining that 19 individual class members were Georgia citizens, ruling that affidavits naming Georgia addresses alone are inadequate evidence of residency. *Id.* at 10. Finally, the court questioned the accuracy of the estimated class size, given the likelihood that more than 932 individuals would fall within the broad net—all those directly or indirectly impacted—cast by Plaintiffs. *Id.* at 11.

Back to Top

Third Circuit Finds Continuous Release of Hazardous Chemicals To Be an "Event or Occurrence" Sufficient for Remand under Class Action Fairness Act

In a victory for plaintiffs seeking to keep their mass tort actions in state court, the U.S. Court of Appeals for the Third Circuit held the continuous release and dispersal of hazardous or toxic chemicals qualifies as an "event or occurrence" under the Class Action Fairness Act ("CAFA"), allowing a federal District Court to remand a mass action to a state trial court. *See Abraham v. St. Croix Renaissance Group*, No. 13-1725 (3d Cir. May 17, 2013), *available at* www.bdlaw.com/assets/attachments/Abraham.pdf.

Defendant St. Croix Renaissance Group, L.L.L.P. ("SCRG") owns an alumina factory site in St. Croix where red ore, called bauxite, is refined into alumina. *Abraham*, slip op. at 5. Plaintiffs, over 500 residents of the area, filed a suit alleging that, for more than ten years, Plaintiffs unwillingly inhaled and consumed dust and loose particles from open piles where SCRG stores residues from the refining process. *Id.* at 3-6. SCRG promptly removed the civil action to the District Court of the Virgin Islands and Plaintiffs moved to remand to the Superior Court of the Virgin Islands under CAFA. *Id.* at 3, 7.

Plaintiffs argued that under CAFA, removal was excluded because "all of the claims in the action arise from an event or occurrence in the State in which the action was filed" and the injuries were all experienced in that State. *Id.* at 7-8. The District Court granted Plaintiffs' motion to remand, finding that an "event" was not confined to a "discrete happening that occurs over a short time span such as a fire, explosion, hurricane, or chemical spill," making the analogy that "one can speak of the Civil War as a defining event in American history, even though it took place over a four year period." *Id.* at 17-18.

The Third Circuit agreed with the District Court's broad reading of the words "event" and "occurrence," finding the lower court's interpretation of those terms consistent with their ordinary usage. *Id.* at 21. The appellate court held that the continuous release of a hazardous substance comprised an "event or occurrence," thereby rendering removal under CAFA improper. *Id.* at 25-26.

V. LEGISLATION

Oklahoma Supreme Court Finds Comprehensive Tort Reform Law Unconstitutional

To the chagrin of tort reform advocates, the Oklahoma Supreme Court found, by a 7-2 majority, a comprehensive tort reform law unconstitutional on the grounds that the 90-section law violated the state single-subject rule, which prevents the legislature from crafting "veto-proof" bills that combine unrelated subjects. *Douglas v. Cox Retirement Properties, Inc.*, No. 110270 (Okla. June 4, 2013), *available at* http://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=469532.

The Plaintiff in Douglas brought a wrongful death action, alleging that a rehabilitative care center provided negligent treatment and care. *Douglas*, slip op. ¶¶ 1-2. The Defendant moved to dismiss for failure to attach an expert affidavit to the petition in compliance with the Comprehensive Lawsuit Reform Act of 2009, in response to which Plaintiff argued the tort reform law was unconstitutional. *Id.* ¶ 2. The trial court granted Defendant's motion to dismiss, and then certified its decision to the state supreme court for immediate review. *Id.*

The Oklahoma Supreme Court granted certiorari and reversed. *Id.* ¶ 12. Under the Oklahoma Constitution, in contrast to the United States Constitution, acts of the Oklahoma state legislature may only include one subject. *Id.* ¶ 4. The purpose of the rule is to prevent both misleading laws and "logrolling," the practice of packaging multiple subjects into one bill, which can force a choice of whether to enact an unfavorable law in order to pass a favorable one. *Id.*

Back to Top

Although the law at issue had a broad unifying topic of lawsuit reform, the court held that this did not cure the myriad of disparate subjects across its 90 sections—ranging from procedural revisions to the state Medicaid program, to a new act governing asbestos and silica claims; from laws requiring seat belt use to liability of firearm manufacturers; from school discipline to livestock, and many more. *Id.* ¶¶ 7-10. Because of the sheer quantity of subjects, the court found that it was unable to sever the bill, holding it void as a whole. *Id.* ¶ 11.

The dissent warned that the majority's interpretation would make it nearly impossible for the Oklahoma legislature to pass comprehensive tort reform, and that it could call into question other comprehensive legislation that had been enacted years earlier.