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I. CLASS ACTIONS

Ninth Circuit Allows Fruit Plantation Workers to Avoid Federal Jurisdiction By Limiting Actions to Fewer Than 100 Plaintiffs

The Ninth Circuit affirmed a federal district court's remand of seven separate-but-related toxic tort actions, refusing to rule that the actions constituted a single "mass action" under the Class Action Fairness Act of 2005 ("CAFA"). *See Tanoh et al. v. Dow Chem. Co.*, No. 09-55138 (9th Cir. Mar. 27, 2009), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2009/04/05/0955138.pdf. CAFA extends federal jurisdiction to "mass actions," defined as civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" but specifies that claims joined by motion of a defendant would not be included in a mass action. 28 U.S.C. § 1332(d)(11)(B). The decision could significantly limit federal removal jurisdiction under CAFA.

In 2006, 664 workers on fruit plantations in West Africa filed seven actions against Dow and several other defendants in Los Angeles Superior Court, alleging negligence, product liability, fraud, and battery related to on-the-job exposure to a pesticide containing 1,2-dibromo-3-chloropropane ("DBCP"). *Tanoh*, Slip. Op. at 15. In an attempt to join the claims, Dow removed the case to federal court and opposed plaintiffs' motion to remand, arguing that the separate actions together qualified as a mass action removable under CAFA and that plaintiffs were essentially gaming the system. *Id*. at 22–30. The U.S. District Court for the Central District of California rejected these arguments and remanded back to state court. On appeal of the remand, the Ninth Circuit relied on the plain language and legislative history of CAFA to conclude that the "fairly narrow" mass action provision did not apply to the plaintiffs' claims because Congress considered and rejected federal jurisdiction for claims joined by motion of a defendant. *Id*. at 22–23. The court also distinguished scenarios in which plaintiffs' lawyers abuse the class-action device by filing multiple actions for the *same* group of plaintiffs to expand their recovery in state court without triggering CAFA. *Id*. at 26–29. *Compare Freeman v. Blue Ridge Paper, Inc*. (discussed below).

Earlier in March, the U.S. District Court for the Central District of California similarly rejected federal mass action jurisdiction for a similar set of cases also originally filed in the Los Angeles Superior Court against Dow and other defendants by 2,485 plaintiffs who had worked on fruit plantations in Central America. *See Vanegas et al. v. Dole Food Co.*, No. 09-181 (C.D. Cal. Mar. 9, 2009).

Sixth Circuit Holds That Plaintiffs Cannot Circumvent Federal Jurisdiction By Dividing Claims Temporally

In contrast to the result reached by the Ninth Circuit in the *Tanoh* case (discussed above), the Sixth Circuit held that federal jurisdiction was proper where the same group of plaintiffs had divided their claims by time period into five separate lawsuits in an effort to avoid federal jurisdiction under the Class Action Fairness Act ("CAFA"). *Freeman v. Blue Ridge Paper Prod., Inc.*, No. 08-6321 (6th Cir. Dec. 29, 2008), *available at* http://www.ca6.uscourts.gov/opinions.pdf/08a0461p-06.pdf. Under CAFA, federal jurisdiction is proper where a class is comprised of at least 100 members, the aggregate amount of all plaintiffs' alleged damages exceeds $5 million, and at least one class member is a citizen of a state diverse from the defendant. 28 U.S.C. § 1332(d)(2). In a prior lawsuit, the plaintiffs, who owned land downstream from a paper mill, won $2 million in damages from defendant Blue Ridge Paper Products, Inc. ("Blue Ridge") for

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injuries suffered between 1999 and 2005. *See Freeman*, Slip Op. at 2. In October 2005, the same plaintiffs filed an identical lawsuit in state court against the same defendant, except that the lawsuit alleged damages that had accrued since the previous trial ended in August 2005. *Id.* Each plaintiff sought $74,000 in damages and the class sought less than $5 million in damages. *Id.* at 2–3.

Blue Ridge removed the case to federal district court in January 2006. *Id.* at 3. In September 2006, the court remanded for failure to meet the amount in controversy requirement under CAFA. *Id.* In December 2007, the plaintiffs amended their October 2005 complaint to cover the six-month period between August 2005 and February 2006, and Blue Ridge again removed. *Id.* Also in December 2007, plaintiffs filed four additional complaints in state court with each complaint seeking damages for a 6-month period—$74,000 in damages per plaintiff and less than $5 million in damages for the plaintiffs as a class. *Id.* After removal of the four new cases to federal court, the district court remanded all five consolidated cases to state court because the statutory deadline for removal of the original case had expired and because the other four cases did not meet the amount in controversy requirement under CAFA. *Id.* at 3–4. The defendants appealed the federal district court's remand.

The Sixth Circuit held that all five cases must be aggregated for purposes of determining the amount in controversy and therefore the district court should treat the case as if the plaintiffs claimed $24.5 million in damages. *Id.* at 4, 6. "Plaintiffs put forth no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction. In fact, plaintiffs' counsel admitted at oral argument that avoiding CAFA was the only reason for this structuring." *Id.* at 4. The Sixth Circuit's decision in *Freeman* is distinguishable from the Ninth Circuit's decision in *Tanoh* (discussed above) in that *Freeman* involved multiple actions filed by the same plaintiffs whereas *Tanoh* involved multiple actions filed by different groups of plaintiffs.

Sixth Circuit Affirms Denial of Class Certification in Toxic Exposure Case

In an unpublished opinion, the Sixth Circuit affirmed a denial of class certification based on the plaintiffs' failure to demonstrate impracticability of joinder as required under Federal Rule of Civil Procedure 23(a)(1). *See Turnage v. Norfolk Southern Corp.*, No. 07-6033 (6th Cir. Jan. 22, 2009), *available at* http://www.ca6.uscourts.gov/opinions.pdf/09a0046n-06.pdf. A 2002 train derailment in Tennessee resulted in the formation of a cloud of sulphuric acid. For residents within 1.3 miles of the site, emergency officials ordered a mandatory two-day evacuation; for residents within 3 miles, officials recommended voluntary evacuation. The defendant, Norfolk Southern, reimbursed expenses for 827 of the 963 households in the 1.3-mile radius and 1037 of the 6047 households in the 3-mile radius. Plaintiffs sought class certification between 2003 and 2007, shifting their definition of the proposed class several times, but the district court adopted a magistrate's recommendations to deny the class. *Turnage*, Slip. Op. at 3–5.

Based on two factors, the Sixth Circuit affirmed the denial of certification for "all persons who were evacuated from the surrounding area" and who experienced appreciable damage, noting that "[r]egardless of the actual number of plaintiffs in this case, their proximity to each other and the discrete and obvious nature of the harm make identifying and contacting them relatively easy." *Id.* at 5. The court resisted the plaintiffs' argument for the impracticability of joinder (or "numerosity"), reasoning that the plaintiffs' estimate of 15,000 uncompensated residents was speculative, encompassed persons who did not experience appreciable damage, and was not supported by concrete evidence. *Id.* at 5–6.

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II. WARNINGS

District Court Allows Failure to Warn Claim for Ethanol-Blended Gasoline in Boats

A federal district court judge denied a motion to dismiss plaintiffs' claim that gasoline manufacturers negligently failed to warn of the dangers of using ethanol-blended gasoline in boats, rejecting defendants' arguments that the claim was preempted by federal law and that market-share liability was inappropriate. *See Kelecseny v. Chevron U.S.A., Inc.*, No. 08-61294-CIV (S.D. Fla. Jan. 20, 2009). Although the initial complaint asserted several causes of action, plaintiffs conceded that all of their claims, except for negligent failure to warn, should be dismissed in light of *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990) (holding that market-share theory can only be used in negligence actions) ("*Conley*"). *Kelecseny*, Slip Op. at 2. The defendants filed a motion to dismiss the remaining claim.

The court held that plaintiffs' negligent failure to warn claim was not preempted by the Energy Policy Act of 2005 or the Energy Independence and Security Act of 2007 because neither Act banned the sale of unblended gasoline and because boat users are exempt from Florida's mandate for blended gasoline. *Id*. at 11–13. Neither the use of non-ethanol gasoline nor a hypothetical warning about the use of ethanol would stand as an obstacle to achieving the goals of the 2005 and 2007 Acts. *Id*. at 11. The court also ruled that the plaintiffs had satisfied the requirements for proceeding under the market-share theory of liability set forth in *Conley* because the plaintiffs could not identify which gasoline manufacturer was responsible for the alleged injuries, despite reasonable attempts to make such identifications. *Id*. at 14.

III. NUISANCE / NEGLIGENCE

District Court Rejects Liability for Groundwater Contamination Where Purchaser Adequately Inspected Property

A federal district court judge granted summary judgment to Cargill and dismissed negligence and nuisance claims, which alleged that Cargill knew or should have known of groundwater contamination prior to purchasing an industrial property. *See Schwan v. Cargill, Inc.*, No. 4:07CV3170 (D. Neb. Jan. 2, 2009). Residents of a subdivision sued Cargill, which owned one of the two properties known as the Engelman Road Facility. *Slip Op*. at 1–2. Employees of the previous owner of the Engelman Road Facility, Heinzman Engineering, Inc. ("Heinzman"), regularly dumped chlorinated solvents on the ground. *Id.* at 5.

The court held that the plaintiffs presented no evidence that Cargill contributed to the solvent contamination or knew of the contamination at any relevant time. Neither Cargill's pre-purchase inspections nor third-party environmental assessments of the property exposed the contamination. *Id*. at 8–9, 30. Based on testimony from Heinzman employees that visible signs of contamination disappeared 30 minutes after dumping the solvents, the court further held that subsurface contamination at the Engleman Road facility was not discoverable by a reasonable inspection and therefore Cargill had no duty to ask about it or take soil samples. *Id.* at 41. The court concluded that, even with further discovery, Cargill could not be liable under either a negligence or a nuisance theory because Cargill neither knew, nor should have known, of the contamination. *Id*. at 26–27, 30, 43.

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IV. EXPERTS

Sixth Circuit Does Not Require Expert Testimony for Causation in Indoor Pesticide Negligence Suit

In a case with potentially broad implications for the standard of care in certain toxic tort cases, the Sixth Circuit has ruled that, under Michigan law, a jury need not hear expert testimony to find defendants negligent for spraying pesticides in an occupied hotel room. *See Gass v. Marriott Hotel Svcs., Inc.*, No. 07-1733 (6th Cir. Mar. 3, 2009), *available at* http://www.ca6.uscourts.gov/opinions.pdf/09a0078p-06.pdf. Plaintiffs claimed that exterminators sprayed their room and belongings with an unknown pesticide that led to plaintiffs' illness. *Gass*, Slip Op. at 1–2. The lower court limited the expert testimony of plaintiffs' examining physicians on osteopathy and environmental medicine to symptoms, diagnosis, and treatment and excluded the subject of specific causation. *Id.* at 9. The district court then granted the defendants' motion for summary judgment, holding that no reasonable jury could have found negligence absent expert testimony linking the illness to a particular pesticide.

In a 2-1 decision, the Sixth Circuit affirmed the lower court's decision with respect to the limited admissibility of plaintiffs' expert testimony, but nonetheless reversed the grant of summary judgment to the defendants with regard to causation. The majority concluded that expert testimony regarding the standard of care for exterminators was not necessary for a jury to conclude negligence based on their ordinary experience. *Id.* at 13–16. With regard to causation, the court distinguished precedent in which the factual context was more complex and in which the defendants had offered expert testimony on the absence of causation. *Id.* at 16–21. The court also noted that a Material Safety Data Sheet ("MSDS") showed that at least one possible chemical could have caused the illness. *Id.* at 17–18.

Fourth Circuit Excludes Plaintiff Expert's Opinion on Groundwater Contamination

The Fourth Circuit affirmed a district court's opinion holding that plaintiffs failed to establish causation for damages stemming from alleged groundwater contamination. *See Miller v. Mandrin Homes, Ltd.*, No. 07-1285 (4th Cir. Jan. 8, 2009), *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/071285.U.pdf. The suit claimed violations of CERCLA and various state laws related to the defendants' sale of allegedly contaminated property to the plaintiffs. *Miller*, Slip Op. at 2, 5–6. The plaintiffs offered expert testimony to support their allegations that volatile organic compounds ("VOCs") had leached from a former landfill into the plaintiffs' groundwater. *Id.* at 3–4. Despite relying solely on aerial photographs of the property and data from tests performed by others, the expert opined that the photos were consistent with the historical presence of a landfill on the property and the detection of VOCs in the plaintiffs' sump water leaching from a nearby landfill. *Id.* at 10–11. The district court excluded the testimony of the expert as speculative, and the plaintiffs appealed. *Id.* at 6–7.

The court held that the opinions failed to establish that the plaintiffs' theory of contamination was probable, as opposed to merely possible, and therefore did not establish a genuine issue of material fact. *Id.* at 9–10. Specifically, the court rejected the expert's conclusion that the presence of VOCs in groundwater indicates contamination from a landfill because VOCs could have reached the property from other sources. *Id.* at 11.

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