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Toxic Torts

Mass Action Exclusion Keeps Refinery Case In State Court Based on Meaning of 'Event'

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Plaintiffs' claims that they were exposed to hazardous substances from a refinery site for more than 10 years cannot be removed as a mass action under the Class Action Fairness Act of 2005, the U.S. Court of Appeals for the Third Circuit held May 20 (*Abraham v. St. Croix Renaissance Group LLLP*, 3d Cir., No. 13-1725, 5/17/13).

CAFA's provision allowing for removal of mass actions to federal court excludes from its definition actions in which ''all of the claims in the action arise from an event or occurrence in the State in which the action was filed . . . .'' The exclusion is at 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

The case turned on whether the term ''event or occurrence,'' could include an alleged ongoing release of hazardous substances over the course of many years.

Judge D. Brooks Smith, writing for a three-judge panel, affirmed the district court's opinion that CAFA's mass action provision excluded this case for removal because the alleged continued dispersion of hazardous substances from the defendant's premises constituted an ''event or occurrence.''

The appeals court rejected defendant St. Croix Renaissance Group LLLP's argument that the exclusion did not apply because the plaintiffs' claims were based on a ''series'' of incidents that resulted in their alleged exposure to hazardous substances.

The defendant argued that the exclusion only applies if the complaint alleges injuries that are the result of a ''single, discrete incident.''

But the appeals court said, ''In common parlance, neither the term 'event' nor 'occurrence' is used solely to refer to a specific incident that can be definitively limited to an ascertainable period of minutes, hours, or days.''

For example, the Third Circuit said ''one can speak of the Civil War as a defining event in American history, even though it took place over a four-year period and involved many battles.''

The appeals court held that where the record demonstrates circumstances that share some commonality and persist over a period of time, these can constitute ''an event or occurrence'' for purposes of the exclusion in § 1332(d)(11)(B)(ii)(I).

Certiorari Petition Expected. Leah M. Nicholls, counsel who argued for plaintiffs and attorney at Public Justice in Washington, D.C., told BNA May 20, ''The Third Circuit's decision is well-reasoned, based on common sense, and based on the structure of the statute.''

Nicholls said that the class action abuses that led Congress to pass CAFA and send more cases to federal court are not present here.

''This is a case where . . . all of the injuries are happening in one location—literally on an island—it's the kind of thing where it makes sense to stay in state court,'' she said.

But Carl J. Hartmann III, of Christiansted, St. Croix, Virgin Islands, argued for SCRG and told BNA May 20 that his client intends to petition for a writ of certiorari in the U.S. Supreme Court because the decision is contrary to other decisions in circuit and district courts.

''What [the Third Circuit] said is that an event can go on and on and on, and that has the net effect of diverting a lot of these cases to state courts—and that is not what CAFA was intended to do,'' he said.

''For mass actions, it will serve to divert everything that is not truly multi-state to state courts if this holds. I don't think that's the direction that the Supreme Court has been going,'' Hartmann said.

Hartmann noted that the Ninth Circuit considered the meaning of the ''event or occurrence'' language in *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012) (13 CLASS 253, 3/9/12), and concluded that the mass action exclusion applied only where there is a ''single'' event or occurrence.

Nicholls however said that the *Bank of America* case was distinguishable on the facts because it involved fraud in thousands of home mortgage borrowing interactions.

The Third Circuit's opinion ''is the first court of appeals opinion to address this mass action section of the statute in the context of mass environmental cases,'' she said. ''Hopefully this will set the tone for mass environmental actions going forward.''

Mounds of Red Dust. SCRG purchased a former alumina factory in St. Croix in 2002, which was owned by other entities for about 30 years.

The facility refined a red ore called bauxite into alumina, creating ''enormous mounds'' of residue, the plaintiffs said. The red mud allegedly contained hazard-

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ous materials, including chlorine, fluoride, TDS, aluminum, arsenic, molybdenum, selenium, coal dust, and friable asbestos, among others.

These substances were dispersed by wind and erosion, inhaled by plaintiffs, deposited on their persons and properties, and deposited into cisterns, the plaintiffs asserted.

The plaintiffs contended that SCRG did nothing to abate the problem, and ''allowed the series of continuous transactions to occur like an ongoing chemical spill.''

Eleanor Abraham and over 500 individual plaintiffs sued SCRG in the Superior Court of the Virgin Islands. They alleged public and private nuisance claims, abnormally dangerous condition, intentional and negligent infliction of emotional distress, and negligence.

The plaintiffs sought money damages and injunctive relief to end the release of hazardous substances and to remediate the property.

Appellate Jurisdiction. SCRG removed the action to federal court under CAFA's mass action provision.

CAFA defines a mass action as any civil action 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. 28 U.S.C. § 1332(d)(11)(B)(i).

The plaintiffs moved to remand the case, arguing their case was excluded from the definition of mass action. The district court granted the motion and remanded the case. The defendant appealed under 28 U.S.C. § 1453(c)(1).

On appeal, the Third Circuit rejected the plaintiffs' threshold argument that the appeals court lacked jurisdiction.

The plaintiffs asserted that CAFA permits appellate review of a grant or denial of a motion to remand for class actions, not mass actions.

But the court said the plaintiffs' argument does not acknowledge Section 1332(d)(11)(A) that states that ''a mass action shall be deemed to be a class action removable'' under certain other parts of the statute.

''The plain text of this provision makes § 1453's treatment of 'class actions' equally applicable to 'mass actions,' '' the court said.

Meaning of 'Event or Occurrence.' The appeals court said the issue in this case is the meaning of the phrase ''event or occurrence'' in the mass action exclusion.

The court first examined the plain meaning of the language.

The defendant ''heavily relied'' on the ''singular nature'' of the article, ''an,'' preceding ''event or occurrence'' to reach its conclusion, the appeals court said.

SCRG asserted that the ''an'' means that the exclusion is not applicable if the complaint alleges injuries that are not the result of a single, discrete incident.

Here, there were a series of alleged incidents, including the erosion of the red mud containing the various hazardous substances, the dispersion by wind of the mud, and the improper storage of, and failure to remove, these substances, SCRG argued.

The appeals court said that SCRG's interpretations was ''not completely devoid of merit'' because a single incident would be ''semantically consistent'' with Congress's decision to use the single form of the words ''event or occurrence.''

But the appeals court said it must give the words used their ''ordinary meaning.''

''The word *event* in our view is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane, or chemical spill . . . . Important events in history are not always limited to discrete incidents that happened at a specific and precise moment in time,'' the court said, agreeing with the district court's reasoning.

Consistent With CAFA's Purpose. This interpretation is not at odds with the statutory scheme in CAFA, the appeals court said.

The statute's local controversy exception, home-state exception, and mass action exclusion ''assure that aggregate actions with substantial ties to a particular state remain in the courts of that state,'' the Third Circuit said.

Exclusion Applies Here. The appeals court next considered whether the exclusion applied here.

The plaintiffs alleged that the condition of the refinery site since 2002 provided a source of the ongoing emission of the red mud and hazardous substances, as well as dispersion onto the plaintiffs' persons and property.

''Because we cannot identify separate and discrete incidents causing the emission of the various substances at any precise point in time, we reject SCRG's argument that the plaintiffs' claims arose from multiple events or occurrences,'' the Third Circuit said.

The Third Circuit affirmed the district court's motion to remand.

Judges Thomas L. Ambro and Michael A. Chagares joined in the opinion.

The opinion is available at http://www.bloomberglaw.com/public/document/Eleanor_Abraham_et_al_v_St_Croix_Renaissance_Docket_No_1301725_3d.

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