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9th Circ. Eases Way For Toxic Tort Removal To Fed. Court

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Law360, New York (May 12, 2015, 10:10 AM ET) -- The Ninth Circuit has held that the local event exception to federal court jurisdiction for mass tort state law actions under the Class Action Fairness Act[1] is limited to actions arising from singular happenings, such as a single chemical spill or single explosion. This places the Ninth Circuit in direct conflict with the Third Circuit, which previously held that the local event exception extends to actions arising from continuous sets of circumstances that could be characterized collectively as an event, such as multiple releases of chemicals into the environment. By substantially narrowing the local event exception to federal jurisdiction, the Ninth Circuit has eased the way for defendants to remove toxic tort suits filed in state court to federal court.

District Court Holds That Removal Is Improper Under CAFA Local Event Exception

In Allen, et al. v. The Boeing Company, et al.,[2] over 100 individuals filed a suit against the Boeing Company and its environmental remediation contractor in Washington state court alleging that for more than 40 years Boeing released toxic chemicals into the groundwater at its manufacturing plant in Auburn, Washington. The plaintiffs alleged that they had incurred property damage as result of the groundwater contamination and that Boeing and its contractor had been negligent in investigating and remediating the contamination.

Boeing removed the action to federal district court asserting federal jurisdiction under CAFA, which Congress enacted in 2005 to address perceived abuses of the class action procedures in state courts. The act expands federal diversity jurisdiction over certain class actions and “mass actions” asserting state law claims. Mass actions are civil actions in which monetary claims of 100 or more persons are to be

tried together because the claims involve common questions of law or fact.[3] Among other reforms, the act loosens the traditional requirements of complete diversity (i.e., all plaintiffs must be of different state citizenship than all defendants) for certain class and mass actions.[4] Also, contrary to the normal rules of removal for diversity actions, the act allows class and mass actions to be removed from state court without regard to whether a defendant is a citizen of the state in which the action is brought.[5]

There are several exceptions to CAFA jurisdiction over mass actions. Importantly, an action shall not be deemed a "mass action" under CAFA if "all of the claims in the action arise from an event or occurrence in the State in which the action was filed and that allegedly resulted in injuries in that State or in States contiguous to that State."[6] The plaintiffs in Allen argued, and the district court agreed, that plaintiffs' allegations of contamination at Boeing's facility fell within this local event exception and that removal was therefore improper.

The district court relied upon a Third Circuit decision, Abraham v. St. Croix Renaissance Group LLLP,[7] in which the plaintiffs alleged that noxious material on defendants' real property was being blown onto plaintiffs' property causing injury. The Abraham court stated that the words "event" and "occurrence" "do not commonly or necessarily refer in every instance to what transpired at an isolated moment in time, ..." such as a fire, explosion or chemical spill.[8] The Third Circuit noted that the Civil War could be called an event in American history, despite the fact that it took place over four years and consisted of many battles.[9] "In short, treating a continuing set of circumstances collectively as an 'event or occurrence' for purposes of the mass action exclusion is consistent with the ordinary usage of these words, which do not necessarily have a temporal limitation."[10]

Ninth Circuit Reverses, Holding The CAFA Local Event Exception Is Limited To Singular Happenings

In a 2-1 decision, the Ninth Circuit in Allen reversed the district court, stating that "[w]ith due respect to the Third Circuit, we do not agree with its definition of 'event or occurrence' as that term is used in CAFA."[11] Initially, the Ninth Circuit noted that it was bound by its own previous decision in Nevada v. Bank of American Corp.[12]Nevada stated that "[c]ourts have consistently construed the 'event or occurrence' language to apply only in cases involving a single event or occurrence, such as an environmental accident, that give rise to the claims of all plaintiffs."[13]

Moreover, the Allen court found that even without the Nevada controlling precedent, "we would not adopt the Third Circuit's approach."[14] As used in CAFA, the phrase "event or occurrence" does not refer to something like the Civil War, but to a "singular happening."[15] The Allen court buttressed its conclusion by arguing that a broader definition would cause the local single event exception to be redundant with another major exception to CAFA jurisdiction, the local controversy exception. The local controversy exception allows the court to decline jurisdiction in those circumstances in which more than two-thirds of the members of the proposed class and a significant defendant or the primary defendants are all citizens of the state.[16] "There would be no need to consider the local controversy exception's criteria ... if the local single event exception applied to all 'circumstances that share some commonality and person over a period of time.'"[17]

The Allen court also drew on legislative history to support its conclusion that "event or occurrence" referred to a singular happening. The court quoted the following language from the Senate Committee Report: "The ... exception would apply only to a truly local single event with no substantial interstate effects. The purpose of this exception was to allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local ..." S. Rep. No. 109-14, at 7 (2005). Thus, according to the court,

the legislative history draws the line between a one-time chemical spill and a continuing course of pollution, contamination or conduct that occurs over a period of years. For example, if an oil refinery has an accident and, as a result, releases toxic materials into the air or water, a suit against the refinery based on the accidental release of contaminants would fall within the exception, but an action against the refinery alleging a continuous course of pollution over a number of years would not.[18]

Finally, the court noted that even if it read the local event exception as covering allegations of a continuing nature, the plaintiffs' action still would not qualify because they alleged two distinct wrongful acts by two different defendants: the years of Boeing's alleged contamination and the contractor's alleged negligent failure to remediate the contamination.[19]

Judge Johnnie B. Rawlinson dissented, concluding that "the [Third Circuit's] analysis in Abraham is more persuasive on the particular issue we are called upon to decide."[20] Judge Rawlinson distinguished Nevada, which alleged fraud in thousands of individual home mortgage modification and foreclosure processes. On the other hand, "[t]here is a clear parallel between the allegation made by the plaintiffs in the Abraham case and the allegations made by the plaintiffs in this case. Although I would not necessarily go so far as to label the Civil War a single event under the act, the approach taken by the Third Circuit is otherwise reasonable."[21]

Conclusion

The reasoning and result of Abraham and the majority decision in Allen are in direct conflict, making the issue ripe for Supreme Court review. Which view of the local event exception will prevail is an important question for two reasons. First, courts have largely shut the door to class actions alleging injuries or damages arising out of environmental contamination because of problems with establishing "commonality" and "typicality" of such classes and the class representatives. As a result, increasingly, these toxic tort suits are being brought as mass actions, precisely the types of action to which the local event exception applies. Second, many if not most claims of environmental contamination or toxic torts do not arise out of a single happening, such as one spill or an explosion. More typically, alleged contamination is the result of many years of operations which result in numerous releases into the environment. The Ninth Circuit's narrow interpretation of the local event exception, if adopted nationwide, will allow many more toxic torts cases to be heard in the federal courts.

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[1] 28 U.S.C. § 1332(d).

[2] No. 15-13562, 2015 U.S. App. LEXIS 6868 (9th Cir. Apr. 6, 2015).

[3] 28 U.S.C. § 1332(d)(ii)(B)(i).

[4] 28 U.S.C. § 1332(d)(2).

[5] 28 U.S.C. § 1453(b).

[6] 28 U.S.C. § 1332(d)(11)(B)(ii).

[7] 719 F.3d 270 (3d Cir. 2013).

[8] *Id.* at 277.

[9] *Id.*

[10] *Id.*

[11] *Allen*, 2015 U.S. App. Lexis 6868, at *10.

[12] 672 F.3d 661 (9th Cir. 2012).

[13] *Id.* at 668 (citations omitted).

[14] *Allen*, 2015 U.S. App. Lexis 6868, at *11.

[15] *Id.*

[16] 28 U.S.C. § 1332(d)(4)(A).

[17] *Allen*, 2015 U.S. App. Lexis 6868, at *12-13 (quoting *Abraham*).

[18] *Id.*, at *16.

[19] *Id.*, at *18-20. The court remanded the case to the district court for the court to consider whether the local controversy exception of federal jurisdiction under CAFA applied. *Id.*, at *29.

[20] *Id.*, at *30.

[21] *Id.*, at *34.
