Alison Frankel's **ON THE CASE**

Is long-running pollution 'an event'? 3rd Circuit says yes in CAFA case

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The doctrine of strict textualism - in which judicial decisions are compelled solely by statutory language - has always reminded me of what my father, an internist, used to say about overeager surgeons: When your only tool is a hammer, every problem is a nail. And when your only judicial philosophy is textualism, every case is a matter of words. Simple enough, right? Wrong. Consider a ruling Friday by a three-judge panel at the 3rd Circuit Court of Appeals that turned on the definition of "an event or occurrence."

The issue for the 3rd Circuit was removal to federal court of a mass action under the Class Action Fairness Act. As you probably recall, Congress passed CAFA in 2005 with the express intention of steering most class actions out of state court and into the federal system. CAFA also mandated that mass actions involving parallel claims by 100 or more individual plaintiffs be litigated in federal court, with a couple of exceptions. One of the exceptions holds that strictly local controversies may remain in state court, even if more than 100 plaintiffs have sued. To meet CAFA's criteria for that exception, cases must assert claims that all "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."

There's not much ambiguity in defining state borders, but what about in delineating the time frame of an event? Was, say, the Civil War a single event or a collection of battles and political actions that each represent a unique event? In the case before the 3rd Circuit, more than 400 current and former residents of St. Croix in the U.S. Virgin Islands claimed to have been injured by St. Croix Renaissance Group's supposed failure to clean up toxic waste piles at a former alumina refinery SCRG purchased in 2002. St. Croix, which is in the business of redeveloping contaminated properties, never operated the refinery and has spent years in cleanup-cost litigation with a former owner of the site and others. But the plaintiffs said in filings in territorial court (the Virgin Islands equivalent of state court) that asbestos and other hazardous chemicals from the abandoned refinery were meanwhile swirling around St. Croix and damaging their health.

SCRG removed their suits to federal court as a mass action under CAFA. The plaintiffs moved for remand to the territorial court under the local controversy exception; SCRG's lawyer, **Carl Hartmann** countered that the plaintiffs' suits didn't involve "an event or occurrence." In December, U.S. District Judge **Harvey Bartle** of Philadelphia sided with the plaintiffs, finding that 10 years of supposedly continuous contamination can be construed as "an event" for CAFA jurisdictional purposes. "We think that an event, as used in CAFA, encompasses a continuing tort which results in a regular or continuous release of toxic or hazardous chemicals, as allegedly is occurring here, and where there is no superseding occurrence or significant interruption that breaks the chain of causation," Bartle wrote. "A very narrow interpretation of the word 'event' as advocated by SCRG would undermine the intent of Congress to allow the state or territorial courts to adjudicate claims involving truly localized environmental torts with localized injuries."

SCRG asked the 3rd Circuit for an expedited review, which was granted. In its appellate brief, the company argued (among other things) that Bartle's definition of an event was at odds with that of the 9th Circuit in Nevada v. Bank of America, which is the only federal appellate ruling on this question. In a brief in response, the plaintiffs' appellate counsel at Public Justice said several district courts have held that ongoing contamination is a single event, and that the legislative history of CAFA shows that Congress included the local controversy exception specifically to permit environmental tort claims to be litigated in state court.

The 3rd Circuit panel of Judges **Thomas Ambro**, **Brooks Smith** and **Michael Chagares** said that SCRG's argument wasn't "completely devoid of merit" because Congress chose to use singular forms of "event" and "occurrence" in CAFA's local exception provision. But the panel said that under the ordinary meaning of the words (and without any time limits specified in the statute), an event or occurrence can be a collective set of circumstances, such as continuing contamination. The 3rd Circuit said it didn't even have to consider the legislative history of CAFA to reach that determination.

SCRG has already filed a notice of its intention to seek review from the U.S. Supreme Court, which demonstrated its interest in CAFA jurisdictional tussles earlier this year in Standard Fire v. Knowles. SCRG counsel Hartmann told me in an interview that the company was surprised by the 3rd Circuit's decision because the issue seems to be much more complicated than the appellate opinion suggests, given the 9th Circuit's holding in the Nevada case. Moreover, he said, the ruling could have broad implications in environmental mass actions. "This is going to take all those cases and move them to state court," he said. "It's clear this court wants to push cases out of federal court and into state court. We don't think that's what Congress intended."

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Public interest groups, however, are cheering the opinion. **Leah Nicholls** of Public Justice, who argued at the 3rd Circuit for the St. Croix plaintiffs and called the decision "groundbreaking" in a blog post, told me that the 3rd Circuit "quite reasonably said it's not inconsistent to say in this case that continuous and ongoing conduct is a single event or occurrence." According to Nicholls, the facts here - which involved the impact of supposedly ongoing contamination at one site - were quite different from those before the 9th Circuit in the Nevada case, in which a state attorney general brought a wide-ranging parens patriae action involving BofA's alleged deception about mortgage modification and foreclosure practices. "This is local residents suing over a local facility," Nicholls said.