

Raising The Bar For Class Claims In Environmental Cases

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In a recent environmental contamination putative class action, *Reece v. AES Corp.*,^[1] the U.S. Court of Appeals for the Tenth Circuit affirmed an Oklahoma district court’s denial of two motions to remand. Both courts held that the plaintiffs had failed to meet the threshold citizenship requirement of the local controversy exception of the Class Action Fairness Act of 2005 (CAFA). The Tenth Circuit also affirmed the district court’s dismissal of the plaintiffs’ complaint for failure “to allege the element of injury.” This case adds to a limited body of case law addressing fracking and related activities, highlights the need for substantive supporting evidence of “citizenship” to trigger CAFA’s local controversy exception, and adds to a growing trend among circuit courts to disallow “fear of contamination or injury” claims in the environmental tort context.



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Reece Decision

The plaintiffs in this case alleged that fluid fracking waste, coal combustion waste, and fly ash contaminated the environment in Oklahoma where it was generated, along the route it was transported, and where it was disposed of (allegedly in two abandoned and unlined former strip mines that leak contaminants into groundwater and nearby waterways). The plaintiffs’ proposed class comprised individuals who live, work and recreate near those areas.



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The amended complaint named various companies involved in the generation, transportation and disposal of that waste as defendants. It alleged claims for strict liability, public and private nuisance, trespass, negligence, negligence per se, and unjust enrichment. The complaint sought compensatory and punitive damages, as well as injunctive relief. The plaintiffs allege that they suffer from “reasonable concern” about several health risks, including breathing contaminated air and “physical ailments consistent with disclosures and warning set forth in [Material Safety Data Sheets], including respiratory conditions, ... and skin and eye irritations.”



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Plaintiffs’ Motions for Remand

The defendants removed the case to Oklahoma district court under CAFA, and the plaintiffs filed a remand motion arguing that their case fell under CAFA’s “local controversy,” “home state” and “interests of justice” exceptions. Each of these exceptions requires the plaintiffs to show that a

threshold percentage of class members are Oklahoma citizens. The plaintiffs relied on summary exhibits that showed Oklahoma property ownership and residency statistics, though they did not provide the underlying data.

In light of the lack of substantive evidence, the district court denied the motion on the ground that the plaintiffs had not met their burden of proof. As explained by the court, the plaintiffs' showing fell short because it tabulated Oklahoma property owners and residents, which are not necessarily "citizens" as required by the statutory exceptions. In addition, the proposed class spanned over 20 years — from the time the coal-related activity started in the mid-1990s. The plaintiffs made no effort to account for the fact that the citizenship composition of the proposed class would have changed over that lengthy time span.

The plaintiffs then filed a "renewed" motion for remand that included an affidavit from a local land records expert concluding that "at least two-thirds" of the members of the proposed class were "Oklahoma residents," but again did not include any supporting data. The district court characterized the plaintiffs' motion as a "motion for reconsideration" and denied it on the ground that the court would not consider newly added evidence.

In affirming the district court's decision, the Tenth Circuit focused on CAFA's "local controversy" exception. Under that exception, the plaintiffs bore the burden of showing by a preponderance of the evidence that "greater than two-thirds of the members" of the proposed class are "citizens of the state in which the action was originally filed." The plaintiffs were also working against "a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." The court noted that "property owners" and "residents" are not necessarily "citizens" because the latter requires an "intent to remain in the state." Because the plaintiffs did not propose a narrower class of only "citizens," the Tenth Circuit agreed with the district court that the plaintiffs had to provide substantive evidence that the proposed class met the requisite citizenship threshold. The Tenth Circuit further agreed that the conclusory and unsubstantiated demonstratives used by the plaintiffs in connection with their first remand motion fell short.

Without resolving whether the plaintiffs' second remand motion was a "renewed" motion or a "motion for reconsideration," the Tenth Circuit affirmed the district court's denial of that motion as well. Even if the district court should have considered the evidence submitted with the plaintiffs' second motion (i.e., the affidavit of the local land records expert), the Tenth Circuit viewed that decision as, at worst, "harmless error" because the "affidavit falls numerically short of the standard." The expert concluded that the proposed class included "at least two-thirds Oklahoma residents," but the statute requires "greater than two-thirds." The affidavit was additionally ineffective in demonstrating that two-thirds of the proposed class members were Oklahoma citizens because the expert again accounted for "residency" and not "citizenship."^[2]

This outcome illustrates the heightened precision that courts require for plaintiffs to avail themselves of CAFA's local controversy exception and the steep evidentiary burden that plaintiffs face if they fail to define a proposed class that clearly meets that statutory standard. Where this exception arises and where plaintiffs do not limit their proposed class explicitly to "citizens," decisions like *Reece* provide defendants with ammunition for preventing remand. Note that the Tenth Circuit does not provide guidance about, and it is unclear how, these plaintiffs could have proven the "intent" aspect of citizenship in this case.

Defendants' Motion to Dismiss

The defendants filed individual motions to dismiss the plaintiffs' complaint. The district court sustained those motions, but allowed the plaintiffs 15 days to adequately allege injury. The plaintiffs filed an amended complaint that attempted to provide more detail. The court narrowed that amended complaint by dismissing certain parties from certain claims and again allowed the plaintiffs 15 days to adequately allege injuries for the remaining claims. The plaintiffs failed to supplement their pleading, so the court dismissed the complaint without prejudice.

The plaintiffs appealed the dismissal of their strict liability, negligence and negligence per se claims — all three of which require “a specific allegation that the actions taken by the defendants caused an injury.” Relying on Oklahoma law, the Tenth Circuit affirmed dismissal of these claims because “a plaintiff in a toxic tort case must prove that he or she was exposed to and injured by a harmful substance ... [a]lleging reasonable concern about an injury occurring in the future is not sufficient to allege an actual injury in fact ... a cause of action does not accrue until an injury in fact occurs.” This decision is consistent with a growing trend among courts to deter “fear of contamination and injury claims” in the environmental tort context. For a discussion of a recent Eighth Circuit case rejecting environmental tort “fear of contamination” claims on similar grounds see our legal update “U.S. Court Of Appeals For The Eighth Circuit Refuses To Certify Nuisance Class Alleging Fear Of Contamination But No Actual Contamination.”

In addition to agreeing that the plaintiffs' allegations of potential future harm were insufficient to sustain a toxic tort claim, the Tenth Circuit likewise agreed that the plaintiffs' allegations of present physical harm were insufficient because “the general statement that plaintiffs suffer ailments consistent with exposure to [the contaminants at issue] is nothing more than a formulaic recitation.” The Tenth Circuit agreed that without specific allegations of a plaintiff suffering the alleged injuries after coming into contact with the contaminants at issue, there was no basis to infer that the defendants are liable. Thus, it affirmed the district court's dismissal of all of the plaintiffs' remaining claims.

The Tenth Circuit's decision raises the bar for plaintiffs attempting to proceed as a class with these types of claims. Even at the complaint stage, the Tenth Circuit wanted to see “concrete examples” and “specific allegations of individual plaintiffs contracting the alleged ailments after coming into contact with” the contaminants at issue. The requirement that plaintiffs bringing environmental tort claims come forward with more specific allegations of injury may deter the filing of claims for “concern about a future injury” at the outset. Further, the decision likely will increase plaintiffs' litigation costs by requiring expert testimony to demonstrate exposure and actual injury.

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[1] *Reece v. AES Corp.*, No. 14-7010, 2016 WL 521247 (10th Cir. Feb. 9, 2015).

[2] After the district court denied the first remand motion, the plaintiffs attempted to modify the class definition to include only residents and/or property owners who are Oklahoma “citizens.” The Tenth Circuit acknowledged that the modification may have been effective had it been included in the complaint, but held that “post-removal amendments are ineffective to divest a federal court of jurisdiction.” *Id.* at 43.

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