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Offshore Exposure Claims: Lessons in Removal, Jurisdiction and Class Certification

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Following Hurricane Katrina, two oilfield workers filed separate suits in Louisiana state court alleging that they were exposed to Naturally Occurring Radioactive Material (NORM) during the course of decommissioning a BP platform that was damaged by the storm. Importantly, these suits were one of the first attempts, if not the first, to seek class action status in the context of offshore drilling for claims alleging exposure to hazardous substances and resulting personal injuries.

After each suit was removed under the Class Action Fairness Act (CAFA) and the Outer Continental Shelf Lands Act (OCSLA), the federal court in the Western District of Louisiana first considered whether the cases were properly removed to federal court and then whether class certification was appropriate for such claims. These cases present valuable lessons concerning removal, jurisdiction and class certification, especially for claims allegedly occurring offshore.

Interplay Between the Jones Act, CAFA and OCSLA for Purposes of Removal

In 2008, George Larry Myers filed suit in Louisiana state court, alleging that he was exposed to NORM in oilfield pipe that was cut during the decommissioning process and sought class action status on behalf of over 100 workers. *Myers v. BP America, Inc*., 2009 WL 2341983 (W.D.La.). The BP platform at issue was located on the Outer Continental Shelf off the coast of Louisiana, was permanently attached to the seabed and was erected for oil and gas exploration and production. Meanwhile, a time-chartered liftboat—on which the workers ate and slept—was jacked-up adjacent to the platform. One such worker, John Paul DeHart, filed suit in a different Louisiana state court asserting similar, if not identical, claims. The federal court did not need to reach the merits of removal in the *Myers* case because the plaintiff there waived remand by taking affirmative steps in federal court before seeking remand. However, the merits of removal were considered in the consolidated action involving *DeHart*. *DeHart v. BP America, Inc*., 2010 WL 231744 (W.D.La.).

1. Removal When Jones Act Claims Are Asserted

The defendants removed the *DeHart* case by asserting federal jurisdiction under CAFA and OCSLA, and that any claims alleging seaman status by the plaintiff were fraudulently or

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improperly asserted to prevent removal. As a general rule, of course, Jones Act cases are not removable. *Preston v. Grant Advertising, Inc*., 375 F.2d 439 (5th Cir. 1967). However, the United States Fifth Circuit Court of Appeals has recognized that in certain circumstances "defendants may pierce the pleadings to show that the Jones Act claim has been fraudulently pleaded to prevent removal." *Burchett v. Cargill, Inc*., 48 F.3d 173, 175-176 (5th Cir. 1995).

Under the usual test for seaman status, there are two prongs: 1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; and 2) the seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and nature. The latter prong requires a showing that the plaintiff performed a significant part of his work aboard the vessel with some degree of regularity and continuity. *Barrett v. Chevron, USA, Inc*., 781 F.2d 1067, 1074 (5th Cir.1986). Generally, the worker must demonstrate that at least 30 percent of his time was spent in the service of that vessel.

In *DeHart*, however, the plaintiff admitted that the overwhelming majority of his work on the project was performed while he was physically on the platform performing decommissioning work and not the vessel, the latter being where he merely ate and slept. Accordingly, as a matter of law, there was "no possibility" that he would be deemed a seaman under the Jones Act and remand was denied on this basis. *DeHart v. BP America, Inc.*, 2010 WL 231744, *6 (W.D.La.).

2. CAFA Jurisdiction Generally

In general, Congress enacted CAFA to encourage federal jurisdiction over interstate class action lawsuits of national interest. CAFA contains a basic jurisdictional test that requires a removing defendant to prove minimal diversity—where one plaintiff is diverse from one defendant; an aggregated amount in controversy of $5,000,000 or more; and at least 100 members of the putative class. 28 U.S.C. § 1332(d).

In *DeHart*, the court held that it was facially apparent that CAFA jurisdiction was present, based on the size of the class alleged and the damages claimed, including alleged permanent neurological, psychological and pathological conditions arising from the alleged exposure. In short, even a minimal award to each of the putative class members would satisfy the jurisdiction limit under CAFA. However, did any of the exceptions to CAFA jurisdiction apply?

3. Exceptions to CAFA Jurisdiction

While the plaintiff argued that the "local controversy" and "home state" exceptions were applicable, the court disagreed.

a. The Local Controversy Exception

The court correctly noted that Congress crafted CAFA to exclude only a narrow category of truly localized controversies. Accordingly, under the "local controversy" exception, a

district court must decline to exercise jurisdiction when 1) more than two-thirds of the members of the proposed plaintiff class are citizens of the state in which the action was originally filed; 2) the plaintiffs sued at least one defendant (a) from whom they seek significant relief, (b) whose conduct forms a significant basis for their claims, and (c) who is a citizen of the state in which the action was originally filed; 3) the principal injuries resulting from the alleged conduct, or any related conduct, of each defendant happened in the state in which the action was originally filed; and 4) during the past three years, no other class action has been filed against any of the defendants asserting the same or similar factual allegations, on behalf of the same or other persons. 28 U.S.C. § 1332(d)(4)(A).

In *DeHart*, the court noted that the only proof of citizenship presented by the plaintiff was from a "personnel on board" form received from the defendants in discovery. However, no residency or citizenship was even listed for a majority of the personnel on the form. Therefore, the plaintiff failed to satisfy his burden of demonstrating that two-thirds of the putative class were Louisiana citizens on the date suit was filed. Moreover, the injuries allegedly occurred while the putative class was working on the Outer Continental Shelf, which is under the exclusive jurisdiction and control of the federal government—not Louisiana. So, there was no "local controversy" under CAFA in any event. *DeHart v. BP America, Inc.*, 2010 WL 231744, *11-12 (W.D.La.).

b. The Home State Exception

Under the "home state" exception, a district court shall decline to exercise its jurisdiction over class actions in which two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. 28 U.S.C. § 1332(d)(4)(B). Generally, courts have held that all primary defendants must be citizens of the state in which the action was originally filed. *Raspberry v. Capitol Country Mut. Fire Ins. Co*., 609 F.Supp.2d 594, 606 (E.D.Tex. 2009).

But who are "primary defendants"? Since CAFA does not define the terms and there is very little case law addressing the issue, the court in *DeHart* looked to the Senate Report on CAFA for guidance. The Report provides that "primary defendants" should be interpreted to mean those defendants who are the real "targets" of the lawsuit or, stated differently, the defendants who would be expected to incur most of the loss if liability is found. For example, one court has held that "primary defendants" should include any person who has substantial exposure to significant portions of the proposed class, particularly any defendant who is allegedly liable to the vast majority of the members of the proposed class (as opposed to simply a few individual class members). *Robinson v. Cheetah Transportation*, 2006 WL 3322580, *2-3 (E.D.La.) (quoting 3 S. Rep. No. 109-14 at 43-44 (2005)).

Under that rationale, the court in *DeHart* held that BP—a non-Louisiana corporation—was a "primary defendant" as the alleged owner of the platform at issue, the alleged charterer of the vessel at issue, and the alleged Jones Act employer of the plaintiff and many members of the putative class. Therefore, with BP as a primary defendant, the "home state" exception to CAFA was inapplicable as well and CAFA jurisdiction was proper for purposes of removal.

Class Certification for Exposure Claims

1. Can Class Certification Even Be Decided By Summary Judgment?

After adequate discovery, the court in *Myers* considered whether the exposure claims were appropriate for class certification following a summary judgment filed by the defendants. *Myers v. BP America, Inc*., 2009 WL 2341983 (W.D.La.). As a threshold matter, the first issue was whether class certification could even be considered by summary judgment and without an evidentiary hearing.

Initially, the court noted that Rule 23 of the Federal Rules of Civil Procedure does not require an evidentiary hearing on the question of class certification. Instead, the Supreme Court has recognized that although the issue of class certification is usually enmeshed in law and fact, the issues are sometimes plain enough from the pleadings to resolve the issue. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). And while the Fifth Circuit has stated on numerous occasions that the district court should ordinarily conduct an evidentiary hearing on class certification, in cases "where 'clear grounds exist [ ] for denial of class certification' a district court may escape this obligation." *Merrill v. Southern Methodist University*, 806 F.2d 600, 608 (citing *Morrison v. Booth*, 730 F.2d 642, 644 (11th Cir.1984) (interpreting Fifth Circuit precedent)). With this background, the court in *DeHart* held that if there are no genuine issues of disputed material fact concerning the prerequisites for class certification under Rule 23, a motion for class certification may be decided summarily.

2. The Predominance Requirement for Exposure Claims

To establish that a case is appropriate for class certification, the representative plaintiff must establish all of the following requirements of Rule 23(a): 1) a class so numerous that joinder of all members is impracticable ("numerosity"); 2) the existence of questions of law or fact common to the class ("commonality"); 3) class representatives with claims or defenses typical of the class ("typicality"); and 4) class representatives that will fairly and adequately protect the interests of the class ("adequacy of representation"). Fed.R.Civ.P. 23(a). Further, plaintiffs who seek class certification under Rule 23(b)(3) must demonstrate that questions of law or fact common to class members predominate over any questions affecting only individual members ("predominance") and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ("superiority"). Fed.R.Civ.P. 23(b)(3)*; Steering Committee v. Exxon Mobil Corp*., 461 F.3d 598, 601 (5th Cir. 2006).

However, courts have repeatedly held that claims for personal and emotional injuries arising from exposure to toxic chemicals are inappropriate for class-wide treatment because individualized factual issues concerning specific causation and damages predominate over any common issues. *Exxon Mobil Corp*., 461 F.3d at 601-04. Stated differently, claims for injuries resulting from exposure to toxic substances have generally been found not to satisfy the predominance requirement because causation, damages and defenses must be determined individually. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct.

2231, 138 L.Ed.2d 689 (1997); *Kemp v. Metabolife International, Inc*., 2002 WL 113894, *4 (E.D.La.2002). Typically, exposure claims "will be highly individualized with respect to proximate causation, including individual issues of exposure, susceptibility to illness, and types of physical injuries." *Exxon Mobil*, 461 F.3d at 602. Instead, "one set of operative facts would not establish liability and the end result would be a series of individual mini-trials which the predominance requirement is intended to prevent." *Id*.

In *Myers*, the defendants argued that any claims asserted by putative members of the class would necessarily require individualized proof unique to each class member; analyses of individualized test results and data; and would likely vary based on each individual's unique medical history and background. The court agreed, held that the plaintiff failed to satisfy the predominance requirement, and granted summary judgment dismissing the class action. *Myers v. BP America, Inc*., 2009 WL 2341983 (W.D.La.). Similarly, due to lack of predominance in the *DeHart* matter, the court recently granted the defendants' summary judgment and dismissed the class action in that case as well. *See DeHart v. BP America, Inc.*, Civil Action No. 6:09-0626, R. Doc. 109 (W.D.La.).

Conclusion

Litigation involving class actions and toxic exposure claims presents a unique and complex web of jurisdictional and substantive issues from the date suit is filed until class certification is ultimately decided, especially when such claims arise offshore. With adequate foresight and focused preparation, these claims can be properly defeated through motion practice to avoid an expensive trial or evidentiary hearing on class certification.

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