Legal Backgrounder

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High Court's *Cert* Denial Foments Greater Confusion Over Removal of Mass Actions Under Federal Law

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During its last full term, the U.S. Supreme Court issued several decisions regarding mass or class action litigation that already have been and likely will continue to be widely discussed. For example, the Court's ruling that a *parens patriae* action involving many or all of a single state's citizens does not qualify as a "mass action" is a significant limitation to CAFA's removal provisions.[1]

These decisions have overshadowed the Court's denial of certiorari in *St. Croix Renaissance Group, L.L.L.P. v. Abraham*.[2] This denial left in place splits among the U.S. Courts of Appeal for the Third, Ninth, and arguably Fifth Circuits (as well as various district courts) regarding what constitutes a "mass action" under the provisions of the Class Action Fairness Act of 2005 ("CAFA"), and when CAFA's "event or occurrence" exclusion applies.

Under CAFA, when assessing whether a district court has jurisdiction, "a mass action shall be deemed to be a class action removable under [the class action removal criteria] if it otherwise meets the provisions of those paragraphs."[3] A "mass action" includes claims for monetary relief by 100 or more persons that are to be "tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."[4]

However, CAFA contains exceptions to this definition, one of which was relevant in *St. Croix*. Under CAFA, "the term 'mass action' shall not include any civil action in which - (I) 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."[5]

The question left unanswered in the text of CAFA is what constitutes an event or occurrence. According to the Senate Judiciary Committee Report on CAFA:

> 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, even though there are some out-of-state defendants. By contrast, this exception would not apply to a product liability or insurance case. The sale of a product to different people does not qualify as an event.[6]

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[1] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *see also Halliburton v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (addressing various evidentiary issues that commonly arise in securities fraud class action lawsuits).
[2] 134 S. Ct. 898 (2014).
[3] 28 U.S.C. § 1332(d)(11)(A).
[4] *Id.* at § 1332(d)(11)(B)(i).
[5] *Id.* at § 1332(d)(11)(B)(ii)(I) (emphasis added).
[6] S. Rep. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44.

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This guidance does not resolve the issue of when, if ever, alleged injurious conduct over a period of time can be considered a single event. The answer varies by circuit.

The Ninth Circuit's Narrow Definition of "Event or Occurrence." In its 2012 *Nevada v. Bank of America Corp.* decision,[7] the Ninth Circuit rejected the district court's definition of an event or occurrence. In a narrow interpretation of the statute, the court held that the "exclusion applies only where all claims arise from a *single* event or occurrence."[8] In doing so, the Ninth Circuit noted that:

> [T]he legislative history of CAFA supports this interpretation, making clear that the exception was intended to apply 'only to a truly local single event with no substantial interstate effects' in order 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.'[9]

Because the claims at issue alleged "widespread fraud in thousands of borrower interactions," the event or occurrence exception did not apply.[10]

Many district courts in and out of the Ninth Circuit have similarly interpreted CAFA's "event or occurrence" language as covering single acts, not a pattern of various alleged wrongful conduct over time.[11] In other instances, courts have found that where a singular wrongful act occurs, the "event or occurrence" exception is satisfied even though that act lasted for some time.[12]

The Third and Fifth Circuits' Expansive Definition of "Event or Occurrence." In *St. Croix*, the district court departed from the Ninth Circuit's view when deciding what constituted an "event or occurrence." In 2002, defendant St. Croix Renaissance Group ("SCRG") purchased the site of a former alumina refinery which had operated for decades under the ownership of a number of different entities and at which structural asbestos had been exposed in 2002.[13] Plaintiffs alleged that when SCRG purchased the site, it contained hazardous residue left over from the alumina refining process and friable asbestos, and that those substances were dispersed throughout nearby neighborhoods during SCRG's ownership.[14]

SCRG removed the suit under CAFA's mass action provision, and plaintiffs moved to remand, arguing that the event or occurrence exclusion applied because SCRG's failure to stop the spread of pollutants from its property was a single failure to abate. The district court agreed, finding that plaintiffs' claims of "continuing

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[7] 672 F.3d 661 (9th Cir. 2012).
[8] *Id.* at 668.
[9] *Id*. (quoting S. Rep. No. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44).
[10] *Id*.
[11] *See, e.g., Aana v. Pioneer Hi-Bred Int'l, Inc.*, No. CV 12-00231, 2012 WL 3542503 (D. Haw. July 24, 2012) (claims by property owners that defendants failed to prevent soil erosion and allowed toxins to drift to neighboring properties for over a decade did not constitute "event or occurrence"); *Dunn v. Endoscopy Ctr. of So. Nev.*, No. 2:11-CV-00560, 2011 WL 5509004 (D. Nev. Nov. 7, 2011) (exception does not apply to allegations of personal injuries by different plaintiffs arising from reuse of syringes because "[t]he plain language of the statute, which obviously controls, says 'an event or occurrence' not 'events or occurrences.' The use of the singular in the statutory language is important and sufficient.").
[12] *See, e.g., Armstead v. Multi-Chem Grp., LLC*, Civ. No. 6:11-2136, 2012 WL 1866862 (W.D. La. May 21, 2012) (claims from single chemical plant explosion satisfy "event or occurrence" exception); *Allen v. Monsanto Co.,* No. 3:09cv47, 2010 WL 8752873, at *9 (N.D. Fla. Feb. 1, 2010) (alleged release of PCBs by the same plant into one local waterway over a period of years is "event or occurrence").
[13] *Abraham v. St. Croix Renaissance Grp., L.L.L.P.*, Civ. No. 12-11, 2012 WL 6098502, at *2 (D.V.I. Dec. 7, 2012).
[14] *Id.*

environmental damage" constituted an event or occurrence within the meaning of CAFA.[15] Comparing the alleged pollution to the Civil War, the court concluded that:

> The word event … is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane or chemical spill. For example, 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.[16]

Adopting the district court's "Civil War" rationale, the Third Circuit affirmed, finding that "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."[17] The court found that, because SCRG allegedly allowed contaminants to spread to other parcels during its ownership, this was a continuous release of toxins from a single facility that qualified for the event or occurrence exclusion and required remand.[18]

After denial of certiorari in *St. Croix*, the Fifth Circuit took up this issue under different facts than either prior appellate case. In *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, plaintiffs sued defendants with whom they had executed oil, gas, and mineral leases.[19] After several years of exploration, defendants drilled and operated a single well, which failed.[20] Plaintiffs sued in state court, alleging that defendants' negligence in five specific areas during the drilling and operation of the well led to its failure. Defendants removed the case under CAFA's mass-action provisions. Plaintiffs sought remand on various bases, including a claim that the "event or occurrence" exception applied.[21]

The Fifth Circuit found that the failure of the well constituted a single "event or occurrence" within the meaning of the CAFA exception.[22] Defendants argued that the five bases for the negligence claims were separate events. The Fifth Circuit disagreed, finding that the alleged negligent acts resulted in the single event or occurrence at issue—the failure of the well. The panel also found that even though the allegedly negligent conduct in *Rainbow Gun Club* took place over several years, "the plain text of the exclusion supports the Plaintiffs' view that the terms 'event' and 'occurrence' are not generally understood to apply only to incidents that occur at a discrete moment in time."[23]

The Fifth Circuit addressed the differing definitions of "event or occurrence" in *St. Croix* and *Nevada v. Bank of America*, and held that the facts before it were closer to those in *St. Croix*. Characterizing *Nevada v. Bank of America* as "more ambiguous" than *St. Croix*, the Fifth Circuit panel found that the Ninth Circuit's "only" specific ruling was that an environmental tort is an example of an "event or occurrence," but allegations that a bank misled many consumers in various ways are not. According to the *Rainbow Gun Club* panel, the Ninth's Circuit's opinion provided no additional guidance on the definition of "event or occurrence."[24] The Fifth Circuit speculated that even if the Ninth Circuit had intended to adopt a "narrower view" of the "event

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[15] *Id.* at *3.
[16] *Id.*
[17] *Abraham v. St. Croix Renaissance Grp., L.L.L.P*, 719 F.3d 270, 277 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 898 (2014); *id.* at 278 ("CAFA does not require limiting the construction of 'event or occurrence' to something that happened at a discrete moment in time").
[18] *Id*. at 279-280.
[19] 760 F.3d 405, 407 (5th Cir. 2014).
[20] *Id.*
[21] *Id.* at 407-08.
[22] *Id.* at 412-13.
[23] *Id.* at 409; *see also id.* at 410 (noting that the "event or occurrence" language was a broader, compromise position from an earlier draft of CAFA referring to a "single sudden accident").
[24] *Id.* at 412.

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or occurrence" exception rather than the "equivocal" opinion it issued, the Ninth Circuit's "limited analysis does not overcome the text of the statute, the legislative history, and the unambiguous and compelling analysis of the Third Circuit in *Abraham.*"[25]

Implicit in the Fifth Circuit's ruling is a question of whether different definitions of "event or occurrence" apply to different claims. Nothing in the text of CAFA indicates that the removal or exclusion requirements differ based on the type of underlying claim at issue; the language refers to "an event or occurrence" without any further specification or description.[26] That *Nevada v. Bank of America* dealt with alleged fraudulent conduct in mortgage transactions and *St. Croix* involved allegations of negligent ongoing pollution does not explain the difference in outcome. Although the Fifth Circuit recognized the lack of differentiation between claims in the statute,[27] *Rainbow Gun Club* can be read as creating different standards. The facts in *Rainbow Gun Club* are closer to a single spill or a plant explosion than those in *St. Croix*. Nevertheless, both cases were based on allegations of negligence, which the Fifth Circuit found to be an "event or occurrence," whereas fraud and misrepresentation-based claims were not.

Absent a Supreme Court Decision, Different Interpretations of "Event or Occurrence" Will Remain. Whether alleged pollution at environmental sites is considered a single event will remain an open question until the Supreme Court addresses the issue. Until then, defendants in environmental mass actions must navigate three widely different opinions when opposing remand under CAFA's "event or occurrence" exception, and owners of sites similar to SCRG's may be subject to resolution of mass actions in state court in the Third Circuit. Although it is not an environmental pollution case, the Fifth Circuit's opinion in *Rainbow Gun Club* further complicates this issue by reading all precedential weight out of the Ninth Circuit's opinion and adopting the Third Circuit's opinion in *St. Croix*, even though the factual bases of the claims are dissimilar. Defendants seeking to distinguish their cases should consider the many factual differences discussed above between *St. Croix* and *Rainbow Gun Club*. They also should address the Fifth Circuit's conclusion that the "[p]laintiffs' claims do not arise from any one of the several alleged acts of negligence, but from the single occurrence [the failure of the well] that resulted from the collective related acts." To the extent a defendant can show that the alleged negligent acts were themselves injuries, it may be able to limit application of *Rainbow Gun Club.*

An open question also remains about whether the Third Circuit's rationale can be expanded to products liability or other types of cases for which mass-action treatment has previously been denied. Though the Senate report expressly states that the "event or occurrence" exception is not applicable to "the sale of a product to different people," this language is not binding. In the past, plaintiffs in products liability cases have attempted unsuccessfully to exploit the "event or occurrence" exception.[28] However, not all courts have proven hostile to fitting a products liability case under the "event or occurrence" exception,[29] and the Third Circuit's rationale may encourage plaintiffs to try this tactic again, arguing that an alleged "failure-to-warn" was a single event or occurrence rather than multiple alleged failures.

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[25] *Id.* at 412.
[26] 28 U.S.C. §1332(d)(11)(B)(ii)(I).
[27] *Rainbow Gun Club*, 760 F.3d at 411.
[28] *See, e.g. Allen*, 2010 WL 8752873, at *9 (noting large-scale products liability cases "do not fit within the 'event or occurrence' classification under CAFA").
[29] *See Dunn*, 2011 WL 5509004, at *3 ("the Court does not necessarily endorse a blanket exception for products liability cases").

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