IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) LISA WEST, and (2) STORMY HOPSON, Individually and as Class Representatives, Plaintiffs, v. (1) ABC OIL COMPANY, INC., (2) BEREXCO, LLC, (3) CHAPARRAL ENERGY, LLC, (4) FAIRFIELD OIL & GAS CORP., (5) GUINN COMPANY, (6) HEMBREE A. W. COMPANY, (7) LEASEHOLD MANAGEMENT CORP., (8) NEW DOMINION, LLC, (9) NEWELL OIL AND GAS, LLC, (10) OKLA. OIL & GAS MANAGEMENT, INC., (11) ONSHORE ROYALTIES, LLC, (12) PHOENIX OIL & GAS, INC., (13) BILLY JACK SHARBER OPERATING, LLC, (14) TRANSPO ENERGY, LLC, Defendants.	)	Case No. CIV-16-00264-F (Removed Case No. CJ-2016-49 District Court of Pottawatomie County)

PLAINTIFFS' MOTION TO REMAND, MOTION TO DEFER MOTIONS TO DISMISS AND BRIEF IN SUPPORT

April 18, 2016

Ray Maples, OBA #18586
Glendell Nix, OBA #13747
MAPLES, NIX & DIESSELHORST, PLLC
15401 North May Avenue
Edmond, Oklahoma 73013
Telephone: (405) 478-3737
Facsimile: (405) 513-5005
Email: ray@mndlawfirm.com
glendell@mndlawfirm.com

-And-

Edward L. White, OBA #16549
Kerry D. Green, OBA #31998
Edward L. White, P.C.
829 East 33rd Street
Edmond, Oklahoma 73013
Telephone: (405) 810-8188
Facsimile: (405) 608-0971
Email: ed@edwhitelaw.com
Kerry@edwhitelaw.com

ATTORNEYS FOR PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PLAINTIFFS MOTION TO REMAND, MOTION TO DEFER MOTIONS TO DISMISS AND BRIEF IN SUPPORT

Plaintiffs move the Court to remand this action to Oklahoma District Court since jurisdiction does not exist under 28 U.S.C. §1332(d) also known as the Class Action Fairness Act of 2005 ("CAFA"). CAFA's requires the Court to decline jurisdiction, and even if it does not, the discretionary reasons for declining jurisdiction weigh heavily in favor of remand. This case deals with matters inherently of interest to Oklahoma's state courts – insurance, definition of tort law, Oklahoma real property, oil and gas law, and the rights and privileges of a class comprised by a vast majority of Oklahomans – so general principles of federalism militate in favor of remanding it to the court with the most direct interest in the subjects at stake. The policy questions inherent in ruling on Plaintiffs' claims are the type of state-specific considerations that principles of federalism dictate be analyzed by state courts: answering certified questions cannot substitute for the opportunity to shape and rule on a case affecting thousands of plaintiffs and one of the State's largest industries as well as a new man-made risk of immense proportions.

Plaintiffs also ask the Court to defer consideration of Defendants' various motions to dismiss - including, but not limited to, Docket No's 34, 58, 59, and 62 – until after the Court rules on Plaintiff's Motion to Remand this action.

Finally, Plaintiffs ask the Court for leave to supplement their brief in support once information on the residency distribution of the plaintiff class is gathered and analyzed.

BRIEF IN SUPPORT

Federal jurisdiction statutes, "particularly removal statutes, are to be narrowly construed in light of [the] constitutional role [federal courts have] as limited tribunals." *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094-95 (10th Cir. 2005). *Accord Miedeura v. Maytag Corp.*, 450 F.3d 1322, 1328-29 (11th Cir. 2006) ("statements in CAFA's legislative history, standing alone, are an insufficient basis for departing from the well-established rule" construing removal statutes narrowly and resolving doubts in favor of remand). *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (applying rule of strict construction in CAFA context); and *Palisades Collections, LLC v. Shortz*, 592 F.3d 327, 336 (4th Cir. 2008) (same), cert. denied *AT&T Mobility, LLC v. Shortz*, 557 U.S. 919 (2009).

Where a motion to remand questions the bona fides of a removal under CAFA, the district court may need to take evidence to address the contested issues. *See Dart Cherokee Basin Operating CO., LLC v. Owens*, 574 U.S. __; 135 S. Ct. 547, 554 (2014) (addressing proof of disputed jurisdictional facts in the context of the amount at issue, which is not at issue in this case, while composition of the class is at issue).

In February 2005 Congress enacted CAFA. CAFA expanded diversity jurisdiction to encompass many more class actions. CAFA was codified in the diversity jurisdiction statute at 28 U.S.C. §1332(d). To remove a class action under CAFA, a defendant must show that the "matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs" and that "any member of a class of plaintiffs is a citizen of a State different from any defendant."

Movant Berexco has established the baseline facts required for removal under CAFA. Substantially more than $5 million – actually more like $75 million – is at stake in the litigation, and at least one member of the proposed plaintiff class is from Oklahoma and at least one of the named defendants is domiciled in another state, including Berexco which is domiciled in Kansas.

If Movant, Berexco's allegation at paragraph 5 of the Notice that it does not inject any fluid into the Arbuckle formation, then it may be a candidate for voluntary dismissal of claims against it.[1] With limited exceptions, science indicates that induced and triggered earthquakes are caused by injection into the Arbuckle formation, and not by re-injection of fluid into layers situated above the Arbuckle. Plaintiffs plan to explore this matter with counsel for Defendant Berexco.

Plaintiffs also agree with Berexco's Notice of Removal on several other key points. The class is comprised of more than 100 members. Diversity exits since three of the 15 Defendants do not reside in Oklahoma. The amount in controversy exceeds $5 million. In fact, Movant cites statistics indicating that that amount of insurance premium written in Oklahoma for 2014 alone was nearly $16.5 million. Thus, from 2011 to present, it is likely that the value of the requested retrospective relief, whether characterized as damages or injunctive relief, may exceed $75 million.

[1] Plaintiffs recently stipulated to dismissal of Defendant Sullivan and Company, LLC because that entity provided proof that it operated a water flood operation reinjecting into producing formations rather than into the Arbuckle. See Docket 66. Compare the facts associated with dismissed Defendant Sullivan's operations with the allegations contained in the Petition at paragraphs 40 and 50 (asserting that "injection wells can be operated without dramatically increasing the rate of triggered and induced earthquakes: reinject into the producing formation").

What Movant failed to address were the two reasons why a court either "may," under 1332(d)(3), or "shall," under 1332(d)(4)), decline to exercise jurisdiction. The Court "may" decline jurisdiction under a provision that will be referred to as the "Discretionary Exception" contained in 1332(d)(3). The Court shall decline jurisdiction if either the "Local Controversy Exception" contained in 1332(d)(4)(A) or the "Home State Exception" contained in 1332(d)(4)(B) are applicable.

The Notice asserts that "logically the class will include many non-resident businesses, banks, mortgage companies, and persons who were, at one time, Oklahoma residents but have since moved out of state." Notice at p.5. Some out-of-state businesses will own properties in Oklahoma, and they will be included in the class. However, to the extent the class definition could be read to include mortgage companies with a security interest in Oklahoma properties, such was not the intent of the class definition. Plaintiffs affirmatively forgo inclusion of mortgage companies with security interests in Oklahoma properties in the scope of the class, and that clarification of the class definition will be reflected in any subsequent motion for class certification. Mortgage companies will not be included in the class.

The Notice further asserts that the prospective relief includes persons who "will acquire an insurable interest in real property in the Class Area in the future." *Id.* As for what may happen in the future, CAFA and diversity jurisdiction law more generally define that question to be irrelevant: citizenship is considered at a fixed time keyed to filing of the complaint or amended complaint. 28 U.S.C. § 1332(d)(7). *See also Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 153 (3rd Cir. 2009) (with narrow

exceptions, questions of jurisdiction are examined at the time of filing, not considering what may happen in the future).

The Notice includes no discussion at all of the percentage of class members from outside of Oklahoma. The Notice does not acknowledge nor does it discuss the residency-based mandatory and discretionary rules for finding an absence of federal jurisdiction.

Common sense dictates that most owners of real property in Oklahoma are Oklahoma residents. Plaintiffs are gathering records from the counties identified in the class definition that will contain at least two important data points: first, the address of the Oklahoma property at issue; and second, the address of the person authorized to receive official mail from the county regarding the property. To the extent that Oklahoma properties are owned by out-of-state persons, those out-of-state persons presumptively indicate to the county their intent to receive mail regarding the Oklahoma property at their out-of-state address. Plaintiffs expect to have the data from the eight counties soon. Plaintiffs already have records from Oklahoma County (313,000 parcels), Pottawatomie County (34,000 parcels), Lincoln County (25,000 parcels), and Seminole County (23,000 parcels). Records for McClain and Pontotoc County have been requested from a service that manages their records. Cleveland County is working on a request for Plaintiff. For Okfuskee County, Plaintiffs expect those records to be sent shortly on a flash drive. Once received, the data will be analyzed to see what percentage of properties have mail sent to an address outside of Oklahoma. Plaintiffs thus ask the Court for leave to conduct third party discovery and then for time to analyze the data obtained to

demonstrate the likely overwhelming Oklahoma residency of the class. Plaintiffs expect that 45 days should be sufficient to undertake the data collection and analysis.

PROPOSITION I

THE LOCAL CONTROVERSY EXCEPTION MANDATES THAT THE COURT DECLINE TO EXERCISE JURISDICTION.

The Local Controversy exception under CAFA directs that the Court shall decline jurisdiction when the following conditions are satisfied:

> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
>
> (II) at least 1 defendant is a defendant —
>
> > (aa) from whom significant relief is sought by members of the plaintiff class;
> >
> > (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
> >
> > (cc) who is a citizen of the State in which the action was originally filed; and
>
> (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> > (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons…

28 USCS § 1332(d)(4)(A).

The factors that must be established to apply the Local Controversy exception thus include: (a) that two-thirds of the class are citizens of Oklahoma; (b) that at least one

defendant "from whom significant relief is sought" and whose "alleged conduct forms a significant basis for the claims" is an Oklahoma citizen; (c) that the injuries were incurred in Oklahoma; and (d) that none of the defendants have been sued in a class action filed in the last three years "asserting the same or similar factual allegations."

A. Citizenship of the Class.

"Residency" is not necessarily the same as "citizenship" because citizenship includes both residency and the "intent to remain there indefinitely." *Middleton v. Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014). However, most residents of a particular state intend to remain there indefinitely. In fact, Oklahoma has one of the higher percentages of its residents that were born in the state at 60.8%. *See* "Lifetime Mobility in the United States: 2010," a United States Census document available online at https://www.census.gov/prod/2011pubs/acsbr10-07.pdf. Without survey evidence, the evidentiary standard for establishing citizenship under CAFA "must be based on practicality and reasonableness." *Preston v. Tenet Healthsystem Memorial Center, Inc.*, 485 F.3d 804, 816 (5th Cir. 2007).

As noted above, common sense indicates that greater than two-thirds of those owning an insurable interest in Oklahoma property reside within the state of Oklahoma. Plaintiffs are currently working to bolster that common-sense notion with data for the eight counties included in the class. Data showing where property owners receive their official mail from the county is being obtained and will be analyzed to determine what percentage of owners receive mail at an out-of-state address.

Also bolstering the notion that most class members reside in Oklahoma is the fact that the vast majority of properties in each of these counties are going to be single family residences, and those structures are usually owner occupied. In 2015 Edmond issued 42 construction permits for commercial construction, down from 57 in 2014; permits for new single family houses were 543, down from 584 in 2014.[2] Thus, more than 90% of structures built for those years in Edmond was single family homes. The percentage of construction permits that were for single family homes in Edmond was over 94% in 2011.[3] Data for other metropolitan areas regarding the number of residential and commercial building permits are not as easily obtained, but there is no obvious reason to believe that the percentage of construction comprised by single family as compared to commercial is substantially different in other cities in the eight counties affected by the proposed class.

From the foregoing, we can see the likelihood that Plaintiffs will be able to establish that more than two-thirds of the class is citizens of Oklahoma. Additional discovery already underway from third party sources will add additional factual underpinning to the common-sense conception that most property owners in these counties are Oklahoma citizens. Plaintiffs leave to supplement this Motion once the results of this discovery are received and analyzed.

---

[2] *Oklahoman*, Diana Baldwin, January 16, 2016 at p.4A.

[3] *Oklahoman*, Diana Baldwin, February 1, 2012 at p.11A (giving number of commercial building permits) and *Oklahoman*, "Edmond Building Permits Increase 55%," Diana Baldwin, February 2, 2013

B. Citizenship of Defendants

Of the 15 originally-named Defendants, all but three are Oklahoma citizens. The three largest injectors (Phoenix, New Dominion, and Oklahoma Oil and Gas Management) are all Oklahoma citizens. The three largest injectors by themselves comprise 41.5% of the injection volume in Pottowattomie County. Only 10.3% of the injection volume was undertaken by out-of-state companies (ABC, Berexco, and Onshore). Thus, there is no doubt that at least one Defendant "from whom significant relief is sought" and whose "alleged conduct forms a significant basis for the claims" is an Oklahoma citizen. This prong of the Local Controversy exception is easily satisfied.

C. Site of Injury

The third prong requires Plaintiffs to show that the "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed." The property owned by class members is situated in Oklahoma, and it is put at risk by Defendants' injection of wastewater in Oklahoma. Plaintiffs and the class must either purchase insurance on their Oklahoma property or risk catastrophic loss from an earthquake. The injury – the need for insurance – is an injury in rem connected to their Oklahoma property. Thus, the prong requiring injury in Oklahoma seems to be easily satisfied in this case.

D. Same or Similar Factual Allegations

Plaintiffs admit that this is the prong of the Local Controversy exception that is admittedly least likely to be satisfied in this case. There are other class actions filed within the last three years that allege some variation on the theme that injection of

wastewater causes earthquakes, and that those harmed or potentially harmed by earthquakes may have claims against certain defendants. If all that is required is that cases sounding a little like this one have been filed, then this prong will be satisfied.

However, if this prong requires the Court to get into the specifics of how the claims are similar and how they differ, Plaintiffs may satisfy this prong. The law requires a thoroughgoing analysis of the claims asserted in cases purportedly making the "same or similar factual allegations." *See, e.g., Lafalier v. State Farm Fire & Cas. Co.*, 391 Fed. Appx 732, 738 (10th Cir. 2010) (affirming remand and rejecting insurers argument that the court should look at the substance of the cases rather than their actual allegations in analyzing the Local Controversy exception). The question at issue in *Lafalier* was whether the parties were the same, and the unsuccessful defendants argued that it was sufficient that the defendants in the case were in privity with the parties in the prior state class action. That relationship was found insufficient by the 10th Circuit. In practical effect, the parties might have been the same in both actions, but technically they were distinct, and the form had to be respected.

There is a common core of facts among this case and several prior class actions filed in Oklahoma State Courts. This action and prior actions argue that one defendant common to this action and prior action (New Dominion) injected waste water in a manner that caused or triggered earthquakes.[4] That is the common core of facts between this case and prior cases.

[4] That Plaintiffs did not design the case to avoid federal jurisdiction is illustrated by them naming New Dominion as a defendant. Plaintiffs could have easily done the calculus to extract that defendant from the style, but Plaintiffs focused on the substance of the claims, not where it would be litigated. New Dominion was the second-largest

Other pending putative class cases seek recovery of property damage previously incurred by Oklahoma property owners as a result of earthquakes. There are cases filed in multiple Oklahoma counties including:

a. Lincoln County - *Ladra v. New Dominion, et al.* (CJ-2014-115); and Cooper v. New Dominion, et al. (Case No. CJ-2015-24);

b. Logan County - *Griggs v. Chesapeake, et al.* (Case No. CJ-2016-6); and

c. Oklahoma County – *Felts et al. v. Devon Energy et al.* (Case No. CJ-2016-137)

A federal action was recently filed by the Sierra Club against Chesapeake Operating, LLC; Devon Energy Production Co. LP; and New Dominion, LLC (Federal Court for the Western District of Oklahoma, filed February 16, 2016). The Sierra Club seeks specific injunctive relief under the Solid Waste Disposal Act, amended as the Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq. ("RCRA") regarding injection volumes and monitoring of seismic activity, relief that is generally not available in Oklahoma State courts since those functions are within the exclusive jurisdiction of the Oklahoma Corporation Commission under Oklahoma state law.

There are two primary differences between prior actions and this case that make them NOT have the "same or similar factual allegations against any of the defendants": First, the other cases do not seek retroactive and prospective injunctive relief related to recovery of premium paid for earthquake insurance; and Second, the prior cases do not

injector in Pottawatomie County, so it was named as a defendant. The absence of indicia that Plaintiffs tried to avoid diversity jurisdiction militates in favor of remand. See 28 U.S.C. §1332(d)(3)(C).

directly address the liability of a class of defendant companies operating injection wells. *Ladra* and *Felts* do not address insurance premiums at all, so those cases do not make the same or similar allegations. *Griggs* mentions insurance premiums in passing regarding the requested relief, but *Griggs* does not focus on the prospective aspect of insurance premiums. None of the cases proposed a defendant class comprised of companies injecting wastewater in the Arbuckle.

PROPOSITION II

THE HOME STATE EXCEPTION MANDATES THAT THE COURT DECLINE TO EXERCISE JURISDICTION.

The Home State exception under CAFA directs that the Court shall decline jurisdiction if "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."

The composition of the class has been previously addressed. Both common sense and the data Plaintiffs are gathering are expected to establish that more than two-thirds of the class are Oklahoma citizens. Thus, one part of the Home State exception is likely to be satisfied.

The second part of the Home State exception requires that the "primary defendants" be citizens of Oklahoma. A Senate Report issued after CAFA's enactment purported to clarify what was meant by "primary defendant," and it described the phrase thus: "the committee intends that 'primary defendants' be interpreted to reach those

defendants who are the real 'targets' of the lawsuit – i.e., the defendants that would be expected to incur most of the loss if liability is found." S. Rep. No. 109-14, at 43 as reprinted in 2005 U.S.C.C.A.N. at 41. *Sorrentino v. ASN Roosevelt Ctr, LLC,* 588 F.Supp.2d 350, 358 (E.D.N.Y. 2008) described the term thus:

> The term "primary defendant" is not expressly defined in the CAFA, and has variably been defined as one: (1) who has the greater liability exposure; (2) is most able to satisfy a potential judgment; (3) is sued directly, as opposed to vicariously, or for indemnification or contribution; (4) is the subject of a significant portion of the claims asserted by plaintiffs; or (5) is the only defendant named in one particular cause of action.

In this case, as previously noted, 12 of the 15 originally-named Defendants are Oklahoma citizens. The three largest injectors (Phoenix, New Dominion, and Oklahoma Oil and Gas Management) are all Oklahoma citizens. The three largest injectors are responsible for 41.5% of the injection volume in Pottawatomie County. Only 10.3% of the injection volume was undertaken by out-of-state companies (ABC, Berexco, and Onshore). That means that nearly 90% of the injection volume was undertaken by Oklahoma companies. Such percentages indicate that the "primary defendants" are Oklahoma companies.

Where circa 90% of the plaintiffs are from Oklahoma and circa 90% of the bad conduct is undertaken by Oklahoma companies, a case seems to be the poster child for the Home State exception. Both prongs of the Home State exception are satisfied, so this action must be remanded to state court. Further, the policy considerations associated with federalism and state control of state-specific legal and property issues also indicate remand is proper.

PROPOSITION III

THE FACTORS SPECIFIED IN THE DISCRETIONARY EXCEPTION INDICATE THAT THIS FEDERAL COURT SHOULD DECLINE TO EXERCISE JURISDICTION IN FAVOR OF OKLAHOMA STATE COURTS WITH A STRONGER CONNECTION TO THE FACTS AND LAW AT STAKE IN THIS CASE.

Plaintiffs believe that this case satisfies at least one of the two mandatory tests specified above, and that remand is proper on those bases, particularly as it relates to the Home State exception. However, even if the Court determines that this case narrowly fails to qualify for either of the mandatory exceptions, it is close to doing so. In those instances, there should be some natural inclination to, as a matter of deference or comity, to remand to state court. The discretionary exception gives the court discretion to remand in view of the following:

> In the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds 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 based on consideration of—
>
> (A) whether the claims asserted involve matters of national or interstate interest;
>
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
>
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
>
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is

> substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
>
> (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 USCS § 1332(d)(3).

Preamble Requirements. As noted above, it is believed that more than two-thirds of the class are citizens of Oklahoma. However, even if that high a percentage is not obtained, it cannot be credibly asserted that more than one-third of the class is from Oklahoma. If between one-third and two-thirds is from Oklahoma, the Discretionary Exception allows the Court to remand this case in view of the cited factors.

The primary defendants (largest injectors) and the vast majority by number of defendants are from Oklahoma. In fact, the three largest injectors make up more than 40% of the injection volume, while the out-of-state defendants combined comprise just 10% with all of the Oklahoma defendants aggregated making up the other 90% of injection volume.

A. National or Interstate Interest?

The legal issues at stake are the subject of intense interest as it relates to Oklahoma jurisprudence and regulation, not national regulation. With very limited exceptions, the manner in which oil and gas are produced have traditionally been the subject of state, not federal jurisprudence. In order to get a permit to drill a well, a producer must generally go to the Oklahoma Corporation Commission (OCC), not to any federal agency. See, for example, the application to drill available online at the OCC web

site at http://www.occeweb.com/og/ogforms.html. The foregoing permit applies to both wells intended to produce oil and gas and to wells intended to be used to inject waste fluids. See item 4(b) on the application to drill available at the above-noted link (asking an applicant to indicate whether it is an "oil/gas, injection, disposal, water supply, strat test, or service well."

Plaintiffs' cause of action – private nuisance, ultrahazardous activities, negligence, and trespass – are all within the traditional purview of state law, rather than federal law. There are federal torts, but they are either statutory creatures or relate specifically to defined defendants (i.e., federal actors) or defined locations (i.e., federal land). See, for example 28 U.S.C. § 2674 and *Burgio v. McDonnell Douglas, Inc.*, 747 F. Supp. 865 (E.D.N.Y. 1990) (generally discussing application of federal common law to torts on federal property). The torts at issue in this case are state law creatures, and if the relatively new issues of law are to be shaped by appellate decisions, it will be Oklahoma appellate courts and, ultimately, its Supreme Court that are the ultimate arbiters of what the law is and should be in this case. Federal courts could reach out for guidance from the Oklahoma Supreme Court, but such questions directed toward the Oklahoma Courts from a federal court would necessarily involve a less complete analysis of the issues involved than if the Oklahoma appellate courts were reviewing the case in toto.

B. Governed by Oklahoma Law?

As noted above, Plaintiffs' causes of action and Defendants' defenses are governed by state, not federal law. A further indicator of the primacy of Oklahoma law in governing the issues in this case are the briefs by Defendants' in support of their motions

to dismiss. Defendants Guinn and Phoenix filed a Motion to Dismiss (Doc. No. 62) that includes a first proposition relying on Oklahoma statute (12 O.S.§ 1381 and 1382) as well as Oklahoma cases. Proposition II of that motion asserts that the Oklahoma Constitution deprives the courts of jurisdiction over the dispute and, instead, vests jurisdiction in the OCC. Analysis of the other Defendants' motions to dismiss reveals a similar pattern: their primary reliance is on state law principles. That is because this action is predominantly, if not exclusively, governed by Oklahoma law.

C. Pled to Avoid Federal Jurisdiction?

Plaintiffs did not plead this action to avoid federal jurisdiction. Rather, they pled it to establish the bona fides of their claims. That Plaintiffs did not design the case to avoid federal jurisdiction is illustrated by them naming New Dominion as a defendant. Plaintiffs could have easily done the calculus to extract that defendant from the style of this case and not name them as a defendant, but Plaintiffs focused on the substance of the claims, not where it would be litigated. New Dominion was the second-largest injector in Pottawatomie County, so it was named as a defendant. The absence of indicia that Plaintiffs tried to avoid diversity jurisdiction militates in favor of remand. See 28 U.S.C. §1332(d)(3)(C).

D. Nexus with the Forum?

The nexus this case has with Oklahoma is broad and strong. Oklahoma real property is affected as are basic principles of its law in multiple contexts: property, tort, insurance, and oil and gas. All of those areas of law are inherently state law questions. Congress has made the decision to keep insurance law integrally tied to state-by-state

regulation. *See, e.g., Group Life & Health Ins. CO. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979) (the power of the states to tax and regulate insurance companies was reaffirmed, but the insurance industry would no longer have a blanket exemption from the antitrust laws).

E. Composition of the Class?

Plaintiffs have previously discussed the composition of the class ad nauseam, so those arguments will not be repeated. In this context, the overwhelming membership of both plaintiff and defendant classes being from Oklahoma urges application of discretion to remand this case for determination by a state court.

CONCLUSION

Policy factors favor remand in this case. This is a quintessentially-Oklahoma-based case. Both mandatory and discretionary tests dictate remand. The limited discovery and stay of consideration of pending Motion to dismiss will give the parties the opportunity to present material evidence regarding contested jurisdictional facts.

Respectfully submitted,

/s/Ray Maples
Ray Maples, OBA #18586
Glendell Nix, OBA #13747
MAPLES, NIX & DIESSELHORST, PLLC
15401 North May Avenue
Edmond, Oklahoma 73013
Telephone: (405) 478-3737
Facsimile: (405) 513-5005
Email: ray@mndlawfirm.com
glendell@mndlawfirm.com

-And-

/s/Edward L. White
Edward L. White, OBA #16549
Kerry D. Green, OBA #31998
Edward L. White, P.C.
829 East 33rd Street
Edmond, Oklahoma 73013
Telephone: (405) 810-8188
Facsimile: (405) 608-0971
Email: ed@edwhitelaw.com
Kerry@edwhitelaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This certifies that on April 18, 2016, I electronically transmitted the above document to the Clerk of the Court using the CM/ECF system for filing. Accordingly, a Notice of Electronic Filing will be automatically sent to:

April B. Coffin	abcoffin@gpmlegal.net
Ashley L. Powell	apowell@hartzoglaw.com
Daniel V. Carsey	dcarsey@rischardlaw.com
Drew Neville, Jr.	dneville@hartzoglaw.com
Eric L. Huddleston	ehuddleston@eliasbooks.com
J. Todd Woolery	todd.woolery@mcafeetaft.com
Joseph M. Vorndran	joe@stuartclover.com
Kelly K. Basey	baseylaw@gmail.com
Patrick L. Stein	patrick.stein@mcafeetaft.com
Robert G. Gum	rggum@gpmlegal.net
Timothy J. Bomhoff	Tim.Bomhoff@mcafeetaft.com
William K. Elias	wkelias@eliasbooksbrown.com
Wyatt D. Swinford	wswinford@eliasbooks.com
Jack Mattingly, Sr.	jacksr@mroklaw.com
Katherine T. Loy	dlb@dlb.net
Micheal L. Darrah	dlb@dlb.net
Lane R. Neal	dlb@dlb.net
E. Edd Pritchett, Jr.	dlb@dlb.net
Harry E. Brown	brownlaw@cox.net

/s/Edward L. White