Friday, May 13, 2011

Federalism Revisited And Reinforced

To our readers:

Sorry about that. Blogger was down for almost 24 hours yesterday and this morning. In almost five years, we've never experienced that during business hours. Anyway, that combined with Bexis having to fly to the west coast for the ALI annual meeting, kept us from posting until now.

Here's the post we were planning on uploading yesterday.

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We try to keep abreast of what's happening out there. Our goal, not always met, is to check the federal courts of appeals' websites every day. We run searches and check some other things, too. But we can't follow everything, especially if it's not directly drug/device related. That's why we're indebted to our readers, such as Jeff Yeatman at DLA Piper, for sending us items that they think we should know about – and even telling us why.

The Fourth Circuit's recent decision in Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011), is an example. Sure, we'd seen the blurbs about it from BNA and other sources, but Rhodes is an environmental contamination (alleged) case, so we'd let it go by. But there's something else about Rhodes that touches on something near and dear to our hearts – federalism in the context of state-law tort litigation in federal court.

It turns out that Rhodes was one of these made-for-litigation would-be class actions where nobody was really hurt. The plaintiffs brought claims – not because anybody had any disease, but merely because (they claimed) they had an elevated level of a certain chemical in their blood that was linked to that claimed pollution.

That kind of claim reminds us of the question, "What is the sound of one hand clapping?" Purely on the basis of elevated blood levels, the plaintiffs in Rhodes sued for "negligence, gross negligence, battery, trespass, and private nuisance." There was also a claim for medical monitoring, but the plaintiffs dismissed that after class certification was denied (raising other interesting issues worthy of their own post). 636 F.3d at 93.

The district court threw out all of the claims under West Virginia law, for the perfectly logical reason that they didn't have any injury. The plaintiff's position was straight out of the movie "Minority Report" – we can sue you now, because you're going to injure us in the future – as if somebody can be tagged for drunk driving solely on the basis of blood alcohol level, before ever getting into the car.

We're traditionalists here. No injury; no lawsuit – only the sound of one hand clapping.

On appeal in Rhodes the Fourth Circuit agreed. Negligence law in West Virginia was pretty much the same as negligence law anywhere, the plaintiff "is required to prove that he or she sustained an injury caused by the defendant's allegedly negligent conduct." 636 F.3d at 94. Plaintiffs admitted they had nothing more than elevated blood readings. They didn't present any precog evidence (we suppose Agatha was unavailable), so the court affirmed dismissal because no injury had happened or was "reasonably certain." Id. at 95. If that was all the case was about, however, Jeff wouldn't have sent it to us, nor would we be blogging about it.

Rather, plaintiffs claimed that battery did not require actual harm – merely "physical impairment" that wasn't really impairment at all – but only "any alteration in the structure or function of any part of the body, even when such structural change does not cause other harm." 636 F.3d at 95 (citing Restatement (Second) of Torts §15, comment a (1964)).

Current West Virginia law, however, requires "actual physical impairment" for battery. 636 F.3d at 95. Mere exposure and fear of injury aren't enough. Id. Undeterred, plaintiffs asked the court to predict that the West Virginia Supreme Court (technically "of Appeals") would overthrow current law and adopt the broader Restatement view.

Here's where we get interested.

The Fourth Circuit refused to make the prediction. We're a federal court, it held. It's not our job to "expand the tort of battery under West Virginia law to include any chemical exposure that results in potentially dangerous, detectable levels of that chemical in a person's body." Id. at 95. Eschewing judicial triumphalism, the court accepted its "limited" role of applying existing state law:

"[O]ur role in the exercise of our diversity jurisdiction is limited. A federal court acting under its diversity jurisdiction should respond conservatively when asked to discern governing principles of state law. Therefore, in a diversity case, a federal court should not interpret state law in a manner that may appear desirable to the federal court, but has not been approved by the state whose law is at issue. Mindful of this principle, we decline the plaintiffs' invitation to predict that the West Virginia Supreme Court of Appeals would adopt the specific provisions of the Restatement advanced by the plaintiffs."
Id. at 96 (citing Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975)).

All right! Rhodes isn't just a no-injury case, it's a federalism case. The Fourth Circuit turned down flat an opportunity to play the activist and predict an expansion of state tort law beyond the limits of current precedent. Not only that, it did so for West Virginia, where before 2010, at any rate, we'd have given higher odds on any type of expansive prediction coming true than just about anywhere else in the country.

Not only that, the Fourth Circuit invoked federalism more than once in Rhodes. Plaintiffs also advocated following a Restatement position over current West Virginia law in the context of public nuisance – another "tort" notorious for its susceptibility to expansive liability (real or imagined). Rhodes refused to hold that, just because a case is called a "class action," the actual harm requirement of

public nuisance (called "special injury") could be read out of the law. Federalist principles again precluded such an argument:

"We are not persuaded by this argument, because it fails to acknowledge that the Supreme Court of Appeals of West Virginia has not recognized a class action exception to the "special injury" requirement. We decline to recognize such an exception in the first instance because, as we have stated, a federal court in the exercise of its diversity jurisdiction should act conservatively when asked to predict how a state court would proceed on a novel issue of state law."
636 F.3d at 97-98 (again citing Challoner).

So Rhodes is a federalist two-fer.

Rhodes also got us thinking. We've been touting federalism in diversity tort cases for almost as long as we've been blogging. One of our very first posts, way back in November 2006, cited not only Challoner, but examples of pro-federalist precedent in every federal court of appeals.

We thought we'd go look and see if there are any more recent decisions like Rhodes out there.

Right off the bat we know of a couple of others, in our home Third Circuit. Bexis has been pushing the federalist principle in the Third Circuit for almost twenty years now, back as far as Philadelphia v. Lead Industries Ass'n, 994 F.2d 112, 123 (3d Cir. 1993), one of his first ever PLAC amicus assignments. As we blogged about at the time, in Sheridan v. NGK Metals Corp., 609 F.3d 239 (3d Cir. 2010), the court refused to expand Pennsylvania law in another exposure-only case:

"A federal court under Erie is bound to follow state law as announced by the highest state court. . . . Unlike our role in interpreting federal law, we may not "act as a judicial pioneer" in a diversity case."
Id. at 253-54 (quoting Lead Industries; other citation and quotation marks omitted). And then there's M.G. v. A.I. Dupont Hospital for Children, 393 Fed. Appx. 884 (3d Cir. 2010), which we blogged about here, after excoriating the (now reversed) district court opinion here. Bexis also briefed that one for PLAC, and the

Third Circuit took notice. In M.G., the Third Circuit "note[d] the well-established principle that a federal court sitting in diversity, when called upon to make a prediction of state law, should act conservatively" in reversing a prediction that Delaware would adopt medical monitoring. Id. at 893 n.7.

So here's what our little search turned up:

Third Circuit: Still more good law out of the Third: Refusing to abrogate economic loss rule in New Jersey – "[I]n reaching our conclusion we have exercised restraint in accordance with the well-established principle that where two competing yet sensible interpretations of state law exist, we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of that state decides differently." Travelers Indemnity Co. v. Dammann & Co., 594 F.3d 238, 253 (3d Cir. 2010).

Fifth Circuit: Refusing to create new exception to Texas economic loss rule – "[I]n hazarding an Erie guess, our task is to attempt to predict state law, not to create or modify it. The practical effect of adopting an exception like the one [plaintiffs] propose is the creation of a previously nonexistent state law cause of action. Therefore, [plaintiffs] carry a heavy burden to assure us that we would not be making law." Memorial Hermann Healthcare System Inc. v. Eurocopter Deutschland, GmbH, 524 F.3d 676, 678 (5th Cir. 2008).

Sixth Circuit: Refusing to grant standing under Ohio declaratory judgment statute to uninjured persons – "[W]hen given a choice between an interpretation of state law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path." Aarti Hospitality, LLC v. City of Grove City, 350 Fed. Appx. 1, 6 (6th Cir. 2009).

Seventh Circuit: Refusing to abrogate impact rule in Illinois medical malpractice cases – "[F]ederal courts are loathe to fiddle around with state law. And that is especially true when it comes to important matters of state tort law, where there is an inherent danger in us intruding on the state's development of its own law." Barnes v. Anyanwu, 391 Fed. Appx. 549, 553 (7th Cir. 2010).

Eighth Circuit: Refusing to broaden the universe of persons considered "clients" in legal malpractice cases – "Our duty is to conscientiously ascertain and apply state law, not to formulate new law based on our own notions of what is the better rule." Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 612 (8th Cir. 2009).

Ninth Circuit: Refusing to create a new exception to California's implied warranty privity requirement – "We decline this invitation to create a new exception that would permit [plaintiff's] action to proceed. So doing, we acknowledge that state courts have split on this privity question, and that the requirement may be an archaism in the modern consumer marketplace. Nonetheless, California courts have painstakingly established the scope of the privity requirement . . . and a federal court sitting in diversity is not free to create new exceptions to it." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1023-24 (9th Cir. 2008).

District of Columbia Circuit: Refusing to recognize negligent infliction of emotional distress in the District – "Were we to allow [plaintiff] to recover for IIED, we would be substantially expanding the scope of the third-party IIED tort under District of Columbia law. Of course, in considering common law claims, federal courts must apply existing law-we have no power to alter or expand the scope of D.C. tort law." Pitt v. District of Columbia, 491 F.3d 494, 507 (D.C. Cir. 2007).

Looking at things, we have to say that federalism is alive and well – if not always successful – in the federal appellate courts. In somewhat less than five years since our first look at the subject, we've found new precedent in over half of the circuits, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and DC circuits, all refusing to expand the scope of state-law claims at least in part for federalism reasons under the Erie rule. Thus, we continue to think that anytime that a novel tort theory is asserted in a diversity case in federal court, defendants should include federalism-based arguments in opposition to the claim.