MondayMonday

Mere Notice Pleading Lives?

December 15, 2014

The days dwindle down to a precious few and the melancholy of 2014's end of times is so palpable that we cannot breathe. Oh the things not done! The friends who have passed. The cases languishing in the file cabinet. The promises we have not kept to family and loved ones. Even the disaster growing in the front hallway closet, waiting only for the first snow when, as in every year since we left our mother's home, we will not be able to find our gloves.

We are so imperfect, yet we hold ourselves to a higher level than we hold God himself. Auschwitz? Everyone has a bad day. Sandy Hook? He was busy that morning. 9/11? We should be thankful more innocent people did not die. But failing to buy those Christmas headphones for dear little Johnny on Black Friday when they were $50 off? Grounds for divorce. Having an extra drink at the office Christmas party and telling the young associate she (or he) has both a great mind and a great body? Loss of license is too small a penalty.

Is there a cure? Yes. Move the celebration of Christ's birthday to its proper place, perhaps in March or as Luke suggests, summer or early fall. Then take New Year's Day and

move it somewhere else, as January 1st is merely an affectation of the Norman Conquest. Whatever you do, separate these two holidays and eliminate what has become psychic Hell Week for many of us. Of course, this is still no guarantee that we won't forget to call Aunt Margaret and wish her happy holidays in the Spring as easily as we do in the Winter. We're just hopeless.

This might well be our last edition until next year and so we allow ourselves the unusual pleasure of reviewing a case from the United States Supreme Court which came down only this morning. *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (12/15/14), discusses a very limited question dealing with removal petitions in the federal courts. To those of you who handle mass tort cases, or have otherwise faced removal notices by corporate defendants, what the Court doesn't explicitly say in its decision speaks volumes.

Plaintiff brought this class action to seek compensation for royalties that defendant owed for oil and gas leases. Originally brought in Kansas, the case was quickly removed to district court by defendant, under the defense tactical theory that no corporation wants to be stuck in the state court of the state where the deed took place. Defendant invoked CAFA (Class Action Fairness Act) allowing removal, *inter alia*, where the amount in controversy exceeds $5 million. Plaintiff successfully remanded the case back to state court when the 10th Circuit denied appellate review of the district court's remand order. (While remand orders are usually not appealable, CAFA enables unsuccessful removers to seek appellate review by permission.) En banc review was also denied.

The substance of plaintiff's remand was that defendant had failed to offer any evidence of the $5 million "amount in controversy" requirement in its removal notice. Now, you'd think that in light of *Iqbal/Twombly*, mere notice pleading in the federal courts was dead, and plaintiff was right. However, that rule does not apply to a corporate defendant, apparently, for the Court today said that the mere allegation of the $5 million "amount in controversy" was enough. The authority? The mere notice pleading required by Rule 8(a). Oh, RBG, how could you? Scalia, our new best friend, leading a 5:4 dissent, would have found no jurisdiction to even review the 10th Circuit's denial of leave to appeal.