

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA, JUDGE

IN RE ROUNDUP PRODUCTS)	MDL No. 2741
LIABILITY LITIGATION,)	Case No. 16-md-02741-VC
_____)	
)	
LORETTA I. PENNIE, et al.)	
)	
Plaintiffs,)	
vs.)	No. 3:17-cv-01711-VC
)	
THE MONSANTO COMPANY, et)	
al.,)	
)	
Defendants.)	San Francisco, California
_____)	Thursday, June 15, 2017

TRANSCRIPT OF OFFICIAL ELECTRONIC SOUND RECORDING
OF PROCEEDINGS

FTR 10:03 a.m. - 10:24 a.m. = 21 minutes

APPEARANCES:

For Plaintiffs Pennie, et al.:

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(by telephone - listening only)

(Appearances continued on following page.)

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BY: **JOE G. HOLLINGSWORTH, ESQ.**

1 Thursday, June 15, 2017

2 10:03 a.m.

3 P R O C E E D I N G S

4 **THE CLERK:** All rise. Court is now in session, the
5 honorable Vince Chhabria presiding. Please be seated.

6 Calling case number 16-MD-2741, Roundup Product
7 Liability Litigation, and 17-CV-1711, Pennie, et al., versus
8 Monsanto Company, et al.

9 Counsel, please step forward and state your
10 appearances for the record. To the podiums, please, thank you.

11 **MR. WISNER:** Good morning, your Honor. Brent Wisner
12 on behalf of the plaintiff. With me is my associate Pedram
13 Esfandiary.

14 **THE COURT:** Good morning.

15 **MR. HOLLINGSWORTH:** Good morning, your Honor. Joe
16 Hollingsworth on behalf of Monsanto Company.

17 **THE COURT:** Good morning. So we -- I think we can
18 have a kind of a brief discussion.

19 Mr. Hollingsworth, maybe I'll start with you.
20 I think that, you know, you've argued against remand on a
21 couple of bases that I think are unreasonable, right? I mean,
22 they have not stated a claim, they're not pursuing a claim
23 under FIPRA, there's no reasonable argument that there was
24 federal officer removal, and I don't think we need to discuss
25 those.

1 I think the one question is the question I raised in
2 the supplemental brief -- in the request for supplemental
3 briefs, which is the *Grable* question, and it seems to me that
4 you're right that adjudication of this federal question is
5 necessary to adjudicate the state law claims, fraud and
6 probably failure to warn too, I would think, but -- and it's
7 certainly disputed.

8 So the two parts of that test I think are met, but
9 the question becomes, I guess, whether you could meet the third
10 and the fourth parts of the test, whether it's a substantial
11 federal question, in the context of things, and whether, from a
12 prudential standpoint, it would somehow upset, you know,
13 Congress' understanding of the appropriate federal/state
14 balance for these claims to be adjudicated in state court.

15 And on that, I guess -- I think you probably have an
16 uphill battle, mainly because Congress has said there's not
17 going to be a private federal cause of action under FIPRA for
18 misbranding or mislabeling, but there can be state law causes
19 of action that assert -- as long as they're sort of
20 co-extensive with FIPRA and state law doesn't try to outlaw
21 something that FIPRA would allow.

22 So that seems to me to reflect a contemplation by
23 Congress that these claims will be adjudicated in state court.
24 So I guess it's hard for me to see how you win on the third and
25 fourth parts of the test.

1 **MR. HOLLINGSWORTH:** Well, as to -- let's start with
2 substantial, your Honor. As to substantial, given that the
3 court has to take the Complaint as it's stated, we didn't write
4 the Complaint, the plaintiffs did. As to substantial, there
5 are a number of issues that they have pleaded here and that
6 your Honor has called out in his order, and I don't know
7 whether I need to go back to the specific --

8 **THE COURT:** No, you don't.

9 **MR. HOLLINGSWORTH:** -- provisions of the
10 Complaint --

11 **THE COURT:** No, I've read them.

12 **MR. HOLLINGSWORTH:** -- a number of substantial
13 issues --

14 **THE COURT:** But that goes -- it seems to me that
15 that goes to whether it's necessary to adjudicate a federal
16 question in the context of the state law claims. They may
17 disagree. I think it is, and I think that the language in
18 their Complaint kind of reflects a concession that it is, that
19 the -- you know, state law has to be co-extensive with what
20 FIPRA requires and doesn't require, allows/doesn't allow.

21 They might disagree with me on that, but I don't
22 think it matters, because I don't see how that language goes to
23 the third and fourth parts of the test, and the third and
24 fourth parts of the test, as I understand it at least, are much
25 more about, you know, sort of how important this question is in

1 the grand scheme of the case and how weird would it be to have
2 this federal question adjudicated in state court.

3 **MR. HOLLINGSWORTH:** I think your Honor --

4 **THE COURT:** And this doesn't seem weird.

5 **MR. HOLLINGSWORTH:** I think your Honor needs to
6 accept that it's important because they've pled it as
7 important, and they've argued some of those facts to your Honor
8 before in connection with other proceedings in front of this
9 Court. Your Honor knows how serious it is.

10 The pleadings make the involvement of the federal
11 officer absolutely necessary to the claims that they've made in
12 the case, because --

13 **THE COURT:** Well, but if there was no -- I don't
14 agree with that, and I don't think that if -- if they stated in
15 their Complaint that, you know, proving that there was
16 collusion between Monsanto and the EPA is essential to our
17 case, I don't think we'd have to defer to that. I mean, the
18 reality is that it's not, right?

19 I mean, whether there was collusion between Monsanto
20 and EPA or not, they could still win their case, and it's not
21 clear to me how important -- I mean, it seems, in the grand
22 scheme of things, relatively unimportant whether there was
23 collusion between Monsanto and EPA, because they don't need
24 that to win their case.

25 And as we've discussed in the context of discovery

1 disputes that we've had in these cases, the EPA's conclusion
2 about glyphosate is relevant. It's not the most important
3 thing to whether glyphosate causes cancer or whether the case
4 should go to the jury on whether glyphosate causes cancer.
5 It's not the most important thing. It's relevant, but the
6 EPA's conclusion would have that level of relevance regardless
7 of whether there was collusion between Monsanto and EPA
8 officials.

9 So I don't -- yeah, they make a lot of noise about
10 collusion, I guess because it's, you know, good atmospheric
11 for them, but that doesn't mean that it's a very important part
12 of their case.

13 **MR. HOLLINGSWORTH:** Well, two things, your Honor, in
14 response. One is that *Grable* says that your Honor should use a
15 commonsense approach to the kaleidoscopic things that can
16 happen when federal issues arise, and I've never seen a case
17 like this. In my 44th year, I've never had to deal with
18 allegations like this. They seem to be proper for a federal
19 court to be deciding, and not for a state court to be deciding.
20 That's number one.

21 Number two goes to the way the Court has treated the
22 importance of EPA thus far, and that, your Honor, with all due
23 respect, is only in the context --

24 **THE COURT:** You mean in our cases here?

25 **MR. HOLLINGSWORTH:** Yes.

1 **THE COURT:** Okay.

2 **MR. HOLLINGSWORTH:** Yes, that's only in the context
3 of general causation proof. I can almost guarantee your Honor
4 that when Mike Miller gets in front of a jury here, if he ever
5 does, pray tell, the first thing that he's going to be talking
6 about is the collusion between EPA and Monsanto, and the
7 illegality of it and the illegality of the actions of a federal
8 officer.

9 That is the reason that *Grable* says that your Honor
10 needs to --

11 **THE COURT:** Mr. Miller's bluster is not going to be
12 tolerated in any trial that takes place in this court. So
13 I don't think that Mr. Miller's bluster is a helpful argument
14 for you here in this -- in connection with this remand motion.

15 **MR. HOLLINGSWORTH:** Well, let me back up, then, from
16 that. The issue of the secondary nature of whatever it is EPA
17 did in connection with these plaintiffs' proof of claims is
18 something that your Honor has addressed so far, as far as I'm
19 aware of, only in the context of the proof of general
20 causation, the general causation aspect of this claim.

21 All of the liability issues -- let's leave
22 Mr. Miller out of it. All of the liability issues in this case
23 will bring all that stuff right back to the floor your Honor,
24 right here or in some kind of a forum, be it federal or state.

25 **THE COURT:** Well, it sounds like we might have to

1 have a motion *in limine* about that and, you know, in state
2 court there can be a motion *in limine* about how much, you know,
3 how much focus can be placed on allegations of collusion
4 between EPA and Monsanto, if there is even enough evidence on
5 that issue to go to a jury at all.

6 **MR. HOLLINGSWORTH:** Well, they have made the
7 allegations, and there are a number of places in the Complaint
8 where they make these allegations. I think there are nine or
9 ten specific paragraphs that I counted in preparing for this
10 argument.

11 Taking those at face value, I think based on the
12 commonsensical approach that *Grable* talks about, which is a
13 different approach than was ever taken before to questions of
14 whether or not a case arises under federal law, as your Honor
15 is aware, is a different approach.

16 It seems to me, based on this extraordinary, unique
17 Complaint, that this Court ought to accept the removal of these
18 cases from a state jurisdiction, so that this Court can apply
19 the uniformity and in the sense that federal courts can bring
20 to litigation of issues that involve the interpretation of so
21 many federal questions.

22 Just the -- going back to the issue of misbranding,
23 just the issue of whether misbranding is an equivalent claim to
24 a state law failure to warn claim is a really complicated issue
25 that I think, in itself, presents a federal question under

1 *Grable*, your Honor. So that's one.

2 **THE COURT:** Sorry, go ahead.

3 **MR. HOLLINGSWORTH:** So that's part one of my answer
4 to your introductory comments.

5 Part two would have to do with the fourth element of
6 *Grable*. I don't think that -- I think this case deserves to be
7 in federal court for the reasons that the fourth element
8 addresses, and I don't think that -- I think this case is so
9 unique and extraordinary that we're not talking about opening
10 the floodgates here, because we have a case that involves
11 collusion, i.e., an agreement --

12 **THE COURT:** Well, that's really what --

13 **MR. HOLLINGSWORTH:** I looked up collusion, and --

14 **THE COURT:** That's really what your -- I mean, you
15 are really hanging your hat on these allegations about
16 collusion between EPA and Monsanto, and the reason this case is
17 so different from any number of other cases, fraud or failure
18 to warn cases out there, is because of this allegation of
19 collusion between EPA and Monsanto. That is really what you're
20 hanging your hat on.

21 **MR. HOLLINGSWORTH:** Well, the Complaint makes proof
22 of a federal claim essential to their case in the first place.
23 I'm not sure that I'm taking your Honor's questions in order
24 here, but they have asserted a federal claim that Monsanto's
25 product, Roundup, containing glyphosate, is misbranded, and

1 then they go on in the same paragraph of that Complaint and say
2 that to the extent California law imposes a duty or obligation
3 on defendants that exceeds those required by federal law,
4 plaintiffs do not assert them.

5 So that, it seems to me, puts them in -- that answer
6 is your Honor's --

7 **THE COURT:** But you're going back to, like, the
8 first --

9 **MR. HOLLINGSWORTH:** The first question, yes.

10 **THE COURT:** -- the first part of the test.

11 **MR. HOLLINGSWORTH:** Yes.

12 **THE COURT:** And I'm telling you that I'm giving you
13 the first part of the test.

14 **MR. HOLLINGSWORTH:** Okay. I didn't completely
15 understand that.

16 Well, then, in response to the fourth part of the
17 test, your Honor, I don't think that your Honor's decision to
18 deny the motion to remand opens up any floodgates that
19 interferes with the careful balance that --

20 **THE COURT:** Because you are hanging your hat
21 exclusively on the allegations they make about collusion
22 between the EPA and Monsanto.

23 **MR. HOLLINGSWORTH:** That is part of it, and the
24 other part of it is that they've made a specific allegation
25 that they can't make their case on failure to warn under

1 California law without proving --

2 **THE COURT:** But that opens the floodgates.

3 **MR. HOLLINGSWORTH:** -- the federal law involving
4 misbranding.

5 **THE COURT:** That part of your argument does open the
6 floodgates.

7 **MR. HOLLINGSWORTH:** Well --

8 **THE COURT:** That means any state law claim that
9 implicates FIPRA has to be adjudicated in federal court.

10 **MR. HOLLINGSWORTH:** No, any state law claim where
11 plaintiff says that they can't make their case without proving
12 this federal misbranding --

13 **THE COURT:** But that's effectively the law, right?
14 I mean, if it turns out that something -- if a representation
15 is allowed under FIPRA, it cannot be unlawful under state law.
16 So it doesn't matter whether they say that in their Complaint
17 or not, it's the law. It's not a factual allegation they
18 included in their Complaint, it's a statement about the law.

19 So that -- and that is true whether it's in the
20 Complaint or not, and if that's your reason for -- if that's
21 the basis for your insistence that this case needs to be in
22 federal court, you're saying that any state law claim that
23 implicates FIPRA has to be adjudicated in federal court, which
24 is pretty weird --

25 **MR. HOLLINGSWORTH:** No.

1 **THE COURT:** -- because Congress said there's no
2 federal private cause of action under FIPRA, but it's -- any
3 state law claim that is co-extensive with FIPRA can be pursued,
4 and without saying that it has to be in federal court.

5 **MR. HOLLINGSWORTH:** No, that's what the Supreme
6 Court said, interpreting Congress' language, of course, in
7 *Bates*, as your Honor well knows. Your Honor is very familiar
8 with *Bates*, but *Bates* points out that the -- that it left to
9 the Fifth Circuit to decide whether federal misbranding -- an
10 allegation involving federal misbranding that was so seriously
11 taken in that case, and it is here, I think, really was
12 equivalent to Texas state law and failure to warn. That's just
13 one issue.

14 The collusion issue, the illegal agreement issue, is
15 another one. I looked up what agreement -- what "collusion"
16 means in Black's Law Dictionary, taking a page from Judge
17 Scalia's book, and it said what I expected. It's an agreement
18 to do something illegal.

19 So sure, that's part of this Complaint. You know,
20 we have the cleanest bureaucracy in the history of the earth in
21 the United States. It's very, very rare that an allegation
22 like this gets made. I've never heard of it before.

23 **THE COURT:** But I'm just not --

24 **MR. HOLLINGSWORTH:** So it's not a --

25 **THE COURT:** I just don't understand how that relates

1 to this motion. I do understand your argument, I get it.

2 I want to turn to the plaintiffs, and I only have
3 one question for you, which is about your request for
4 attorneys' fees.

5 It's very tempting to award costs and attorneys'
6 fees to you, because the bases they did assert for removal
7 seems to me unreasonable, okay? But there does seem to be an
8 argument for removal that they didn't make, that I think it is
9 probably a loser, but may not be unreasonable.

10 So in a circumstance like that, you know, what is
11 the answer on whether I should award your costs and attorneys'
12 fees? I mean, it seems to me that the standard is not based on
13 which reasons they assert for removal. The standard is whether
14 there's an objectively reasonable basis for removal. Right?

15 **MR. WISNER:** Well, it can't be, because the fees and
16 costs that we're seeking to recover are in response to the
17 unreasonable reasons laid out in the Notice of Removal.

18 **THE COURT:** Do you have any cases that -- any case
19 that stands for the proposition that if there are some bases
20 for removal that are objectively unreasonable and other
21 arguments for removal that might be within the range of
22 reasonableness, that the plaintiff who files a motion to remand
23 should get all or part of its costs or attorneys' fees because
24 it had to deal with responding to unreasonable arguments for
25 removal?

1 **MR. WISNER:** I did look for the sort of piecemeal
2 concept for fees, and I did not find any case law directly on
3 point. But I would just go to the general -- just a reading of
4 the fee shifting statute, right? The purpose of the fee
5 shifting is to compensate the lawyers who had to brief, argue,
6 research, conduct all the work, responding to the arguments
7 that they made.

8 Now, if the Court were to say, well, okay, but when
9 I ordered supplemental briefing, I was really raising the
10 reasonable argument there, and then you brief that issue and
11 now I've decided, based on that briefing, fine, maybe we don't
12 get fees for that portion because that related to the
13 reasonable argument that was raised.

14 But I mean, a large portion of our briefing related
15 to the federal officer jurisdiction, which is -- I don't mean
16 to be rude, but it's quite preposterous. I mean, Monsanto is
17 not a federal officer. It's ridiculous.

18 We spent a lot of time working on that and, you
19 know -- "we" meaning myself and my associate --

20 **THE COURT:** If it's so ridiculous, why did you have
21 to spend so much time working on it?

22 **MR. WISNER:** Well, I mean, because we hold ourselves
23 to a certain standard of litigation and briefing in federal
24 court as well as state court. We pride ourselves in being good
25 lawyers, your Honor.

1 **THE COURT:** Did they bring -- I can't remember -- in
2 their Notice of Removal, did they raise the *Grable* issue at
3 all?

4 **MR. WISNER:** Oh, absolutely. I mean, in those
5 rules, I think upwards of 40 pages, it covers everything under
6 the sun, but that's not what we argued about. We argued -- and
7 I mean, I know you didn't want me to get into the merits a
8 little bit, but I just want to point out that we're really
9 talking about two different issues. Right? The collusion
10 issue and the FIPRA issue, and I think it's pretty clear that
11 the FIPRA issue, the Court feels is necessary -- we disagree,
12 and we've argued that in our briefing, I won't repeat it now --
13 is not necessary, but it would upset the balance of state
14 court, because it would essentially make every failure to warn
15 case involving an EPA product removable.

16 But the second issue is collusion, and I think
17 there, collusion is not a necessary element of our case. And
18 I think it's going to be sort of interesting, when we do get to
19 trail and we have that motion *in limine* where they seek to
20 exclude any reference to the collusion that we say occurred
21 between Jess Rowland and Monsanto, we're going to be pulling up
22 these briefs and saying, well, he said it was the most
23 important issue in the case. They can't argue it's not
24 relevant now.

25 I mean, it's going to be sort of amusing when

1 that -- if and when that comes up.

2 **THE COURT:** Well, no, but the difference is that
3 they may --

4 **MR. WISNER:** I know.

5 **THE COURT:** -- they are referring to your
6 allegations of collusion, and then they will say that, A, it's
7 not -- even if it were an important question, they didn't come
8 up with any evidence.

9 **MR. WISNER:** And at the end of the day, it doesn't
10 really matter what we say, it matters what the Court believes
11 is relevant and admissible, depending whether it's in state or
12 federal court.

13 So -- and I recognize that, but I'm just saying, you
14 know, that issue is not necessary, so that issue doesn't get
15 past the first element, but the issue of FIPRA, which you
16 believe does make it to the second or third, doesn't pass that,
17 because that would fundamentally upset the balance.

18 **THE COURT:** Yeah, I really just wanted to know if
19 you had any case law in support of your argument for all or
20 part of your attorneys' fees.

21 **MR. WISNER:** I only checked in the Ninth Circuit.
22 If you'd like, I could take a look and submit a supplemental --
23 like just an order --

24 **THE COURT:** That's okay, I already asked for
25 supplemental briefing on the question.

1 **MR. WISNER:** Fair enough.

2 **THE COURT:** So you had your chance. Okay, thank you
3 all. I'll --

4 **MR. WISNER:** Your Honor, I want to point out one
5 option on the table, and that is, you know, while we do want
6 our fees, maybe there's a possibility that if Monsanto agrees
7 to withdraw its opposition to all the removals --

8 **THE COURT:** I don't want to get into that settlement
9 negotiation.

10 **MR. WISNER:** Okay.

11 **THE COURT:** That's for you to talk to them about.
12 So I will issue a ruling very shortly on this. Thank you very
13 much.

14 **MR. WISNER:** Thank you, your Honor.

15 10:24 a.m.

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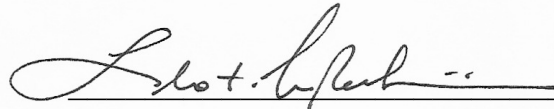
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CERTIFICATE OF TRANSCRIBER

I, Leo Mankiewicz, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

 06/17/2017

Signature of Transcriber

Date