



Evidence of Fraudulent Concealment Can Be Proven By Common Evidence and On Classwide Basis

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The Colorado Court of Appeals issued a recent decision establishing significant legal precedent with respect to class action lawsuits by royalty owners. In *Patterson v. BP America Prod. Co.*, - P.3d - , No. 09CA1943, 2010 WL 547644 (Colo. App. Feb. 18, 2010), the Colorado Court of Appeals upheld a district court's order certifying a class of approximately 4,000 royalty owners (the "Plaintiffs"), who had entered into lease or royalty agreements with BP America Production Company ("BP"), formerly known as Amoco Production Company, or its predecessors. This order entitled the royalty owners to royalties on natural gas sold by BP from wells located in Adams and Weld Counties. In this case, with a long and winding procedural history, the Court of Appeals articulated a principle that, "even without a presumption of reliance, [the] named Plaintiffs in a class action may demonstrate ignorance or reliance on a classwide basis, using circumstantial evidence that is common to the class." *Id.* at *10.

The procedural history of this case provides context to the court's holding. In 2003, certain named Plaintiffs brought suit against BP and later moved for class certification. BP moved for partial summary judgment arguing that many of the Plaintiffs' claims were barred by the six-year statute of limitations. The district court granted BP's motion for summary judgment and the named Plaintiffs appealed. The Court of Appeals reversed the grant of summary judgment holding that the named Plaintiffs' claims did not accrue until they discovered or should have discovered by the exercise of reasonable diligence that BP breached the royalty agreements. In addition, the Court of Appeals held that there were disputed issues of fact as to whether BP's alleged conduct equitably tolled the statute of limitations.

On review, the Colorado Supreme Court reversed the Court of Appeals' holding on the accrual statute, finding that the named Plaintiffs' claims accrued on the date their royalties became due, not when they were discovered. The Supreme Court, however, did not disturb the Court of Appeals' holding regarding equitable tolling.

On remand, the district court granted Plaintiffs' motion for class certification. On an interlocutory appeal, BP first challenged the class certification by asserting that the Plaintiffs had failed to establish the numerosity and typicality requirements for class certification under C.R.C.P. 23(a). Both arguments were rejected by the appeals court, which held that each element for class certification under C.R.C.P. 23(a) had been satisfied.

BP also challenged the district court's class certification contending that the Plaintiffs failed to satisfy the requirements of C.R.C.P. 23(b) "because individual issues concerning fraudulent concealment predominate[d] over issues common to the class." *Id.* at *8. The Court of Appeals disagreed, holding that ignorance and reliance can be proved by common evidence on a classwide basis and that, on the facts of this case, such common evidence predominates over any individual evidentiary issues. *Id.*

While summarizing applicable holdings from other jurisdictions, the court noted that, "at a minimum, fraud can be proved through circumstantial evidence and that direct evidence of ignorance and reliance is not necessarily required in fraud or fraudulent concealment cases." *Id.* at *10.

Furthermore, though BP presented evidence that a few royalty owners had expressed concerns regarding BP's royalty accounting, the Court of Appeals agreed with the district court that such evidence did not show that individualized evidence would be required to determine the actual knowledge of each royalty owner. Rather, the mere fact that certain individual issues existed in a class of approximately 4,000 members was not alone sufficient to defeat class certification. *Id.* at 13.

Please contact [Jack Luellen](#) if you would like additional information about this case.