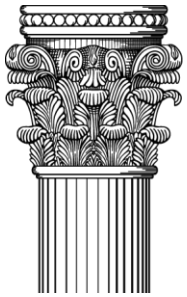

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TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

October 2012

RECENT TOXIC TORT CASES OF INTEREST

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TABLE OF CONTENTS

INTRODUCTION

This edition of the ENVIRONMENTAL/TOXIC TORT NEWSLETTER contains decisions from the Texas Courts of Appeals and the Texas Supreme Court, as well as general information concerning toxic tort practice.

This paper attempts to analyze and/or provide pertinent excerpts from recent Texas activity and cases which address issues relevant to the environmental/toxic tort area of legal practice. Due to space limitations, every issue, fact or argument cannot be included and, consequently, this paper contains some of the most precedential, defining and/or reinterpreted issues currently at hand. Obviously, many of the decisions may be subject to rehearing, further appeal, or *en banc* consideration and should therefore be used "with caution" in the future. The following are excerpts from opinions which have addressed issues relevant to this topic. Quotation marks have been omitted but the following consists of quotes from the opinions in the form of a summary.

SUMMARY

Now in the seventh year since implementation of Chapter 90 of the *Texas Civil Practice & Remedies Code*, Environmental litigation in Texas continues to trickle along at a greatly reduced rate.

The silica docket remains dormant. No movement or increase of substance has occurred and none is expected. The asbestos docket, while not defunct, continues to whimper along. The overall number of new case filings continues to be low while Plaintiffs' firms continue to file suits in other, more plaintiff-friendly states.

As previously reported, in 2011, for the first time since implementation of Chapter 90 of the *Texas Civil Practice & Remedies Code*, a Texas Court of Appeals found the retroactive portion of the law to be unconstitutional. In *Union Carbide Corporation v. Synatzske*, et. al. (discussed herein) the First District denied a motion to dismiss based upon a plaintiff's failure to tender a qualifying report. An *en banc* rehearing was held with a revised opinion released in 2012. The Court, *en banc*, affirmed its prior decision. The effect of this ruling on the litigation as a whole is not yet known.

Additionally, in *The Kansas City Southern Railway Company v. Oney* (discussed herein), the Fourteenth Court of Appeals ruled that the Federal Employers' Liability Act preempts Chapter 90 of the *Texas Civil Practice & Remedies Code*. The effect of this ruling on the litigation as a whole is not yet known.

Chemical exposure litigation, specifically including benzene, continues to see sporadic filings.

Consequently, toxic tort litigation in Texas is still precarious but remains alive.

UNION CARBIDE CORPORATION, Appellant v. DAISY E. SYNATZSKE AND GRACE ANNETTE WEBB, INDIVIDUALLY AND AS REPRESENTATIVES AND CO-EXECUTRIXES OF THE ESTATE OF JOSEPH EMMITE, SR., JOSEPH EMMITE, JR., DOROTHY A. DAY, VERA J. GIALMALVA AND JAMES R. EMMITE, Appellees

NO. 01-09-0114 1-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2011 Tex. App. LEXIS 4934

June 30, 2011, Opinion Issued

Reaffirmed En Banc
2012 Tex. App. LEXIS 5187

June 28, 2012, Opinion Issued

FACTS: The Emmites allege that Joseph, while employed by Union Carbide from 1940 to 1975, was exposed to **asbestos** and, as a result of this exposure, he contracted asbestosis and died on June 15, 2005. The Emmites attached to their original petition a physician report authored by Dr. R. Kradin. Union Carbide moved to dismiss the Emmites' claims, asserting that they had failed to serve it with an adequate physician report. In response, the Emmites served upon Union Carbide a second physician report, dated August 9, 2007, authored by Dr. J. D. Britton. On September 14, 2007, during the MDL pretrial court's hearing on Union Carbide's motion, the Emmites asked the court to compel Union Carbide to produce from its personnel files Joseph's medical records. The Emmites sought to obtain the results of any pulmonary function testing that Union Carbide had performed on Joseph at the time that he had been employed by Union Carbide. At the end of the hearing, the court, stating that it considered this case to be "exceptional," orally denied Union Carbide's motion to dismiss "for good cause." On October 1, 2007, Union Carbide moved for reconsideration of the MDL pretrial court's oral ruling, and, at the beginning of the November 30, 2007 hearing on the motion, the court stated that it would not sign a written order denying Union Carbide's motion to dismiss. In fact, the court made it clear to the parties that it did not intend to sign an appealable interlocutory order.[10] After Union Carbide stated that this was "fine," the parties then discussed the Emmites' pending efforts to apply for an amended certificate of Joseph's death. The Emmites represented that Dr. S. McClure, on the day before the hearing, had signed an application for an amended death certificate that would support a finding that asbestosis was at least one cause of Joseph's death. Union Carbide complained that the affidavit that the Emmites proffered to substantiate this claim contained hearsay and it had not had the opportunity to depose McClure. Union Carbide then placed in the record additional medical records for Joseph and his death certificate. The court stated that it would keep the record open for six weeks and, if the Emmites

filed an amended death certificate showing that asbestosis was a cause of Joseph's death, the court would deny Union Carbide's motion.

On January 14, 2008, the Emmites served, for a second time, Union Carbide with the August 9, 2007 physician report of Dr. Britton, and indicated that, given the "extraordinary circumstances" of this case, they intended to rely upon it as their required physician report. On January 18, 2008, the MDL pretrial court conducted a hearing, at which the Emmites expressed, consistent with their recent service of Britton's report upon Union Carbide, their intent to rely upon it as their required physician report. The Emmites explained that they were still trying to obtain a certified copy of Joseph's amended death certificate, and they requested "a full evidentiary hearing" to present witnesses and additional evidence. The Emmites argued that their case presented an "extraordinary circumstance" because Union Carbide had produced to them Joseph's pulmonary function testing from when he had been a Union Carbide employee. The court granted the Emmites' request for a full evidentiary hearing, and it granted Union Carbide's request to depose Dr. McClure, who had signed Joseph's amended death certificate.

Although Union Carbide did not depose Dr. McClure until September 10, 2009, which was over one and one-half of a year after the MDL pretrial court's January 2008 hearing, a substantial portion of this delay was attributable to the fact that McClure had been seriously injured in an accident. And when Union Carbide did obtain McClure's deposition, she still suffered from some impairment due to her injuries. Shortly after obtaining McClure's deposition testimony, Union Carbide, on October 19, 2009, filed a "renewed" motion to dismiss the Emmites' claims.

In their November 5, 2009 response to the renewed motion to dismiss, the Emmites argued that Union Carbide had waived its right to seek dismissal because the parties had engaged in significant discovery and the motion was untimely filed. Moreover, the Emmites produced an October 28, 2009 physician report, authored by Dr. J. Prince, which they offered as an addendum to Prince's June 12, 2008 letter report that the Emmites had previously given to Union Carbide in the discovery process.

At its subsequent hearing on Union Carbide's renewed motion to dismiss, the MDL pretrial court instructed Union Carbide to file its written objections to Dr. Prince's report. The court explained that it wanted a complete record, including a copy of Prince's deposition, which had been obtained before the hearing. Pursuant to the court's instructions, Union Carbide filed its written objections to Prince's report. The Emmites then filed their response to Union Carbide's objections and Prince's December 2009 amended report, which had been prepared in an effort to respond to some of Union Carbide's written objections.

In his amended report, Dr. Prince, who had been Joseph's pulmonologist during a 2005 hospital visit, stated, in relevant part, that he had physically examined Joseph and provided him with a pulmonary consultation and treatment. Prince noted that Joseph was 85 years old at the time and had a medical history of benign prostatic hypertrophy, osteoarthritis, and dementia. Joseph, who also had a remote history of smoking cigars, had been brought to the emergency room "with a complaint of bilateral lower extremity edema as well as difficulty ambulating." Prince took an occupational exposure history from Joseph, who told Prince that he had worked as an insulator at Union Carbide for many years and "had a possible diagnosis of asbestosis." Prince also noted that Joseph's chest exam revealed "diminished breath sounds at the right lung base with associated

dullness to percussion." Moreover, Joseph was "somewhat confused" and "unable to support his own weight while" standing or sitting. The hospital admitted Joseph with pneumonia, and Prince noted "the presence of bilateral calcified pleural plaques consistent with a prior exposure to **asbestos**." After conducting a computed tomography scan of Joseph's chest and administering other diagnostic tests, Prince diagnosed Joseph as suffering from "pulmonary asbestosis."

On December 4, 2009, the MDL pretrial court granted Union Carbide's motion for reconsideration and conducted its final hearing, but the court did not rule on Union Carbide's renewed motion to dismiss. Rather, on December 22, 2009, the court, after considering all of the evidence, signed its order denying Union Carbide's motion to dismiss the Emmites' claims.

HOLDING: The order was affirmed.

ANALYSIS: On appeal, the court held that appellees' expert report did not comply with *Tex. Civ. Prac. & Rem. Code Ann. § 90.010(f)(1)(B)(ii)* (2011) because the pulmonary function testing performed on the employee by the employer 40 years before the employee's death and provided no evidence of impairment could not be used to satisfy the pulmonary function testing requirement. However, the court held that *§ 90.010(f)(1)(B)(ii)*'s requirement of a verification that the employee had had a pulmonary function testing performed on him in order for appellees to assert their asbestos-related claims was unconstitutional as applied to them under *Tex. Const. art. I, § 16* because it was undisputed that at the time of the employee's death, a physician report containing a pulmonary function test was not required, such a test could not be performed on the employee before he died, and the evidence on file showed that appellees' claims had a substantial basis in fact. In addition, no public interest would be served by *§ 90.010(f)(1)(B)(ii)*'s application to appellees.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant v. RONALD K. ONEY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DANIEL D. ONEY, Appellee

NO. 14-11-00815-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2012 Tex. App. LEXIS 5810

July 19, 2012, Majority and Dissenting Opinions Filed

FACTS: Appellee, Ronald K. Oney, Individually and as Representative of the Estate of Daniel D. Oney, brought a claim under the Federal Employers' Liability Act ("FELA") against The Kansas City Southern Railway Company ("KCSR"). During this employment, the decedent "was exposed to harmful and/or hazardous substances, including known human carcinogens, such as asbestos, silica, and diesel exhaust." As a result of this exposure, Appellees contended that the decedent was diagnosed with lung cancer in April 2010 and died approximately one month later. Appellee asserted a claim under FELA because of KCSR's involvement in interstate railroad commerce. KCSR filed a motion to dismiss based on appellee's failure to serve medical reports under Chapter 90 of the Texas Civil Practice and Remedies Code. The multidistrict litigation ("MDL") court handling pretrial issues in this case denied KCSR's motion, determining appellee is not required to comply with Chapter 90 report requirements. In a single issue, KCSR contended the trial court erred by denying the motion to dismiss.

HOLDING: Affirmed.

ANALYSIS: The Court found that the Federal Employers' Liability Act (FELA) wholly preempts state-law remedies for railway employees injured in the course of employment when any part of that employment furthers interstate commerce. The Court acknowledged that, as a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, the substantive law governing them is federal and cannot be interfered with, lessened, or destroyed by a state rule of practice or procedure. The Court opined that 42 U.S.C.S. § 1983 and the Federal Employers' Liability Act (FELA) are remedial, intended to provide groups with historically unequal access to legal remedies the ability to seek and receive adequate compensation for injuries. Specifically, the purpose behind § 1983 was to ensure access to courts for persons who are deprived of civil rights instead of having to seek redress from governmental agencies not known for protecting civil rights. The primary purpose of FELA was to shift part of the risks inherent in dangerous railway work from employees to employers by eliminating harsh defenses, prohibiting pre-injury releases, and reducing the standard of proof for causation.

The Court specifically distinguished this case from *In Re Global SantaFe*.

PHILIP CANNATA, APPELLANT V. BLACKMON MOORING OF AUSTIN, INC., APPELLEE

NO. 03-10-00672-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

2012 Tex. App. LEXIS 5064

June 20, 2012, Filed

FACTS: St. John Neumann Catholic Church of Austin, Texas, hired Blackmon Mooring to remediate mold in its music room and sacristy in August of 2007. As part of the remediation process, Blackmon Mooring injected a biocide called Sporicidin into the building's air system to kill mold, mildew, dust mites, bacteria, and viruses. At the same time or soon after Blackmon Mooring used Sporicidin in the church, Appellant Cannata, who asserts that he was not warned to stay away, entered the music room and stayed there for approximately twenty minutes until he learned from another employee that the building was off limits at that time. He discovered later that the church's facilities manager had sent Cannata and the other church employees an email warning of the situation at approximately the same time Blackmon Mooring applied the Sporicidin. Later that same day, Cannata began to feel "uncomfortable and exhausted" and starting experiencing headaches, chest tightness, shortness of breath, itchy burning skin, diarrhea, and a bitter, metallic taste in his mouth. Cannata went to see his family doctor, who noted that Cannata was "very ill" from the exposure and prescribed an inhaler and other medication. Cannata's doctor also suggested that he see an allergist, which Cannata did shortly thereafter. Although not clear from the record, it appears that Cannata experienced many of these same symptoms for at least several days after his exposure.

Cannata filed this suit against Blackmon Mooring, alleging that Blackmon Mooring had negligently exposed him to the "harmful and toxic" substance glutaraldehyde[1] on August 6, 2007, by using the glutaraldehyde-containing product Sporicidin in the music room's ventilation system immediately before Cannata entered that room. Cannata complained that Blackmon Mooring was negligent in failing to (1) place proper and adequate warning signs in the exposure area; (2) block access to the exposure area; and (3) maintain a company presence at the remediation site while the Sporicidin was being released. Cannata requested as damages his medical expenses, pain and suffering, mental anguish, and physical impairment.

After generally denying Cannata's claim, Blackmon Mooring filed a motion for summary judgment asserting that it was entitled to summary judgment because its evidence conclusively established that it did not use glutaraldehyde or a product containing glutaraldehyde at the St. John Neumann Catholic Church on August 6, 2007. In the alternative, Blackmon Mooring asserted that Cannata could produce no evidence that Blackmon Mooring applied any dangerous chemicals, including glutaraldehyde, to the church, that Blackmon Mooring applied any chemicals to the church that

would present any inhalation hazards, or that the chemicals used by Blackmon Mooring at the church caused Cannata any personal injuries. The trial court, without specifying the grounds on which it was relying, granted Blackmon Mooring's summary judgment and ordered that Cannata take nothing on his negligence claim.

HOLDING: Affirmed.

ANALYSIS: The Court found that a defendant need not show that the plaintiff cannot succeed on any theory conceivable in order to obtain summary judgment; he is only required to meet the plaintiff's case as pleaded. Further, when a plaintiff's petition alleges specific claims, but does not limit itself to those claims, a defendant is entitled to summary judgment if he disproves at least one element of each claim specifically pleaded unless plaintiff in response raises a genuine issue of material fact as to some other claim that might be brought within the general language of the petition. Appellant did not provide any information in response to the motion other than simply re-alleging his contention as to the chemical identity.

GEICO GENERAL INSURANCE COMPANY F/K/A HOUSTON FIRE & CASUALTY INSURANCE COMPANY, APPELLANT V. AUSTIN POWER INC., APPELLEE

NO. 14-11-00049-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

357 S.W.3d 821; 2012 Tex. App. LEXIS 60

January 5, 2012, Opinion Filed

FACTS: Appellant GEICO General Insurance Company challenged the trial court's summary judgment in favor of Austin Power on a breach of contract claim relating to an insurer's duty to defend. This case involves an insurance-coverage dispute arising from an underlying lawsuit, *Bradley v. AEP Texas Central Company*, Cause No. 2007-26854 in the 63rd District Court of Val Verde County, Texas. In that case, Weldon Bradley and his wife Ruth sued several defendants, including Austin Power, Inc., alleging that Weldon was injured by his exposure to the defendants' asbestos-containing products and machinery. In their factual allegations, the *Bradley* plaintiffs did not identify the date Weldon's injury occurred. In 2008, the trial court in the *Bradley* case granted summary judgment in favor of Austin Power and dismissed it from the case. The parties have stipulated that Austin Power incurred $54,706.67 in attorney's fees and costs in defending the *Bradley* case.

Austin Power held a commercial general liability insurance policy issued by GEICO's predecessor, covering the period from December 31, 1969, to December 31, 1970. Under the policy's terms, GEICO has a duty to defend Austin Power against any claims arising out of an occurrence that results in bodily injury during the coverage period, even if the allegations are groundless, false, or fraudulent. In response to the *Bradley* suit, Austin Power demanded reimbursement for its defense costs from GEICO. The trial court in the coverage lawsuit granted traditional summary judgment in favor of Austin Power, denied GEICO's competing summary-judgment motion, and ordered GEICO to pay Austin Power's attorney's fees and costs from the *Bradley* suit, the coverage suit, and any appeals. GEICO appeals the judgment of the trial court, arguing that because the claim in the *Bradley* petition lacked a specific temporal factual allegation it was not a potentially covered claim under the insurance policy and thus did not trigger GEICO's duty to defend.

HOLDING: Affirmed.

ANALYSIS: The Court held that an insurer has a duty to defend when a third party sues the insured on allegations that, if taken as true, potentially state a cause of action within the coverage terms of the policy. Even if the allegations are groundless, false, or fraudulent, the insurer is

obligated to defend. The duty to defend is independent from the duty to indemnify and can exist even when no obligation to indemnify is ultimately found.

In determining whether an insurer has a duty to defend, courts follow the eight-corners rule, also known as the complaint-allegation rule: an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations. When applying the eight-corners rule, courts construe the allegations in the pleadings liberally. Courts resolve all doubts regarding the duty to defend in favor of the insured. If the pleadings do not contain factual allegations sufficient to bring the case clearly within or without the coverage terms, the general rule is that the insurer is obligated to defend if there is any potential claim under the pleadings that falls within the coverage of the policy. In the case of ambiguity in the underlying petition, the court may not read facts into the pleadings, look outside the pleadings, or imagine factual scenarios which might trigger coverage. However, the eight-corners rule does not require a court to ignore those inferences logically flowing from the facts alleged in the petition. A liability policy obligates the insurer to defend the insured against any claim that potentially could be covered.

Where an insurer moves for summary judgment on the duty to defend, the insurer is required to establish as a matter of law that no covered claims are alleged in the pleadings.