LEGGE FARROW

ADMIRALTY AND MARITIME MATTERS

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Supreme Court Of Texas Holds the State's Multi-District Litigation Procedures Requiring Consolidation Of All Silica-Related Cases Into A Single Multidistrict Litigation Court and the Threshold Showing of a Valid Diagnosis Not Pre-Empted By The Jones Act.

In *In re Global Santa Fe Corp.*, 275 S.W.2d 477 (Tex. 2008), the Supreme Court of Texas evaluated the application of Section 90 of the Texas Civil Practice & Remedies Code to a seaman's claim for exposure to asbestos and silica brought in state court. Chapter 90 was enacted by the Texas Legislature in response to existence of an "asbestosis litigation crisis." The Texas legislature noted that Texas leads the nation in such suits. *In Re Global Santa Fe* at 482. Chapter 90 sets certain pretrial procedures that will govern the efficient and expeditious litigation of the numerous silica and asbestosis personal injury actions in Texas. Section 90.004 requires silica claimants to serve a detailed expert report that verifies that the claimant suffers from one or more silica-related diseases based upon recognized symptoms. The report must be drafted by a medical expert and must verify minimum levels of impairment as set forth in Chapter 90. This is a threshold burden of proof a claimant must meet in order to be permitted to continue its suit.

The second aspect of Chapter 90 is that it consolidates all personal injury suits alleging silica exposure into one multi-district litigation pre-trial court ("MDL"). The MDL pre-trial court decides all pre-trial matters in a consistent and efficient manner, and then remands the individual cases to the trial court from which it came for trial. If the claimant fails to file the report in compliance with Section 90.004, the MDL pre-trial court will retain jurisdiction over the action and will not remand it to the originating court for trial.

In *In re Global Santa Fe*, the MDL pre-trial court, and the Texas Court of Appeals, both held Chapter 90 of the Civil Practice and Remedies Code inapplicable as it was pre-empted by the Jones Act, a federal maritime statute. The Supreme Court of Texas found that the procedural framework set out in Chapter 90 was not pre-empted, although the Chapter's a minimal-impairment provision related to silica claims was held pre-empted by the Jones Act.

With regard to marshaling of all silica related claims into one court, the Supreme Court of Texas found this to be a procedural vehicle existing under Texas law. It cited well-settled precedent that procedural rules of the state courts are not pre-empted by the federal maritime law. In support of this opposition, it relied upon the 1991 case of *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex. 1991), a case in which Michael C. "Mickey" Farrow of Legge, Farrow, Kimmitt, McGrath & Brown, successfully represented Texaco

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in the U.S. and Texas Supreme Courts overturning the Jefferson County District Court's application of the state's substantive law in a maritime personal injury action. (*Id.* at 485).

The court then turned to provisions of Chapter 90 requiring a threshold confirmation of the existence of one of the medically recognized forums of silica-related illness. It found that this, too, was not pre-empted. The Court found the requirement based upon universally recognized criteria for reliably diagnosing the existence of silica-related illnesses through (1) conducting a physical examination by a trained medical professional (2) identifying a silica-related condition, and (3) ruling out other causes of the observed condition. The court found that this requirement assuring reliable expert confirmation of silica-related diseases was not pre-empted by the Jones Act. The court reasoned this requirement is similar to the federal standards for admission of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and its progeny. It also noted that Texas courts have developed similar standards following *Daubert* that draw heavily on the federal jurisprudence. As both federal and state law requires expert testimony "grounded in the methods and procedure of science," the Supreme Court found that this requirement does not alter or offend a similar requirement set forth in the federal cases:

> We see no basis for holding that Texas law generally regarding the admission of expert testimony, which draws so heavily from federal law, is pre-empted by the Jones Act. This law does not clearly conflict with federal maritime law. . . . Nor do we see how the use of such standards, which apply to Jones Act cases proceeding in federal court, would interfere with the proper harmony and uniformity of the federal maritime law.

In re Global Santa Fe at 487.

The court then turned to the minimal impairment provision set forth in Chapter 90. This portion of the Texas Civil Practice and Remedies Code imposes a requirement that the plaintiff suffer from minimal level of physical impairment before he can obtain relief in a silica-related suit. Specifically, claimants alleging silicosis must have sustained "at least Class II or higher or impairment." The court found that this was a substantive rule of law that conflicts with the federal Jones Act and was thus pre-empted. The Court noted that the Jones Act imposes no requirement for a minimal threshold of physical injury, nor any limitation that certain lung diseases have progressed past a certain specified level. It found, due to pre-emption, that Chapter 90 could not impose a higher standard of proof for causation than the federal standard applicable to Jones Act cases. *In re Global Santa Fe* at 489 (citing *Maritime Overseas Corp.*, 971 S.W.2d at 406).

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The practical effect of this decision is that vessel operators and owners being sued for silica-related diseases can enjoy the marshaling of all pre-trial proceedings in the silica MDL court, and also demand reliable confirmation of a valid diagnosis by way of a threshold expert report from the plaintiff. When the case is ultimately remanded for trial to the originating court, however, the maritime defendants will litigate the matter using the same standards of causation applying any Jones Act case.

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If you have any questions about this topic, please contact the following Legge Farrow partner:

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