Judge Mark Davidson
Multi District Litigation Asbestos Judge
201 Caroline, 8th Floor
Houston, Texas 77002

713-368-6600

July 27, 2011

Mr. Robert Shuttlesworth
Ms. Lisa Shub

Re: Cause No. 2010-35923; *Markert v. Tesoro Alaska Company and Tesoro Corporation*

Dear Counsel:

The Court has pending before it a Motion for Summary Judgment in the above case. This letter is the ruling of the Court on that Motion.

The facts are not in significant dispute. Stephen P. Taylor, the decedent, was a student at Texas A&M University in 1979 when he took a summer job with the Defendant Tesoro Corporation ("Tesoro"). Tesoro is a Texas Corporation with operations in a number of states. Mr. Taylor was assigned to work at the refinery in Sitka, Alaska as an employee of Tesoro Alaska Company, an Alaska Corporation ("Tesoro Alaska"). Tesoro Alaska provided Workers' Compensation Insurance for him while he was its employee.[i] After one summer at the plant, Mr. Taylor returned to Texas, and remained a Texas resident for the rest of his life. He died in 2009. It is claimed in this case that the cause of death was an asbestos-related disease from asbestos inhaled during Mr. Taylor's work for one summer at Tesoro Alaska.

At the original hearing, the Plaintiff conceded that if I found Alaska law to be applicable, then the Motion for Summary Judgment should be granted. The Defendant conceded that if I found Texas Law to be applicable, the Motion for Summary Judgment should be denied. Therefore, the ruling hinges on a question of law—Which state's law applies?

The first step in choice of law analysis is to determine whether there is a difference between the laws of the two jurisdictions. That test is met. Texas has placed in its Constitution a right for its citizens to sue an employer for wrongful death if the death is caused by the gross

negligence of another. (*See* Article XVI, Section 6, Texas Constitution and Texas Labor Code Section 408.001(b)). In contrast, under Alaska law, the right of a worker to sue an employer who provides workers' compensation insurance is limited to cases of intentional tort, as opposed to gross negligence.

Given that there is a conflict in the law of the two states, the central issue in the case is a determination of choice of law between Texas and Alaska.

The most recent application of choice of law principles I could find was *Enterprise Products Partners, L.P. v Mitchell*, 2011 WL 693700 (Tex. App.—Houston [1st], February 10, 2011, pet. filed). In that case, the owner of a pipeline that exploded in Mississippi and killed residents of Mississippi was sued in, logically enough, Harris County, Texas. The First Court of Appeals ruled that Texas law should apply, because (i) the owner of the pipeline was a Texas resident, and (ii) the pipe was manufactured in Texas and controlled in Texas. The Court of Appeals discussed the public policy that favors allowing a Texas resident to have the compensatory damages of its residence apply. If, under traditional choice of law analysis under Section 145 of the *Restatement (Second) of the Conflict of Laws* (1971) (the "Restatement"), Texas law is applicable in that case, it can be found applicable in this case.

I issued a letter two weeks ago asking for additional briefing on several points. Worried that my question about *Hughes Woods Products v. Wagner* indicated an inclination to rule against it, the Plaintiff developed a theory that bifurcates choice of law analysis as between compensatory relief and punitive damages. Under the Plaintiff's theory, argued for the first time in its last brief, different states' laws can be applied in one from the other, citing *Total Oilfield v. Garcia*[ii] in support of that proposition.

A detailed examination of *Total Oilfield* is in order. In that case, the trial court dismissed a case brought by a Texas resident for an Oklahoma injury for want of jurisdiction. The basis of that ruling was that Oklahoma had provided a form of relief in its workers' compensation system and that under Oklahoma law, that was an exclusive remedy. Therefore, the trial court reasoned, there was no jurisdiction. The Court of Appeals reversed, holding that choice of law analysis was inappropriate, because there was a statutorily created right to proceed in Texas.[iii] The Court of Appeals then applied, in what is almost certainly *dicta*, a choice of law analysis, and ruled that Texas law applied.

On appeal to the Supreme Court of Texas, the Court disapproved the Court of Appeals' analysis that the choice of law analysis was irrelevant, and expressly approved Texas law as being applicable in a retrial. Because the result of both the Amarillo Court of Appeals' opinion and the Supreme Court's opinion was to reinstate the case, the Court of Appeals was affirmed, but their comment on the irrelevance of the "most significant relationship" was expressly disapproved.

Left to itself, *Total Oilfield* can be read to require a Texas court to apply Texas law to a case between a Texas employee and a Texas corporation, regardless of where liability arose. It appears to hold under the "most significant relationship" test of Section 145 of the Restatement, a lawsuit such as this one should be allowed to go forward under Texas law. Indeed, had it not

been for *Hughes Woods v. Wagner*[iv] and its adoption of Section 184 of the Restatement, that would have been my ruling. Because of that case and that rule, it is not.

Like this case, *Hughes Woods* was a case between a resident of Texas injured while working for a Texas employer. Like this case, liability facts arose in another state. Like this case, the employer had workers' compensation insurance in the other state. The lawsuit was brought against the employer in Texas, and the trial court dismissed. Applying Section 145 of the Restatement, the Court of Appeals held Texas had an overriding interest in the relationship between a Texas citizen and a Texas employer, and reversed, finding the Louisiana workers' compensation bar inapplicable.

The Supreme Court held that the Court of Appeals erred in applying Section 145 of the Restatement, instead adopting and applying Section 184. It states, in applicable part:

> Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which…the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where the employment if principally located, or (3) where the employer supervised the employee's activities from a place of business in the state . . . . "

This section of the Restatement is dispositive of the motion. In *Hughes Woods*, the Court emphasized that Section 145 requires a trial court to look to "the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties . . . ." Justice O'Neill italicized those words just as quoted. In this case, the issue is workers' compensation immunity. The state of the protection is the state of principal employment—Alaska. In adopting Section 184, the Texas Supreme Court held that those factors must be considered to the exclusion of other factors that would be applied under the traditional test. If I am wrong on my reading of *Hughes Woods*, I expect to be promptly reversed.[v]

No case stands for the proposition that choice of law analysis allows for a different state's laws to be applied on compensation from punishment, as argued by the Plaintiff.[vi] If that was the intention of the Supreme Court in either *Total Oilfield* or *Hughes Woods*, it could have said so. It did not.

The Motion for Summary Judgment is respectfully granted.

Counsel is asked to prepare a judgment which grants the Motion for Summary Judgment expressly on grounds of Section 184 of the Restatement, and which states that if Texas law is applicable for punishment damages on an Article XVI wrongful death cause of action, the motion should have been denied and the judgment should be reversed.

Respectfully submitted,

MARK DAVIDSON

MD/ms

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[i] The Plaintiff claims the fact that the insurance policy was bought in Texas is a factor that should be considered. Given that the policy was with a Connecticut company and covered on its face employees in 21 states, this fact is of no significance in a choice of law analysis.

[ii] 711 S.W.2d 237 (Tex. 1986)

[iii] The statute in question is Article 4678, now codified as Section 71.031 of the Texas Civil Practices and Remedies Code.

[iv] 18 S.W.3d 202 (Tex. 2000).

[v] I should mention that in *Hughes Woods*, the case was remanded to the trial court for a determination of whether the Defendant was, in fact, a subscriber to the Louisiana Workers' compensation system. That factual dispute is not present in the case before the Court.

[vi] I can't help but note that the Decedent filed a claim in Illinois during his life, in which the law of that state was asked to be held applicable, and presumably was.

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