



HONORABLE MARK DAVIDSON
MULTI-DISTRICT LITIGATION ASBESTOS COURT
201 CAROLINE, 17TH FLOOR
HOUSTON, TEXAS 77002

June 27, 2015

Mr. J. Kyle Beale

Ms. Debran L. O'Neil

Re: Cause No. 2012-14503; Seiber v. Flowserve, et al

Dear Counsel:

You will recall that Motions for Summary Judgment and to Determine Tennessee law applicable to this case were argued this morning. This letter is the ruling of the Court.

The facts are not contested. Brantley Seiber was employed in Tennessee and was exposed to asbestos in Tennessee. He moved to Texas and lived here for the last twenty-two years of his life. He was undisputedly a citizen of the State of Texas at the time of his death, as was his wife, the Plaintiff in this case. His exposure, if any, to the Defendant's product was in Tennessee. None was in Texas. All of the asbestos containing material to which the Plaintiff claims to have been exposed was installed prior to 1969. It is agreed by the parties that if the Tennessee Statute of Repose applies to this case, summary judgement is proper. It is also agreed that if the Texas Statute of Repose applies, summary judgment should be denied.

The ruling is deceptively easy. The problem is that it is deceptively easy in both directions, depending on which section of a statute I choose to follow. Section 71.031 of the Civil Practice and Remedies Code says, in relevant part:

- a. An action for damages for the death or personal injury of a citizen of this state .. may be enforced in the courts of this state, although the wrongful act .. takes place in a foreign state .. if
 1. A law of the foreign state or of this state gives a right to maintain an action for damages for the death or injury

FILED
COURT CLERK
DISTRICT COURT
HOUSTON, TEXAS

15 JUN 26 PM 2:08

Heiler
AFH

2. The action is begun in this state within the time provided by the laws of this state for beginning the action ...
- c. The court shall apply the rules of substantive law that are appropriate under the laws of the case.

Under every common law conflicts of law standard I have ever applied, the choice of law analysis for liability in this case directs that Tennessee law applies. It is the state in which all applicable exposure took place. It is clear that, at the trial of this case, the substantive law of Tennessee will apply to the dispute between these parties, at least on questions of liability. Under subsection c of the statute, I must enforce the substantive law of Tennessee in this case.

What Subsection c giveth in this case, Subsection a(2) taketh away. The statute unambiguously says that I should use Texas law to determine whether an action brought by a Texas citizen was timely brought. The case was brought within the time period of Texas's Statute of Repose. If, therefore, I enforce Subsection c and rule that it trumps Subsection a(2), the summary judgment will be granted. If I do the reverse, it must be denied.

Only one appellate court has addressed the specific issue of the apparent conflict between the two subsections of the statute. In *Hyde v. Hoffman-LaRoche*, 511 F3d 506, Justice Pricilla Owen, writing for the Fifth Circuit, wrote this clear and cogent analysis:

The Texas Legislature chose the phrase "within the time provided by the laws" rather than a more specific, more restrictive reference to "limitations." At least one Texas state court has held that the phrase "within the time provided by the laws" in subsection (a)(3) includes both statutes of limitations and statutes of repose. Nothing in the context of section 71.031 or its history indicates that the Texas Legislature meant the phrase "within the time provided by the laws" to mean one thing in subsection (a)(2) and another in subsection (a)(3). Accordingly, under Texas law, a resident plaintiff, such as Hyde, must establish under subsection (a)(2) that his action was instituted in Texas "within the time provided by the laws of [Texas] for beginning the action," and that includes Texas statutes of repose. Hyde points out that subsection (c) of section 71.031 explicitly states that courts "shall apply the rules of substantive law that are appropriate under the facts of this case" and contends that statutes of repose are substantive, rather than procedural, laws. Even assuming that is so in this context, subsection (c) directs application of substantive law "as appropriate under the facts of the case,"³⁴ and this general directive does not override the more specific references in subsections (a)(2) and (a)(3) to "the time provided by the laws." We conclude that even if the Roche defendants' wrongful acts occurred in New Jersey or another state, in order to prevail in the Texas action, Hyde would nevertheless be required to establish that his Texas suit was filed within the time permitted under the Texas statute of repose for products liability actions, which is section 16.012(a) & (b) of the Texas Civil Practice and Remedies Code. *Hoffman* at 511-512.

I must conclude, as did the Fifth Circuit, that the specific statute dealing with the timeliness of bringing suits in Section a(2) of Section 71.031 controls over the general provision of Subsection c.

The Defendant argues that Subsection a(2) sets a minimum standard for suits to be brought in Texas, and that Subsection c allows adding more restrictive standards for citizens of this state bringing claims for out of state torts. The express wording of the statute fails to disclose that intent, nor does Justice Owen's interpretation of the statute. If counsel can provide any indication of legislative intent from the adoption of the statute, I will be glad to reconsider this ruling.

The Motion for Summary Judgment is denied. Which state's law will apply at trial will depend on which Defendants are pending at the time of trial. I will defer a ruling on that matter at this time.

Counsel is invited to prepare an order consistent with this ruling.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark Davidson", with a stylized flourish at the end.

MARK DAVIDSON

MD/ms