THE IMPACT OF FEDERAL PREEMPTION ON TORT REFORM LEGISLATION: LITIGATING FEDERAL CLAIMS IN STATE COURT

ARE YOU ALONE IN THE DESERT?

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I. Background On The Doctrine Of Federal Preemption.

The principle by which federal laws trump state laws is known as the doctrine of federal preemption. The roots of federal preemption can be traced back to the United States Constitution. In drafting the Constitution, the Framers envisioned a potential conflict between the two separate and distinct yet competing bodies of government: federal and state. The Framers resolved this conflict by incorporating the Supremacy Clause into the Constitution. The Supremacy Clause dictates that federal law will supersede any state law that interferes with or runs contrary to that federal law:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

U.S. Const. Art. VI, Cl. 2.

This clause establishes the framework for the balance of powers between the federal government and the state governments. Since the United States Supreme Court's landmark decision in *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat) 316, it has been well-established that any state law which conflicts with federal law is "without effect." *See Maryland v. Louisiana* (1981), 451 U.S. 725, 746.

There are two main categories of federal preemption: express and implied. "Express preemption" occurs when "Congress has made its intent known through explicit statutory language" to preempt an area of state law. *English v. General Elec. Co.* (1990), 496 U.S. 72, 79. "Congress can define explicitly the extent to which its enactments pre-empt state law." *Id.* at 78. In the absence of explicit statutory language, implied preemption may exist. There are two types of implied preemption: field preemption and conflict preemption. "Field preemption" occurs when federal law exclusively regulates or occupies an area such that Congress left no room for state regulation in that area. *Id.* at 79. "Conflict preemption" occurs when state law "actually conflicts with federal law." *Id.* Courts have found conflict preemption "where it is impossible for a private party to comply with both state and federal requirements *** or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

As discussed later in this handout, the key questions in every preemption analysis is (1) whether Congress intended to displace state law and (2) whether the state law conflicts with any requirements under federal law. This becomes particularly important when faced with the dilemma of whether newly enacted tort reform legislation can apply to personal injury claims filed under federal law in state court without offending the Supremacy Clause of the United States Constitution. In a recent decision rendered by the Court of Appeals of Ohio, Eighth Appellate District, in *Norfolk S. Ry. Co. v. Bogle* (2006), 166 Ohio App.3d 449, such state-imposed medical criteria in asbestos

personal injury cases was preempted by federal law and, thus, did not apply to asbestos-related claims filed under the Federal Employers' Liability Act in state court.

II. *Norfolk S. Ry. Co. v. Bogle* (2006), 166 Ohio App.3d 449: An In-Depth Analysis Of Federal Preemption And Its Impact On Newly Enacted Tort Reform.

A. Factual Background

Between September 1999 and March 2004, Charles Odell Weldon, and Eric A. Wiles, individually and in his capacity as executor of the Estate of Larry Arnold Wiles, filed separate lawsuits in the Cuyahoga County Court of Common Pleas, Ohio, against Norfolk Southern Railway Company ("Norfolk" or "the railroad"). Specifically, the plaintiffs brought their asbestos-related claims under federal legislation known as the Federal Employers' Liability Act ("FELA") and the Locomotive Boiler Inspection Act ("LBIA"), alleging injuries caused by occupational exposure to asbestos during the course of their employment with the railroad. Under the FELA and LBIA, Congress provided injured railroad workers with the right to file suit against the railroad. *See* 45 U.S.C. § 51.

On September 2, 2004, the General Assembly enacted Ohio's asbestos legislation known as H.B. 292, which set forth certain reporting requirements and medical criteria. Under the newly enacted legislation, plaintiffs in pending cases were required to file a written report and supporting test results constituting prima-facie evidence of their physical impairment that meets the minimum medical requirements within 120 days from the effective date of the statute. *See* R.C. 2307.92(B) and R.C. 2307.93(A)(2). In this case, plaintiffs did not comply with these requirements.

Given the lack of compliance with H.B. 292, Norfolk brought a separate action for declaratory judgment on September 13, 2004 in the Cuyahoga County Court of Common Pleas. In the declaratory judgment complaint, Norfolk asked the trial court to declare that: (1) the medical criteria and the administrative dismissal process contained in H.B. 292 apply to plaintiffs in civil cases filed in the Cuyahoga County Court of Common Pleas that allege claims for relief arising under the FELA/LBIA, and that (2) H.B. 292 does not infringe upon the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2.

In November 2004, Norfolk filed a motion for summary judgment arguing that, as a matter of law, the railroad was entitled to the declaration of judgment as set forth in its complaint. In April 2005, the trial court denied Norfolk's request for declaratory relief. In relevant part, the trial court determined that the application of Ohio's medical criteria and administrative dismissal process to FELA/LBIA asbestos cases was preempted by federal law.

In May 2005, Norfolk filed an appeal to the Court of Appeals, Eighth Appellate District. On appeal, Norfolk argued that it was entitled to the declaratory relief requested in its complaint because the medical criteria and the administrative dismissal process contained in Ohio's asbestos legislation are procedural and not substantive in nature. As a result, this state procedural rule is applicable to

asbestos-related FELA/LBIA claims filed in state court without infringing upon the Supremacy Clause of the United States Constitution. The Ohio Court of Appeals disagreed, and on April 10, 2006, determined that the medical criteria and administrative dismissal process contained in the state legislation was preempted by federal law.

B. Requirements Of Ohio's Asbestos Legislation

Ohio's asbestos legislation reformed asbestos litigation in the state by establishing an uniform process for asbestos claimants to use to advance their injury claims. Under the new legislation, to maintain a tort action, a claimant must file, within 30 days of filing their complaint, "a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment that meets the medical requirements[.]" R.C. 2307.93(A)(1). However, if the claim was pending prior to the effective date of the legislation, then the written report is required to be filed within 120 after the effective date of the legislation. R.C. 2307.93(A)(2). The failure to file the required report results in an administrative dismissal of the claim without prejudice. R.C. 2307.93(C). However, the case may be reinstated once the plaintiff makes a prima facie showing that meets the minimum medical requirements specified in R.C. 2307.92. *Id.*

R.C. 2307.92 sets out the medical requirements needed to maintain a cause of action for a non-malignant condition and lung cancer. R.C. 2307.92(B)-(D). No prima facie showing is required in an asbestos claim based on mesothelioma.[1] Relative to the *Bogle* matter, the plaintiffs alleged a claim of asbestosis, a non-malignant condition.[2] Thus, R.C. 2307.92(B) was applicable, which set out prima facie medical requirements needed to establish an asbestos claim based on a non-malignant condition. To maintain a tort action for a non-malignant condition, the claimant is required to make a prima facie showing "that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is the substantial contributing factor to the medical condition." R.C. 2307.92(B). The prima facie showing also includes certain minimum medical requirements. R.C. 2307.92(B)(1)-(3).

The decision on the prima facie showing of the medical criteria is not conclusive as to liability, is not a presumption of physical impairment, is not admissible at trial and does not effect the evidentiary requirements at trial. R.C. 2307.92(G). If the plaintiff can make a prima facie showing, then the case proceeds on the trial court's docket. If the plaintiff cannot make a prima facie showing, then the case is administratively dismissed without prejudice. R.C. 2307.93(C). Under this procedure, the trial court retains jurisdiction over the case, the statute of limitations is tolled, and

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[1] Mesothelioma is a rare cancer of the lining of the lung or abdominal cavity caused by exposure to asbestos fibers. *See* Miller-Keane Medical Dictionary (2000). *See, also, Norfolk & W. Ry. Co. v. Ayers* (2003), 538 U.S. 135, 142.

[2] Asbestosis is a non-cancerous scarring of the lungs caused by breathing asbestos fibers. *See* Mosby Medical Encyclopedia (Revised Ed. 1996). *See, also, Norfolk & W. Ry. Co. v. Ayers* (2003), 538 U.S. 135, 142, fn. 2.

the dismissal does not count against the plaintiff. The case can be reinstated on the trial court's docket when the plaintiff makes a prima facie showing under R.C. 2307.92 (B).

C. Norfolk's Position: Applying State Imposed Medical Criteria Comports With The Statutory Language And The Legislative Intent.

1. Statutory Language

The first step in a federal preemption analysis is to look at the statutory language and legislative intent behind the federal and state legislation. At the trial court and appellate levels, Norfolk argued that the statutory language and the legislative intent demonstrated that Ohio's asbestos legislation was a state procedural rule used to manage the procedural aspects of asbestos cases by prioritize cases filed in state courts through the use of medical criteria and the administrative dismissal process. Since these requirements are procedural and not substantive, Norfolk argued that the medical requirements and the administrative dismissal process was applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause of the United States Constitution or the doctrine of federal preemption.

In making this argument, Norfolk first looked to three terms defined by the state asbestos legislation: "asbestos claim," "civil action" and "tort action." An "asbestos claim" is defined as any claim for damages related to asbestos. See R.C. 2307.91(C). Norfolk argued that asbestos-related FELA and LBIA claims clearly satisfy this broad definition of an "asbestos claim." The second term is "civil action", which is defined as "all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty." R.C. 2307.91(M). In defining the term "civil action," the legislature excluded actions involving workers' compensation law, claims made against a trust pursuant to 11 U.S.C. Section 524(g), and claims made against a trust established under Chapter 11 of the Bankruptcy Code. Nowhere in the definition of a "civil action" did the legislature specifically exclude FELA/LBIA claims. Thus, under the rule of statutory construction known as *expressio unius est exclusio alterius,* since the General Assembly expressly excluded three areas from the definition of a "civil action," all other civil actions not mentioned in the exclusion fall within the scope of the Act. *See State v. Droste* (1998), 83 Ohio St.3d 36, 39; *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 224-225; *Indep. Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St. 3d 310, 314; *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.* (1986), 28 Ohio St. 3d 171. This includes FELA and LBIA asbestos-related claims.

Also included in the definition of a "civil action" are admiralty claims. *See* R.C. 2307.91(M). This is significant because a correlation exists between admiralty law and FELA jurisprudence. *See, e.g., Norfolk & W. Ry. Co. v. Ayers* (2003), 538 U.S. 135, 163 ("the FELA was intended to 'bring our jurisprudence up to the liberal interpretations that *** now prevail in the admiralty courts of the United States.'"); *Kernan v. Am. Dredging Co.* (1958), 355 U.S. 426, 439 (holding that the Jones Act incorporate the substantive provisions of the FELA); 45 U.S.C. § 53 (Congress adopted the comparative fault scheme under the FELA, which was derived from the admiralty case of *The Max*

Morris v. Curry (1890), 137 U.S. 1). Since H.B. 292 covers admiralty cases, Norfolk argued that this was further evidence that the state legislation applied to FELA/LBIA claims.

The third term is "tort action", which includes a "civil action." *See* R.C. 2307.91(II). Since asbestos-related FELA/LBIA claims fall within the definition of a "civil action', Norfolk argued that it also satisfies the definition of a "tort action" under the state asbestos legislation.

2. Legislative Intent

The Ohio legislature took the unusual step of expressing its intent and findings for enacting the asbestos legislation. Specifically, the Ohio legislature recognized that "there are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today [2003]." H.B. 292, Section 3(A)(3)(c). Since that time, the number has grown to over 44,000 asbestos cases just on the asbestos docket of Cuyahoga County, Ohio, alone. As recognized by the General Assembly, "Ohio has become a haven for asbestos claims and, as a result is one of the top five state court venues for asbestos filings." H.B. 292, Section 3(A)(3)(b). In "response to the asbestos litigation crisis in this state," the Ohio legislature passed legislation reforming asbestos litigation in the state.

Ohio is not the only state in the country to adopt such legislation to manage the ever growing asbestos docket. Georgia recently enacted asbestos reform legislation which is similar to H.B. 292. In addition, Florida and Texas have also passed similar reform legislation containing medical criteria for asbestos cases. Other states including Kansas, South Carolina, Tennessee, Kentucky, Louisiana, Michigan, Missouri, New York, Pennsylvania, California, Virginia and West Virginia have either pending or introduced similar asbestos reform legislation.

At the trial court and appellate level, Norfolk argued that the Ohio asbestos legislation was enacted as a procedural tool to enhance the ability of courts to manage their docket, giving priority to those claimants who can demonstrate actual physical harm or illness while fully preserving the rights of the claimants to pursue asbestos claims. In making this argument, Norfolk pointed to the express intent and goals of the Ohio legislature:

> "In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while

> securing the right to similar compensation for those who may suffer physical impairment in the future."

See H.B. 292, Section 3(B).

The Ohio legislature further commented that the "[m]edical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that the resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future." H.B. 292, Section 3(A)(5).

3. Process Followed In Federal Court For Managing Asbestos Docket

To further demonstrate that Ohio's asbestos legislation was a procedural tool used to manage the trial court docket by prioritizing cases without affecting any substantive rights under federal law, Norfolk pointed to the process used by the federal courts to manage and organize asbestos cases.

In 1987, in response to the overwhelming number of federal asbestos cases alleging maritime claims on behalf of seamen, the Northern District of Ohio created a special Maritime Asbestos Litigation Docket, otherwise known as "MARDOC." *Smith v. Gulf Oil Co.,* (6th Cir. 1993), 995 F.2d 638, 639. See, also, www.ohnd.uscourts.gov. In addition, in federal district courts, asbestos claims, including maritime asbestos claims and FELA cases, are consolidated for pretrial discovery under the provisions of the Judicial Panel on Multidistrict Litigation. When a plaintiff files an asbestos-related FELA claim in federal court, the case is transferred to the Multidistrict Litigation Docket ("MDL"). If the case does not meet the requirements for active processing, the case is administratively dismissed until the plaintiff is able to satisfy the requirements.

The Honorable Charles R. Weiner from the United States District Court for the Eastern District of Pennsylvania, who formally presided over the MDL, issued Administrative Order No. 8. In this Order, Judge Weiner implemented a prioritization and administrative dismissal process for FELA asbestos cases which is similar to H.B. 292 in several respects: (1) both seek to prioritize the cases of those plaintiffs who can make a showing that good grounds exist for their asbestos claims; (2) both provide for an administrative dismissal of those cases not meeting the requirements; (3) both toll the statute of limitations if the case is administratively dismissed; (4) both retain jurisdiction over administratively dismissed actions; and (5) both permit the plaintiff to move to reinstate his/her case upon showing evidence of asbestos exposure and evidence of an asbestos-related disease.[3] Thus,

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[3] Other state courts have established inactive dockets that alter the priority of disposition of asbestos cases. *See* Commonwealth of Massachusetts, Middlesex Superior Court, "Massachusetts State Court Asbestos Personal Injury Litigation Order," Sept. 1986; *See* Order to Establish Registry for Certain Asbestos Matters, In re Asbestos Cases (Cir. Ct., Cook County, Ill. Mar. 26, 1991); *See* Order Establishing an Inactive Docket for Asbestos Personal Injury Cases, In re Asbestos Personal Injury and Wrongful Death Asbestos Cases, No. 9234451 (Cir. Ct., Baltimore, Md. Dec. 9, 1992). Likewise, other jurisdictions have created deferred docket

if the FELA/LBIA claims at issue were filed in federal court, the claimants would have been subject to the federal process of prioritizing and administrative dismissal of cases, which is similar to the requirements of Ohio's asbestos legislation. It follows that the substantive rights created by federal law would not be impaired since federal courts have implemented a similar procedural tools.

4. State Imposed Medical Criteria And Administrative Dismissal Docket Is Not Preempted By Federal Law.

"'As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal[.]'"*Hess v. Norfolk S. Ry. Co.* (2005), 106 Ohio St.3d 389, 393. Substantive law relates to the rights and duties which give rise to a cause of action, whereas procedure is the mechanism for carrying out the suit. *Jones v. Erie RR. Co.* (1922), 106 Ohio St. 408, 412. FELA cases may be brought, at the plaintiff's option, in federal or state court. See 45 U.S.C. § 56.

As explained earlier, field preemption of a state law occurs when Congress has occupied the entire field. *English v. General Elec. Co.* (1990), 496 U.S. 72, 79. Field preemption under the FELA is limited to the recovery for personal injuries to railroad employees sustained during the course of their employment. *Nordgren v. Burlington N. RR. Co.* (8th Cir. 1996), 101 F.3d 1246, 1252. The FELA only preempts state law that falls within its domain. *Lancaster v. Norfolk & W. Ry. Co.* (7th Cir. 1985), 773 F.2d 807, 812. State procedural rules do not fall within the domain of the FELA. *Hess* at 393. Thus, Norfolk argued that Ohio's asbestos legislation is procedural as it establishes certain requirements for prioritizing asbestos cases in Ohio, which is consistent with the role of a state having concurrent jurisdiction over a FELA case. 45 U.S.C. §56. Norfolk further pointed out that nothing in the text or legislative findings of the state law indicated that the Ohio legislature attempted to substantively regulate the field of railroad safety, railroad injuries or railroad liability.

Given the statutory language and legislative intent, Norfolk argued that Ohio's asbestos legislation did not intend to interfere or deprive plaintiffs of their right to recover for valid asbestos claims under the FELA or the LBIA. The substantive right to file asbestos-related FELA claims is not affected or taken away by the medical criteria set for in the state law to prioritize cases. FELA plaintiffs can still bring all of the same claims for pleural thickening, asbestosis and malignancies allegedly caused by occupational exposure to asbestos. *Urie v. Thompson* (1949), 337 U.S. 163 (occupational illness are compensable under the FELA and LBIA). The FELA plaintiff must still prove the elements of negligence: duty, breach, foreseeability, and causation, and must still rely upon federal law to determine all substantive issues. *Adams v. CSX Transp. Inc.* (6th Cir. 1990), 899 F.2d 356, 539. The state law does not change the evidentiary requirements at trial necessary to produce a jury question regarding liability or damages under the FELA. *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 506-507 (a jury question is produced if employer negligence played any part, even the slightest, in causing the injury).

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systems, such as Wisconsin, Georgia, California, New York, Hawaii, Connecticut, and Oklahoma. *In Re Asbestos Cases* (1991), 224 Ill. App.3d 292, 296, n.4.

In that same regard, Norfolk argued that the doctrine of field preempt does not preclude the application of Ohio's medical criteria and administrative dismissal process to LBIA claims. The LBIA supplements the FELA by imposing on interstate railroads a duty to provide safe equipment. *Lilly v. Grand Trunk W. RR. Co.* (1943), 317 U.S. 481, 485. Field preemption under the LBIA is limited to the design, construction and materials of locomotives and its appurtenances. *Napier v. Atlantic Coast Line RR. Co.* (1926), 272 U.S. 605, 611. Thus, Norfolk argued that Ohio's asbestos legislation does not infringe upon the congressionally regulated field of locomotive design and construction. There is no provision in Ohio's asbestos legislation which attempts to regulate railroad equipment. The medical criteria contained in R.C. 2307.92 and the administrative dismissal process set forth in R.C. 2307.93 do not change the substantive elements of a cause of action under the LBIA. To establish a violation of the LBIA, a plaintiff must still show that the carrier's equipment is defective. *Gowins v. Pennsylvania RR. Co.* (6th Cir. 1962), 299 F.2d 431, 433. Ohio's asbestos legislation does not change this under the LBIA.

D. The Ohio Court Of Appeals Finds Field Preemption

The Ohio Court of Appeals did not directly address the issue of whether the medical requirements and administrative dismissal requirements of Ohio's asbestos legislation was procedural or substantive. Instead, the appellate court held that even if the state law is deemed procedural, "a federal right cannot be defeated by the forms of local practice." According to the Ohio Court of Appeals, the medical requirements and administrative dismissal process "would 'gnaw' at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in a state court" and undermine Congress' intent to create uniformity through the enactment of the FELA. *Norfolk S. Ry. Co. v. Bogle* (2006), 166 Ohio App.3d 449, 459. The appellate court further held that "FELA claimants would essentially be indefinitely precluded from asserting their federal rights until they complied with these requirements." *Bogle* at 459.

The Ohio Court of Appeals also minimized the analogy between the state law and the process used by federal courts to manage asbestos cases by claiming that the procedural requirements in federal court "are not as detailed and stringent" as the state law. *Bogle* at 460. While the federal court system is not "as detailed" as Ohio's asbestos legislation, it is certainly similar, and lends further support that the state law is procedural and does not affect any substantive rights under federal law. Both the federal court system and Ohio's asbestos legislation were created to prioritize the cases of those individuals who can demonstrate actual physical harm or illness due to their exposure to asbestos. Had the FELA/LBIA actions at issue been filed in federal court, the claimants would have been subject to the federal process of prioritizing cases and administrative dismissal of cases similar to Ohio's asbestos legislation. The procedure implemented in federal court has never been found to be in conflict with or frustrate the FELA.

III. Impact Of The *Bogle* Decision

A. Status Of The *Bogle* Case

On May 24, 2006, Norfolk filed a discretionary appeal to the Supreme Court of Ohio, urging the Court to exercise jurisdiction over the *Bogle* matter as it involves issues of public and general interest and involves a substantial constitutional question. On August 23, 2006, the Supreme Court of Ohio accepted jurisdiction over this issue, and the matter is currently in the briefing stage. A decision is not expected until mid-2007.

B. Impact Of The Ohio Court Of Appeals Decision

Bogle appears to be the only appellate case to weigh in on the issue of federal preemption and state imposed medical criteria for asbestos cases. It is difficult to gauge what impact this lone decision will have on future cases, especially given that the case has been accepted for review by the Supreme Court of Ohio. Nevertheless, as it currently stands, *Bogle* has essentially eroded the right to have state procedural rules apply to FELA/LBIA claims filed in state courts and has inappropriately broadened the doctrine of field preemption by including state procedural rules within the domain of federal law.

Furthermore, in concluding that FELA/LBIA claims are excluded from the scope of Ohio's asbestos legislation, the appellate court, arguably, went beyond the statutory language and judicially expanded the statutory exclusions beyond those specifically stated in the state statute. This decision potentially expands the rules of statutory construction and undermines the significance that legislative intent plays in statutory construction.

Despite the decision of the Ohio Court of Appeals, any federal preemption argument should be raised at the trial court level and preserved for purposes of appeal. Given the trend by many state across the country to pass similar legislation as Ohio to manage and organize an ever expanding asbestos docket, this issue is sure to be analyzed by many other courts, if not eventually the United States Supreme Court. While Ohio appears to be the first court to speak on this issue, it will certainly not be the last.

IV. Other Areas Of Tort Reform

A. State Venue Rules vs. Federal Venue Rules

Due to concerns over forum shopping, states have begun enacting new venue rules which specifically govern asbestos, silica or mixed dust claims. For example, in Ohio at the urging of the state legislature, Civ.R. 3(B)(11) was enacted by the Supreme Court of Ohio in July 2005 to address venue in tort actions involving asbestos, silica and mixed dust claims. The new venue rule reads as follows:

> "(B) *Venue: where proper.* --Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, 'county,' as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:
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> ***
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> (11) In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business."

This new venue rule is applicable to "all proceedings in actions brought after [the amendment to Civ.R. 3] take effect and also all further proceedings in actions then pending ***." See Civ.R. 86(BB). Thus, the question becomes whether this state venue rule is applicable to federal claims filed in state court. This question has become a popular topic in FELA and Jones Act cases.

It is well-settled that state and federal courts have concurrent jurisdiction over the FELA. "FELA cases may be brought, at plaintiff's option, in federal court or in state court. 45 U.S.C. § 56. 'FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal.'" *Anderson v. A.C. & S., Inc*., 154 Ohio App.3d 393, 398, 2003-Ohio-4943, quoting *Vance v. Consol. Rail Corp.* (1995), 73 Ohio St.3d 222, 227, 1995-Ohio-134. *See, also,* Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987), 480 U.S. 557.

The Supreme Court of Ohio has held that "[s]ubject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits; venue connotes the locality where the suit should be heard." *Morrison v. Steiner* (1972), 32 Ohio St. 2d 86, at syllabus. Furthermore, the Supreme Court of Ohio has held that "[v]enue is a procedural matter." *Morrison* at 88. In this same regard, the Supreme Court of the United States has held that "venue is a matter that goes to process rather

than substantive rights – determining which among various competent courts will decide the case." *Am. Dredging Co. v. Miller* (1994), 510 U.S. 443, 454.

Under federal law, Congress has provided injured seaman the right to file a suit in admiralty under the Jones Act, 46 App. U.S.C. §688. *See Swanson v. Marra* (1946), 328 U.S. 1, 3. In reviewing the venue provision of the Jones Act, the Supreme Court held that "although 46 U.S.C. App. §688 (a)[4] contains a venue provision, 'venue [in Jones Act cases brought in state court] should ... [be] determined by the trial court in accordance with the law of the state.'" *Miller* at 457 (citation omitted).

Like the Jones Act, the FELA contains a venue provision, 45 U.S.C. § 56.[5] Under 45 U.S.C. § 56, it provides for concurrent federal and state jurisdiction over FELA claims. However, 45 U.S.C. § 56 establishes venue only when a FELA claimant brings his/her action in federal court. It does not compel state courts to hear FELA actions. Rather, state venue laws must be satisfied in FELA cases. "The United States Supreme Court has interpreted this statute [the FELA venue provision] as establishing venue in the appropriate federal district court only when a Federal Employers' Liability Act claimant elects to maintain such an action in the federal judicial system." *Garland v. Seaboard Coastline Ry. Co.* (Tenn. 1983), 658 S.W.2d 528, 531, citing to *Baltimore & Ohio Ry. Co v. Kepner* (1941), 314 U.S. 44, 52. In an FELA case where venue was challenged, the United States Supreme Court acknowledged that "[t]he venue of state court suits was left to the practice of the forum." *Miles v. Illinois Cent. RR. Co.* (1942), 315 U.S. 698, 703. See, also, *Garland* at 531.

Courts across the jurisdiction have held that when an FELA claim is brought in state court, then state law apply to the issue of venue. *Missouri Pacific RR. Co. v. Tircuit* (Miss. 1989), 554 So.2d 878, 880; *Hairston v. Metro-North Commuter RR.* (NY App. 1999), 259 A.D.2d 370; *Neal v. CSX Transp., Inc.* (GA. App. 1994), 445 S.E.2d 766, 768; *Rodriguez v. Grand Trunk W. RR. Co.* (Mich. App. 1982), 328 N.W.2d 89; *Hopmann v. S. Pacific Transp. Co.* (Tex. Civ. App. 1979), 581 S.W.2d 532; *James v. Nashville* (Ky. Ct. App. 1949), 221 S.W.2d 449, 451; *Loftus v. Pennsylvania Rd. Co.* (1923), 107 Ohio St. 352 (Ohio courts not bound to entertain causes arising under the FELA unless within the terms of the Ohio statutes dealing with the venue of actions against railroad corporations). Since venue is a procedural issue governed by state law, defendants have a strong

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[4] The venue provision of 46 U.S.C. App. §688 (a) states that jurisdiction of Jones Act cases "shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

[5] The venue provision of 45 U.S.C. §56 states that "an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 et seq.] shall be concurrent with that of the courts of the several States."

argument in FELA and Jones Act cases to ask state courts to apply the state venue rule as opposed to the broad federal venue rule in order to prevent forum shopping by plaintiffs. Thus, a viable argument can be crafted that state venue rules should be satisfied in state court when the claim is brought under federal law.

B. Consolidation Rules

States have also enacted specific procedural rules for consolidating asbestos, silica and mixed dusts cases for purposes of trial. Recently, in July 2005, Ohio took steps to enact a new consolidation rule, Civ.R. 42(A)(2). Under this new rule, asbestos, silica and other mixed dust cases can only be consolidated for purposes of discovery. As for trial, cases can only be consolidated with the consent of all the parties. Absent such consent, the trial court can only consolidate cases for trial involving the same exposed person and members of his/her household. Ohio's new consolidation rule states:

> "*Asbestos, silicosis, or mixed dust disease actions* -- In tort actions involving an asbestos claim, a silicosis claim, or a mixed dust disease claim, the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household."

Likewise, on August 9, 2006, the Supreme Court of Michigan issued Administrative Order No. 2006-6, which prohibits the grouping of asbestos-related cases for settlement or trial. The Administrative Order, however, does not preclude the consolidation of asbestos-related cases for purposes of discovery. It reads as follows:

> "The Court has determined that trial courts should be precluded from 'bundling' asbestos-related cases for settlement and trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only."

As with Ohio's new consolidation rule, the purpose of Michigan's Administrative Order is to ensure that each case is decided on its own merits, and not in conjunction with other cases. Such consolidation rules benefit defendants for purposes of trying and settling each case individually, rather than joined in a group of similarly situated plaintiffs which can be prejudicial. As with the venue issue, since consolidation is a matter of procedure, state consolidation rules should be applied to federal claims filed in state court.

V. Doctrine Of Forum Non Conveniens, Evidentiary Issues And Damages

The common-law procedural doctrine of *forum non conveniens* has been "adopted in the federal jurisdiction by the decision in *Gulf Oil Corp. v. Gilbert* [(1947), 330 U.S. 501, 505]." *Chambers v. Merrell-Dow Pharmaceuticals, Inc.* (1988), 35 Ohio St.3d 123. However, states are free to accept or reject the doctrine of *forum non conveniens* even in cases brought under federal law, like the FELA. Despite the uniformity objective of federal law, the United States Supreme Court has held that states are not bound by the doctrine of *forum non conveniens* as a sort of federal common-law venue rule. *Am. Dredging Co. v. Miller* (1994), 510 U.S. 443, 453-456; *Missouri ex rel. Southern Ry. Co. v. Mayfield* (1950), 340 U.S. 1, 5. Rather, a state court presiding over a federal claim, such as an FELA claim, is free to decide whether to apply the doctrine of *forum non conveniens* according to the court's own local law because this is a procedural matter concerned with local policies. *Am. Dredging Co.* at 456; *Mayfield* at 4-5. While the doctrine of *forum non conveniens* has been adopted as a sort of federal common law venue rule, it remains a matter of procedure and local policy; thus, states are free to accept or reject the doctrine of *forum non conveniens* even in cases involving federal claims filed in state court.

State law also governs the admissibility of evidence in actions brought in state court under federal statute. *Central Vermont Ry. Co. v. White* (1915), 238 U.S. 507, 511-512. For example, many states have adopted the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, for purposes of determining the admissibility of expert opinion under Evid.R. 702. Ohio, however, has taken one step further in adopting the *Daubert* criteria.

In *Valentine v. Conrad* (Ohio 2006), 110 Ohio St.3d 42, the Supreme Court of Ohio held that under Evid.R. 702(C) (Ohio's rule of evidence which incorporates the principles set forth in *Daubert*), an expert opinion that chemical exposure in the workplace caused brain cancer and death of the decedent was unreliable and not supported by scientific principles or methodology. The Court's reasoning was based on the absence of scientific literature finding a causal connection between the chemical exposure and brain cancer. The Supreme Court of Ohio determined that the expert opinions were unreliable because the experts based their causation opinions on extrapolations from epidemiological studies that merely suggested a link between the various chemical exposures and brain cancer. Significant to the Court's determination was that none of the studies relied upon by the experts reported a causal connection between the chemical exposure and the brain cancer. While the chemicals were classified as carcinogens, this did not establish that the chemicals were capable of causing brain cancer. *Valentine, supra.*

Since the requirements of Evid.R. 702 (C) apply to any scientific or technical expert inquiry, this decision may have a broad application to a wide variety of cases, including federal claims filed in state courts. In fact, the approached adopted by the Supreme Court of Ohio in *Valentine* was previously adopted by the United States Supreme Court in *Gen. Elec. Co. v. Joiner* (1997), 522 U.S. 136. Discussing the reliability requirements of Fed.R.Evid. 702, the United States Supreme Court stated that "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner* at 146. The Supreme Court of Ohio agreed holding that "[b]ecause expert opinion based on nebulous methodology is unhelpful to the trier of fact, it has no place in courts of law. *** '[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.'" *Valentine, surpa.* Thus, arguably, this stricter view of the reliability requirement under Evid.R. 702 adopted by Ohio is applicable to federal claims filed in state court.

Likewise, generally speaking, the issue of damages recoverable in a federal claim filed in state court is governed by federal law, not state law. *Schadel v. Iowa Interstate RR., Ltd.*, (7th Cir. 2004), 381 F.3d 671; *Hess v. Norfolk S. Ry. Co.*, (Ohio 2005), 106 Ohio St.3d 389. Specifically, under the FELA, the measure of damages is a substantive issue and thus, governed by federal law. *Monessen Southwestern Ry. Co. v. Morgan* (1988), 486 U.S. 330, 335, citing *Chesapeake & Ohio Ry. Co. v. Kelly* (1916), 241 U.S. 485, 491; *Urie v. Thompson* (1949), 337 U.S. 163,174. This is because the measure of damages in FELA cases are inseparably connected with the right of action. *Monessen* at 335. Through the Supremacy Clause of the United States Constitution, the FELA is exclusive and supersedes all state laws on the subject. *Chicago, Rock Island, & Pacific Ry. Co. v. Wright* (1916), 239 U.S. 548, 551. Therefore, "[s]tate courts are required to apply federal substantive law in adjudicating FELA claims." *Monessen* at 335. "[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown RR. Co.* (1952), 342 U.S. 359, 361. Since federal law governs all issues of substance under the FELA, a substantive right or defense under the FELA cannot be lessened or destroyed by a state's rule of practice. *Norfolk & S. Ry. Co. v. Ferebee* (1915), 238 U.S. 269, 273. This same argument can be crafted in other federal claims brought in state court.