

Commentary

Texas MDL Judge: Ship Docked At Navy Yard Part Of 'Federal Enclave'

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Venable v. Carver Pump Company

The Texas Asbestos Multi-District Litigation (MDL)¹ Judge, Hon. Mark Davidson, recently ruled that a Navy ship docked at a Navy Shipyard is within a "federal enclave."²

Plaintiffs with naval asbestos exposure specifically disclaim recovery for any injury arising as a result of working within a federal enclave. This disclaimer allows a state court to retain jurisdiction and precludes removal to the federal MDL. The U.S. Const. Art. I, Sec. 8, Clause 17 states that the Congress has exclusive legislative power over "all Places purchased by the consent of the legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Courts have interpreted this clause to grant federal jurisdiction over federally-owned lands including military bases, naval shipyards, certain chemical and power plants, and federal buildings. Accordingly, disclaimer of exposure at a federal enclave may be a requisite for a state court's jurisdiction over the cause of action.

The *Venable*³ case significantly limits this common disclaimer practice. Mr. Venable alleged asbestos exposure while working aboard ships in dry dock from 1968 to 1973 at the Long Beach Naval Shipyard in California. The parties agreed that during

this timeframe the Long Beach Naval Shipyard was a federal enclave as a matter of law. Plaintiffs' pleadings disclaimed "any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave." The pivotal issue for Judge Davidson was whether naval ships within the confines of the shipyard for repair or maintenance become part of the federal enclave.

There was no dispute that products made by the defendant Imo Industries Inc. were present on some of the ships where plaintiff worked. Counsel for Imo, a manufacturer of pumps supplied to the Navy for these ships, argued that vessels within the bounds of the shipyard, including any moored to piers or in dry dock built upon shipyard land, become part of the federal enclave. Thus, Plaintiffs' disclaimer of any cause of action or recovery occurring on the federal enclave should entitle defendant to summary judgment as a matter of law. The court agreed.

The Texas MDL ruling differs from an earlier federal court holding in *Anderson v. Crown Cork & Seal*⁴ where the Virginia court ruled that asbestos exposure on naval vessels in a shipyard was not dispositive as a matter of law. The reason the *Anderson* court ruled as it did was because it was unclear where plaintiff's exposure actually took place — whether in the federal enclave, at sea in naval service, or both. In *Venable*, the exposure facts were not in dispute. Venable was employed by the Long Beach Naval Shipyard paid by the federal government; he was not a seaman. His ex-

posure occurred as he walked on the ships and did the work on the ships dry docked at the shipyard. Unlike *Anderson*, there was no question that Venable's work and his exposure occurred only while these ships were in the shipyard.

Further, Imo relied in part upon *In re: Welding Rod Products Liability Litigation*.⁵ In that case, MDL Judge O'Malley addressed federal enclave jurisdiction extensively by contrasting the claims of two Plaintiffs. The first plaintiff, Buteaux, offered proof that "a not-insignificant portion of Buteaux's exposure to welding rod fumes occurred on a federal enclave — the guided missile destroyer on which Buteaux was stationed was dry-docked at the United States Navy's Charleston Naval Shipyard."⁶ The second plaintiff, Williams, was posted as a cook at Fort Polk and Fort Bliss, and his exposure to welding rod fumes had no connection to the time he spent at these bases.⁷ Emphasizing the location of the plaintiffs' injury, Judge O'Malley wrote that "[u]nlike the case with Buteaux, who worked inside an enclosed ship where welding occurred, it is not even arguable that Williams was close enough to suffer exposure to welding rod fumes during his time at the two Army Bases."⁸ Rather, Williams' injury occurred outside of the federal enclave in subsequent exposures during his career as a welder. Like plaintiff Buteaux, Mr. Venable worked inside of enclosed ships that were within the federal enclave.⁹

Plaintiffs' counsel relied upon *Anderson*¹⁰ and *McCormick v. C.E. Thurston & Sons, Inc.*,¹¹ another federal court case out of Virginia which held that vessels docked at a shipyard are not federal enclaves for purposes of removal jurisdiction.¹² However, Imo argued that "the key factor in determining whether federal enclave jurisdiction exists is the location of the plaintiff's injury"¹³ and that both cases relied upon by Plaintiffs addressed navy personnel serving aboard ships, making the exposure history unclear; *i.e.*, whether the exposure occurred at sea or while the ship was docked in a federal enclave. Seeing "multiple distinctions between the facts set forth" in the cases relied upon by Plaintiffs and this case, Judge Davidson rejected Plaintiffs' assertion that a ship in dry dock could never be a part of the enclave.¹⁴ Rather, a case-specific examination of the facts as to the "location of the plaintiff's injury" is pivotal. Where, as here, Mr. Venable worked solely for Long Beach Na-

val Shipyard as a federal employee and only worked on ships while docked and attached to the land, the federal enclave, the location of Mr. Venable's injury was not in doubt.

Imo urged that upon this record, the exposure on the ships was exposure in a federal enclave. Judge Davidson granted the summary judgment since Mr. Venable claimed no exposure to an Imo product other than from vessels in the shipyard.

Judge Davidson's ruling in *Venable* properly views the location of plaintiff's injury as the controlling issue in determining the applicability of the federal enclave doctrine. And, as an MDL ruling, it has added value as precedent in future litigation.

Plaintiffs have sought appeal in the Court of Appeals for the 5th Judicial District in Texas. No briefing schedule has been announced.

Endnotes

1. In 2004, the Texas Supreme Court created a statewide Multi-District Litigation (MDL) court to handle all asbestos-related claims in Texas that were filed in Texas after September 1, 2003. Harris County 11th District Court Judge Mark Davidson was appointed to manage this MDL court in order to facilitate uniform results in pre-trial rulings and standardize discovery and evidentiary requirements. In 2005, the Legislature enacted law permitting cases that pre-date September 1, 2003, to also be transferred to the MDL for pre-trial proceedings.
2. The Order Granting Imo Industries Inc.'s Motion for Summary Judgment on Federal Enclave Exposure was entered on December 14, 2006. Plaintiffs' Notice of Appeal was filed on March 2, 2007, and no briefing schedule has been announced by the Court of Appeals for the 5th Judicial District in Texas.
3. *Venable, et.al. v. Carver Pump Company, et.al.*, Cause No. 2006-08583, in the 11th Judicial District Court of Harris County, Texas, *transferred from* Cause No. 06-01263, the 191st Judicial District Court of Dallas County, Texas.

4. *Anderson*, 93 F.Supp.2d 697 (E.D. Va. 2000).
5. *In re: Welding Rod Products Liability Litigation*, No. 1:03-CV-17000 (MDL Docket No. 1535), 2005 WL 147081, 2005 U.S. Dist. LEXIS 1265 (N.D. Ohio 2005) (the guided missile destroyer dry-docked at the United States Navy's Shipyard was a federal enclave where plaintiff's exposure to welding rod fumes occurred).
6. *In re: Welding Rod*, 2005 WL 147081, *7. The opinion further states in footnote 6 that Plaintiff Buteaux "worked in propinquity to welders working on a federal military vessel or base, such that ... there is a colorable federal nexus and federal jurisdiction over the case exists. *See id.*, slip op. at 6 (concluding federal enclave jurisdiction was appropriate because the welder-plaintiff's claims arose 'out of exposure to a chemical on a federal enclave, *in not insignificant measure*, and in furtherance of employment duties on the federal enclave.')."
 7. *Id.* at *6 ("Williams testified that he attended a total of two weeks of National Guard training per year at the two Army Bases, plus one day per week; his duties during training were as a cook, and never as a welder; and his only exposure to welding during this time was to observe others doing some welding inside a large tent, about 150 feet away. Williams testified he became a welder only years after his National Guard service ended.").
 8. *Id.*
 9. *See also, e.g., Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (RD. Cal. 1992) (any alleged exposure to asbestos took place while on federally procured submarines that were docked at Mare Island and other federal enclaves); *EEX Corn. v. ABB Vetco Gray, Inc.*, 161 F. Supp. 2d 747, 751 (S.D. Tex. 2001) (under the Outer Continental Shelf Lands Act, a vessel ceases to be a vessel the moment it attaches itself to the shelf; it has become a "tiny federal enclave" not governed by international admiralty law).
10. *Anderson*, 93 F.Supp.2d at 703 (internal citations omitted) ("In this case, it is undisputed that the deceased was a Navy seaman, not a shipyard worker. It is additionally undisputed that the plaintiff was stationed on a vessel, the U.S.S. Laffey, which was sometimes docked at the Norfolk Naval Shipyard. However, the plaintiff claims, and the defendant has not shown otherwise, that during the majority of the plaintiff's assignment to the U.S.S. Laffey, the Laffey was at sea and not in the Norfolk Naval Shipyard.").
11. *McCormick*, 977 F.Supp. 400 (E.D. Va. 1997).
12. *Id.* at 402 (Although decedent began his duty aboard the USS Nimitz while it was being built in the Newport News Shipyard, his service aboard the vessel took him elsewhere from 1975 to 1979. Thus, decedent's exposure to asbestos occurred both in dry dock at naval stations around the world and at sea aboard the Nimitz).
13. *Holliday v. Extex*, 2005 WL 2158488, *4 (D.Hawaii 2005) (Litigation arising out of helicopter crash in Volcanoes National Park where court held that location of plaintiffs' injury was key to a finding that federal enclave jurisdiction existed despite fact that helicopter was not a permanent fixture to land and that design, manufacture, maintenance and repair of the helicopter took place outside of the federal enclave).
14. Davidson also rejected an unpublished trial court ruling of Los Angeles County Superior Court Judge Bendix in *Barlow v. American Standard, Inc.*, et al., no. BC 335-153, proffered by Plaintiffs, based upon "multiple distinctions." ■