

## **Texas Court of Appeals Rules Retroactive Application of Certain Minimum Medical Criteria Unconstitutional in Asbestos Case**

**July 6, 2011**

On June 30, Texas's First Court of Appeals ruled that retroactive application of a provision of state legislation establishing minimum medical criteria for asbestos claimants violates the Texas Constitution. *Union Carbide Corp. v. Synatzske, et al.*, No. 01-09-01141-CV, slip op., 2011 Tex. App. LEXIS 4934 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet. h.). In doing so, the court upheld the Texas Asbestos Multidistrict Litigation (MDL) pretrial court's order denying Union Carbide Corporation's (Union Carbide's) motion to dismiss, and remanded the plaintiffs' wrongful death claims based on the alleged asbestos exposure of Joseph Emmite, a former worker at Union Carbide's Texas City facility.

### **Background**

Effective September 1, 2005, Chapter 90 of the Texas Civil Practice and Remedies Code established minimum medical criteria standards applicable to asbestos claimants. The purpose of the statute was to curb the onslaught of cases litigated in Texas courts for nonmalignant, unimpaired claims that hindered the ability of seriously ill claimants to fairly and efficiently pursue their claims for compensation.

Under Chapter 90, the plaintiffs in *Union Carbide* were required to timely serve a medical report that complied with all applicable provisions of Chapter 90 in order to proceed with their wrongful death claim for Mr. Emmite's pulmonary asbestosis. Union Carbide filed a motion to dismiss for failure to meet those requirements. To avoid dismissal, the plaintiffs had to comply with section 90.010(f)(1)(B)(ii), which required them to serve a report that verified that pulmonary function testing was performed on Mr. Emmite and that the physician making the report interpreted the pulmonary function test. This testing was not performed before Mr. Emmite's death.

The plaintiffs instead proffered reports explaining such testing could not be performed due to Mr. Emmite's extraordinary physical condition at the time of treatment and was not necessary because Mr. Emmite's asbestosis diagnosis and asbestos-related impairment had been sufficiently confirmed by other medical means. Union Carbide maintained that meeting the requirements of section 90.010(f)(1)(B)(ii) was mandatory for the plaintiffs to proceed with their wrongful death claim. Unable to comply, the plaintiffs, on appeal, argued that at the time of Mr. Emmite's death, on June 15, 2005, when the wrongful death claim vested, pulmonary function testing was not required to bring an asbestos claim in Texas; consequently, application of section 90.010(f)(1)(B)(ii) to their claim would violate the Texas Constitution's prohibition on retroactive laws.

## Court's Analysis and Conclusion

To determine the constitutionality of Chapter 90 as applied to the plaintiffs' wrongful death claim, the court applied the Texas Supreme Court's three-prong test for whether retroactive application of a statute violates article I, section 16 of the Texas Constitution: (1) the nature and strength of the public interest served by the statute as evidenced by the legislature's factual findings, (2) the nature of the prior right impaired by the statute, and (3) the extent of the impairment. The court further considered the "ultimate test," i.e., whether the statute has the effect of either establishing or eliminating tort liability for conduct that occurred before the enactment of the statute.

To guide its analysis, the court looked to the fundamental objectives of the prohibition against retroactive laws:

(1) it protects "settled expectations" which "should not be lightly disrupted," i.e. "the rules should not change after the game has been played," and (2) it protects against "abuses of legislative power" which "offer[s] special opportunities for the powerful to obtain special and improper legislative benefits."

Statutes that thwart these fundamental objectives by "act[ing] on things which are past," disrupting "settled expectations" and "chang[ing] the [tort liability] rules after the game has been played" are strictly forbidden by the Texas Constitution.

The court reasoned that the pulmonary function testing requirement of section 90.010(f)(1)(B)(ii) impermissibly extinguishes the rights of the plaintiffs to bring a well-established, factually substantiated claim for an asbestos-related injury (failing prongs 2 and 3) and serves no public interest (failing prong 1); rather, it turns the Texas legislature's intent on its head by preventing "the right of people with impairing" asbestos-related injuries "to pursue their claims for compensation in a fair and efficient manner." As a result, the court held that under the "ultimate test" for determining whether a statute is unconstitutionally retroactive, section 90.010(f)(1)(B)(ii) only serves to save Union Carbide from tort liability for conduct that took place before the statute was enacted.

Further, the court concluded that section 90.010(f)(1)(B)(ii) violates the fundamental principles to act on "things which are past," disrupt "settled expectations," and "change the rules [of tort liability] after the game has been played." Therefore, the court affirmed the order of the MDL pretrial court denying Union Carbide's motion to dismiss.

As a result of the court's holding that the pulmonary function testing provision of Chapter 90 is unconstitutional in circumstances where tort liability is established or eliminated for conduct that occurred before the enactment of the statute, the future of the Texas asbestos inactive docket is unclear—but the Texas MDL pretrial court will likely have the opportunity to consider the ramifications of this opinion in the near future.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the authors, **Steven A. Luxton** (202.739. 5452; [sluxton@morganlewis.com](mailto:sluxton@morganlewis.com)) and **Emily K. Shields** (713.890.5119; [emily.shields@morganlewis.com](mailto:emily.shields@morganlewis.com)), or any of the following Morgan Lewis attorneys:

## Houston

Brady Edwards  
Allyson N. Ho  
Denise Scofield

713.890.5110  
713.890.5720  
713.890.5105

[bedwards@morganlewis.com](mailto:bedwards@morganlewis.com)  
[aho@morganlewis.com](mailto:aho@morganlewis.com)  
[dscofield@morganlewis.com](mailto:dscofield@morganlewis.com)

## About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states.  
Please note that the prior results discussed in the material do not guarantee similar outcomes.

**© 2011 Morgan, Lewis & Bockius LLP. All Rights Reserved.**