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Garcia v. Conoco, Inc., Not Reported in F.Supp. (1998)

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1998 WL 35283823  
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United States District Court,  
W.D. Texas,  
San Antonio Division.

Rebecca GARCIA, Individually and as Next Friend  
of Stephanie Renee Garcia, et al., Plaintiffs,  
v.  
CONOCO, INC., et al., Defendants.

Civil No. SA-96-CA-1079-OG.  
|  
May 5, 1998.

**Attorneys and Law Firms**

[Bruce L. Jamison](#), Jamison & Associates, Houston, TX,  
for Plaintiff.

[John R. Breihan](#), [Patton G. Lochridge](#), McGinnis,  
Lochridge & Kilgore, LLP, [Robert C. Wilson](#), Jackson,  
Sjoberg, McCarthy & Wilson, Austin, TX, [Brian J.  
Clarke](#), Chemical Waste Management, Old Brook, IL,  
[Laurence K. Gustafson](#), Haynes and Boone, LLP, [Robert  
E. Thackston](#), Hawkins, Parnell & Thackston, LLP,  
Dallas, TX, [Thomas B. Cook](#), [Laura Byrd Herring](#),  
Bracewell & Patterson, Houston, TX, [Christopher E.  
Lindsey](#), The Purrington Firm LLP, Greensboro, NC,  
[Gordon D. Laws](#), Gary, Thomasson, Hall & Marks,  
Corpus Christi, TX, [Carlos E. Hernandez, Jr.](#), Garcia &  
Romero, L.L.P., Harlingen, TX, [Rebecca Jo Reser](#),  
Davidson & Troilo, San Antonio, TX, [William Michael  
Mills](#), Atlas & Hall, McAllen, TX, for Defendants.

**MEMORANDUM AND RECOMMENDATION**

[JOHN W. PRIMOMO](#), United States Magistrate Judge.

\*1 This is a mass-tort case involving approximately 400  
plaintiffs, and it is related to another case, *Crecensio  
Acuna, et al. v. Brown & Root, Inc.*, Civil No. SA-96-

CA-543-OG (the “*Acuna*” case), which involves  
approximately 1100 plaintiffs. The undersigned issued an  
atypical scheduling order in this case after Judge Orlando  
L. Garcia affirmed the undersigned’s order in the *Acuna*  
case that enforced a similar scheduling order in the *Acuna*  
case. The scheduling order at issue required plaintiffs to  
show, by affidavits from experts, a prima facie case of  
causation for specific injuries that plaintiffs allegedly  
suffered. Before the Court is defendants’ joint motion to  
dismiss this case for failure to comply with the scheduling  
order. Docket no. 24. Defendants argue for dismissal  
because plaintiffs together only supplied a single affidavit  
in their attempt to make an individualized showing of  
causation. Upon consideration, the undersigned will  
recommend that the motion to dismiss should be granted.

**Background**

The plaintiffs in this case and the *Acuna* case each assert  
claims for personal injuries and property damages. In  
each case, plaintiffs allege that their injuries and damages  
were caused by the defendants’ uranium mining and  
milling operations in a very large multi-county area. The  
undersigned issued an order enforcing an atypical  
scheduling order in the *Acuna* case requiring plaintiffs to  
provide affidavits establishing causation for each  
plaintiff’s personal injuries and property damages.  
Plaintiffs in the *Acuna* case appealed that order to Judge  
Orlando L. Garcia, who affirmed the order enforcing the  
atypical scheduling order. In light of the affirmance by  
Judge Garcia, the undersigned issued in this case an  
atypical scheduling order that is nearly identical to the  
scheduling order in the *Acuna* case. Docket no. 19.

In regard to each plaintiff’s claim for personal injuries,  
the scheduling order in this case required plaintiffs to  
produce affidavits from qualified experts that:

- (1) List all injuries, illnesses or conditions suffered by  
the plaintiff that, in the opinion of the expert, were  
caused by an alleged exposure to materials or  
substances from a facility or operation;
- (2) Specify the material(s) or substance(s), that, in the  
opinion of the expert, caused each injury, illness or  
condition listed and identify the particular facility or

operation alleged to be the source of the material(s) or substance(s);

(3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e., ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and

(4) State the scientific and medical bases for the expert's opinions.

In regard to each plaintiff's claim for property damages, plaintiffs were required to:

(1) List all property that, in the opinion of the expert, was damaged by an alleged exposure to material(s) or substance(s) from a facility or operation;

\*2 (2) Regarding property alleged to be damaged, identify all real property by owner, street address, tax block and lot number, size and a description of improvements thereto;

(3) Identify the material(s) or substance(s) that, in the opinion of the expert, caused each alleged property damage and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(4) For all property, report the amount of the alleged loss in value, the timing and degree of the alleged loss, the method of causation and the method of evaluation of such alleged loss in value.

The scheduling order set a deadline for plaintiffs' submission of affidavits to defendants, and provided that defendants could file a motion objecting to the deficiencies in plaintiffs' submissions. In response to the plaintiffs' attempt to comply with the scheduling order, defendants filed a joint motion to dismiss for failure to comply with the scheduling order. The motion asserts that plaintiffs only submitted a single affidavit and it only addresses plaintiffs' personal injuries. The Court must determine whether plaintiffs' latest submission complies with the scheduling order, and whether dismissal is appropriate if plaintiffs have not complied with the order.

## Discussion

### 1. Plaintiffs' Affidavit

In response to the scheduling order, plaintiffs submitted to defendants a sworn affidavit by C.F. Smith, M.D. **Mot. Dismiss**, Exh. A. Dr. Smith's affidavit is nearly identical to his affidavits that were initially submitted by plaintiffs in the *Acuna* case in their attempt to comply with the scheduling order in that case. The submission of those affidavits resulted in the issuance of the order enforcing the scheduling order in the *Acuna* case. Since Dr. Smith's affidavit is nearly identical to the affidavits in the *Acuna* case, it is deficient for the same reasons.

### 2. Requirement 1—Identification Of Each Plaintiff's Injuries.

Plaintiffs were required to provide to defendants an affidavit of an expert identifying the specific injuries, illnesses or conditions suffered by each plaintiff. Together with that information, plaintiffs were required to provide an affidavit that provided the scientific and medical bases for each opinion, identify tests done on each plaintiff and indicate the results of the tests. Despite that, Dr. Smith's affidavit states that the plaintiffs' exposure to toxic substances was sufficient to cause a variety of conditions, and caused *some or all* of a list of injuries. **Mot. Dismiss**, Exh. A, par. 5. Also, the opinions in the affidavit are made applicable to *all individuals listed in Appendix A to the affidavit*. **Mot. Dismiss**, Exh. A, par. 3. Therefore, Dr. Smith's affidavit is deficient because it does not comply with the requirement to "list injuries, illnesses or conditions suffered" as to each plaintiff.

### 3. Requirement 2—Identification Of Injury-Causing Substances.

\*3 The scheduling order also required plaintiffs to provide expert affidavits that specify any materials or substances that, in the opinion of the expert, caused each injury, illness or condition suffered by each plaintiff. As to this requirement, the scheduling order also required that the affidavits identify the particular facility or operation

alleged to be the source of the materials or substances.

Dr. Smith's affidavit identifies the materials used or allegedly released from uranium mining and milling operations. *Mot. Dismiss*, Exh. A, par. 9. The affidavit also provides an opinion that plaintiffs' personal injuries were caused by the exposure to those materials. *Mot. Dismiss*, Exh. A, paragraphs 3–7. Dr. Smith's affidavit does not identify the injuries of each plaintiff, so it is inconceivable how Dr. Smith's general statements regarding causation can satisfy the requirement to identify the specific materials or substances that caused each individual injury. Also, no attempt is made in Dr. Smith's affidavit to comply with that part of the second requirement that requires an expert to identify the particular facility or operation alleged to be the source of the materials or substances that caused the alleged injuries. Dr. Smith only lists the various facilities operated by the defendants. That listing of facilities is meaningless because (1) it is alleged that these facilities were operated in a large multi-county area, and (2) no effort has been made to correlate any geographic group or grouping of plaintiffs to certain uranium mining or milling operations of the defendants. Therefore, the undersigned finds that Dr. Smith's affidavit does not comply with Requirement 2.

#### 4. Requirement 3—Frequency, Method and Dosage Of Exposures.

The scheduling order required affidavits from experts showing the frequency, method and dosage of each plaintiff's exposure to materials or substances that caused their specific injuries. Dr. Smith's affidavit provided an opinion as to the pathways of the plaintiffs' purported exposures. *Mot. Dismiss*, Exh. A, paragraphs 6,7,10. The Court finds that Dr. Smith's opinion is conclusory and speculative as it does not provide the scientific basis for his opinion. Dr. Smith's opinion is also outside of his area of expertise. Dr. Smith is not a hydrogeologist, microbiologist, toxicologist or expert whose opinion could be used to establish whether a certain dosage, method and frequency of contact is sufficient to cause certain injuries. Thus, Dr. Smith's opinions should have been limited to conclusions regarding the current medical conditions of plaintiffs and the causes of plaintiffs' conditions based on reasonable *medical* probability. Therefore, the undersigned finds that Dr. Smith's affidavit does not comply with Requirement 3.

#### 5. Property Damage Claims.

In regard to property damages, no affidavits were submitted to show the type of damages or the causation of such damages. In the *Acuna* case, plaintiffs' were advised that the failure to provide affidavits regarding property damage claims would be considered waiver of such claims. As plaintiffs in this case are represented by the same counsel as plaintiffs in the *Acuna* case, the Court concludes that the property damage claims were waived by plaintiffs.

#### 6. Authority For Dismissal.

\*4 As a result of plaintiffs failure to comply with the Court's scheduling order, the focus turns to defendants' request for dismissal. Rule 16(f) provides that if a party fails to obey a scheduling order, the Court "may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D)." *Fed.R.Civ.P. 16(f)* (1998). Rule 37(b)(2)(C) provides authority for the Court to dismiss this case as a sanction for plaintiffs' failure to comply with the scheduling order. The Court may not, however, impose the extreme sanction of dismissal under *Rule 16(f)* unless the Court first finds that a lesser sanction would not serve the interests of justice. *Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 627 (5th Cir.1997). "Dismissal with prejudice is a drastic remedy to which a court may resort only in extreme situations where there is a clear record of delay or contumacious conduct by the plaintiff." *Id.* Below is a discussion of several factors to aid the Court in exercise of its discretion.

The introduction to the scheduling order indicated that the scheduling order was being entered in light of Judge Garcia's affirmance in the *Acuna* case of the order enforcing the scheduling order. Plaintiffs are represented by the same counsel as the plaintiffs in the *Acuna* case. Therefore, plaintiffs were well-informed as to the requirements of the scheduling order. Indeed, the order enforcing the scheduling order and the order affirming it each provided detailed discussions of the requirements of the scheduling order and identified specific reasons why plaintiffs' submissions in the *Acuna* case were inadequate.

Despite being well-informed as to the requirements of the scheduling order, plaintiffs submitted a single affidavit that is nearly identical to the affidavits initially submitted in the *Acuna* case. Counsel for plaintiffs knew that such an affidavit would be found deficient because the order enforcing the scheduling order set forth the reasons why such an affidavit is deficient. A footnote in plaintiffs' response to the motion to dismiss indicates that plaintiffs were aware of the requirements of the scheduling order:

"It is axiomatic that plaintiffs in this case, represented by the same attorney, will only be able to file affidavits which are similar to those filed in *Acuna*, since every effort was made to strictly comply with the Magistrate Judge's order therein. It is also anticipated that the same Magistrate Judge would find those affidavits insufficient and again recommend dismissal."

**Response**, p. 2, n. 1. In that footnote, plaintiffs assert that they made every effort to comply with the scheduling order in *Acuna*. In *Acuna*, plaintiffs initially submitted affidavits by a medical doctor. After the issuance of the order enforcing the scheduling order, plaintiffs made another attempt to comply by submitting more-detailed affidavits from experts in different fields. Although the second submission of affidavits in *Acuna* reflect a greater expenditure of effort, they were found to be deficient because they did not provide an individualized showing of causation. In this case, however, plaintiffs did not put forth the level of effort as was done in the *Acuna* case. Instead, plaintiffs made little effort to comply with the January 23, 1998 scheduling order in this case, as is shown by the August 24, 1997 affidavit submitted to the defendants. Based on counsel's knowledge of the requirements of the scheduling, the footnote in plaintiff's response, and the date of the affidavit submitted by plaintiffs, it is clear that plaintiffs had no intention of adequately complying with the scheduling order in this case.

\*5 Plaintiffs argue that an extension of time is needed to comply with the scheduling order, namely until 90 days after Judge Garcia rules on the motion to dismiss in

*Acuna*. A proper request for additional time to comply with the scheduling order should include a description of the efforts made to comply, along with an explanation as to what remains to be done to fully comply. No such request was made. Since the request for additional time is hinged upon the ruling on the motion to dismiss in *Acuna*, the request provides further indication that plaintiffs did not intend to adequately comply with the scheduling order. Instead, plaintiffs want to delay the progress of this case until a final pronouncement from Judge Garcia regarding the *Acuna* case is issued. However, Judge Garcia's affirmance of the order enforcing the scheduling order clearly establishes that Judge Garcia supports the requirement of an individualized showing of causation.

Plaintiffs' attempt to comply with the scheduling order is extremely deficient, and they have failed to provide an excuse for the delay they have caused. Plaintiffs have given a clear indication that they did not intend to adequately comply with the scheduling order. In light of that, the undersigned believes that plaintiffs would not make a good faith effort to comply with the scheduling order if given another chance. For these reasons, the undersigned believes that plaintiffs' delay and lack of intent to comply with the scheduling order favors dismissal.

If the case is allowed to proceed, then defendants will suffer great prejudice. Defendants will be required to expend extensive time and money defending broad, unspecified claims as to which no preliminary showing of liability or damages has been made. If this case were to proceed to the discovery process, it is certain that defendants would request identification of each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. If plaintiffs' experts are not able to provide that information, then plaintiffs' discovery responses will not facilitate a firm and reliable basis upon which defendants can build their defense. Based upon plaintiffs' failure to provide the prima facie evidence at this stage, the Court has no reason to believe they will ever be able to produce that information. Therefore, the undersigned believes that the prejudice to defendants favors dismissal.

Related to the factor of prejudice is the interference with the judicial process. If discovery were to proceed, defendants would most likely file motions to compel the identification of each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed

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to the cause. As there are approximately 400 plaintiffs in this case, the effect on the judicial process would be enormous. At some point in this litigation process, the Court will be required to address the issue of whether plaintiffs have sufficiently identified each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. Addressing this issue later in the litigation process will certainly consume more judicial resources. Considering the demands of a mass-tort case upon the Court, in light of the information available to plaintiffs' experts, the undersigned believes that the interference to the judicial process that would be caused by allowing this case to proceed to discovery favors dismissal for failure to comply with the scheduling order.

\*6 The undersigned notes that the burden on plaintiffs was clearly set forth in the scheduling order. Plaintiffs are represented by the same counsel as the plaintiffs in *Acuna*, so they were well-informed as to the requirements of the scheduling order. The scheduling order indicated that it was being imposed as a result of Judge Garcia's affirmance in the *Acuna* case of the order enforcing the scheduling order. Also, the scheduling order provided that any deficiencies in the affidavits submitted by plaintiffs would be the subject of a motion like the one under consideration. **Sched. Order**, docket no. 19, p. 3. Only plaintiffs' are responsible for the failure to provide affidavits from experts as required by the scheduling order. The undersigned believes that these factors favor dismissal.

It is inconceivable how a lesser sanction would be effective because what would remain would be an inadequate showing of causation. As discussed above, proceeding to discovery with an inadequate showing of causation will result in the creation of numerous problems of the same character requiring the expenditure of more judicial resources at a later stage in the litigation process. Therefore, the undersigned believes that the ineffectiveness of a lesser sanction favors dismissal.

In regard to property damage claims, plaintiffs completely failed to submit supporting affidavits and plaintiffs did not address such claims in their response to the motion. Therefore, the undersigned concludes that all property damage claims should be dismissed under [Rule 16\(f\)](#) for failure to comply with the scheduling order.

Rule 41(b) provides additional authority for dismissing plaintiffs' property damage claims. [Rule 41\(b\) of the Federal Rules of Civil Procedure](#) authorizes dismissal of

an action or of any claim against the defendant for failure of the plaintiff to prosecute or to comply with the federal rules or any court order. Clearly, a federal court can dismiss an action for failure to prosecute to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the district courts. [Link v. Wabash Railroad Co.](#), 370 U.S. 626, 629–30, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962). Such a dismissal will be reversed only if the trial court has abused its discretion. *Id.* at 633, 82 S.Ct. hat 1390; [Dorsey v. Scott Wetzel Services, Inc.](#), 84 F.3d 170, 171 (5th Cir.1996). The failure to comply with court orders can warrant dismissal for lack of prosecution. [Long v. Simmons](#), 77 F.3d 878, 879 (5th Cir.1996). As a result of plaintiffs' failure to submit any affidavits regarding property damage claims, such claims should be dismissed under [Rule 41\(b\)](#) for failure to prosecute.

### Conclusion

Plaintiffs failed to comply with the scheduling order because they submitted a single affidavit by an expert that did not appropriately identify (1) each plaintiff's injuries, (2) the materials or substances that caused each injury, or (3) the operations of defendants that substantially contributed to each plaintiff's injuries. Upon consideration of the appropriate criteria, the sanction of dismissal of all personal injury claims under [Rule 16\(f\)](#) is appropriate.

\*7 Plaintiffs failed to submit any affidavit concerning their remaining claims, which are property damage claims, despite being well-informed of the requirement to do so. Therefore, all property damage claims should be dismissed under [Rule 16\(f\)](#) for failure to comply with the scheduling order, and under [Rule 41\(b\)](#) for failure to prosecute.

This Court does not take lightly the impact that dismissal has on plaintiffs in this case. Perhaps some of the individual plaintiffs have suffered injuries at the hands of one or more defendants. However, despite being well-informed of the requirements of the scheduling order as a result of plaintiffs' counsel's experience in the *Acuna* case, plaintiffs have failed to provide sufficient preliminary information of any defendants' liability or

any plaintiffs' damages resulting therefrom. It is truly unfortunate that they have refused to comply with the scheduling order on the basis of their belief that the burdens imposed are unfair. What would be unfair is to require each defendant to defend against every claim by every plaintiff, when it is clearly within plaintiffs' ability at this time to specify what injuries they suffered, how they were incurred, and who inflicted them.

It is reasonable to assume that plaintiffs have chosen their path, knowing that the requested information would have revealed that many plaintiffs cannot establish liability or damages. Plaintiffs have apparently decided to stand or fall as a group, rather than present the specific information as ordered by the Court. Thus, those with potentially meritorious claims are dragged down with those whose claims should never have been brought. Should plaintiffs decide to take seriously their responsibility to specify their individual claims, they should be allowed, even now, to do so. However, in the absence of the specific information, which the Court has directed plaintiffs to provide, further prosecution of this case is unwarranted.

#### **RECOMMENDATION**

It is the recommendation of the Magistrate Judge that defendants' motion to dismiss should be **GRANTED**. All of plaintiffs' personal injury claims should be **DISMISSED** under [Rule 16\(f\)](#) for failure to comply with the scheduling order, and plaintiffs' remaining claims, which are the property damage claims, should be **DISMISSED** under [Rule 16\(f\)](#) for failure to comply with the scheduling order, and under [Rule 41\(b\)](#) for failure to prosecute.

#### ***Instructions for Service and Notice of Right to Appeal/Object***

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to [Title 28 U.S.C. Section 636\(b\)\(1\)](#) and [Rule 72\(b\), Fed.R.Civ.P.](#), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.*** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. See [Thomas v. Arn](#), 474 U.S. 140, 150, 106 S.Ct. 466, 472, [474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 \(1985\)](#). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Services Automobile Association***, 79 F.3d 1413, 1428 (5th Cir.1996).

\*8 SIGNED this 4th day of May, 1998.

#### **All Citations**

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