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Toxic Substances/Lone Pine Order

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TEXAS SUPREME COURT OVERRULES MANDAMUS PETITION IN ABARCA

Abarca v. Hon. Mike Westergren

A Texas court on Dec. 4 gave the 134 plaintiffs in a suit alleging injuries from exposure to toxic chemicals at the Corpus Christi Army Depot 90 days to comply with a Lone Pine order directing them to provide medical evidence of exposure, injuries and causation for each defendant after the Texas Supreme Court denied them leave to file a petition for a writ of mandamus. *Abarca et al. v. ADCO Products Inc. et al.*, No. 95-4858-F (TX Dist. Ct., Nueces Cty., 214th Jud. Dist., Dec. 4, 1996).

In a two-sentence order, the Texas Supreme Court on Nov. 15 overruled the plaintiffs' motion for leave to file a petition for writ of mandamus seeking to vacate the Lone Pine order. *Abarca et al. v. Westergren*, No. 96-0911 (TX Sup. Ct.).

(Call XXX-XXX-XXXX for the order, the mandamus petition, the opposition brief and an amicus brief filed in support of the plaintiffs by the Association of Trial Lawyers of America.)

A Lone Pine order is a case management order in which the plaintiffs in a toxic tort case are required to submit proof of causation to the defendants and the court before they are allowed to proceed with pretrial discovery. It takes its name from an unpublished opinion in *Lore v. Lone Pine Corp.*, No. L33606-85, slip op. (NJ Super. Ct., Law Div. 1986).

In this case, 134 current and former civilian workers at the Army depot have filed a personal injury suit against 81 suppliers and manufacturers, alleging that they have been exposed to various solvents, heavy metals, radioactive compounds and other toxic substances supplied by the defendants while working at the depot.

Fifty of the defendants moved for a Lone Pine order and Judge Mike Westergren of the Nueces County District Court granted their motion on July 10, giving the plaintiffs until Oct. 31 to comply with the order and staying discovery of all of the defendants pending compliance. The plaintiffs filed a motion for leave to file a petition for writ of mandamus with the 13th District Court of Appeals in Corpus Christi in August.

When that motion was denied, the plaintiffs filed this new motion for leave to file a writ of mandamus in the state Supreme Court. That court had granted the plaintiffs an emergency stay of the Oct. 31 deadline but it lifted that stay on Nov. 15 when it overruled the motion for leave to file the mandamus petition.

The state Supreme Court motion was not an appeal of the appellate court decision, and neither the Texas Supreme Court nor

the appellate court's denial of the motions has any substantive or precedential impact on the underlying case, according to plaintiffs' attorney Holly J.W. Huart of the Maieron Law Firm in Houston.

The Lone Pine Order

According to case law cited by the defendants in opposition to the motions for leave to file, a Lone Pine order may be issued by the trial court to spare multiple defendants in a mass tort suit the expense of having to defend against claims brought by individual plaintiffs who have no reasonable basis in fact for their claims.

The Lone Pine order in this case requires the plaintiffs to obtain affidavits from attending physicians or other medical experts detailing the nature, duration and amount of exposure each plaintiff sustained; the date and place of each exposure; any and every illness or condition alleged to have resulted from the exposure; the chemicals that caused the alleged injury in each case; and an opinion, based on a reasonable degree of medical probability, that each plaintiff suffered injuries resulting from the chemical exposure at the depot.

Huart estimated that it would cost the plaintiffs about half a million dollars and take six to nine months to comply with the order.

In motions for leave to file the mandamus petitions to the two courts, the plaintiffs' attorneys had argued that the trial court had abused its discretion and in effect deprived the plaintiffs of a reasonable opportunity to develop their case because they cannot make any discovery. Most of the plaintiffs in this case are Hispanic, blue-collar workers without any financial resources while the 81 defendant manufacturing companies are giant corporations having virtually limitless resources at their disposal.

According to Huart, the trial judge also set a trial date for March 1998 at the Dec. 4 hearing and scheduling conference, which will give them nearly year to make discovery if they are allowed to go forward with discovery proceedings once their affidavits are submitted.

In addition to Huart, the plaintiffs are represented by Donald F. Maieron and by Newtown B. Schwartz Sr. in Houston.

Defendants Ashland Oil Inc. et al. are represented by W. Wendell Hall and Robert G. Newman of Fulbright & Jaworski in San Antonio and Darrell E. Barger of Barger & Moss in Corpus Christi. The amicus brief was filed by ATLA attorneys Howard F. Twiggs and Cheryl Flax-Davidson in Washington, DC.

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