



NewsFlash

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Loftin-Baran 9th COA Venue Opinions **Déjà vu - disagreeable familiarity or sameness or a feeling that one has seen or heard something before.**

A review of the recent venue decisions of the Texas Ninth District Court of Appeals may give one a slight feeling of Déjà vu. In two opinions issued the same day, the Court reversed and remanded, in part, the trial court's denial of several defendants' motions to transfer venue, and found venue improper in two multi-plaintiff, multi-defendant Benzene lawsuits. See *Union Carbide Corp. et al, v. Loftin, et al*, No. 09-08-061, 2008 WL 2369049 (Tex.App.-Beaumont, June 12, 2008) and *Shell Oil, Co. et al, v. Baran, et al*, No. 09-08-062, 2008 WL 2369030 (Tex.App.-Beaumont, June 12, 2008). As one might expect, the opinions were decided along the same lines as the Ninth District Court of Appeals' previous opinion in *Crown Central LLC, et al v. Anderson*, 239 S.W.3d 385 (Tex.App.-Beaumont 2007, pet. filed).¹ The cases had similar facts and parties, just with new names. And even though the plaintiffs in *Loftin and Baran* attempted to create a few different plot twists, they met the same outcome. Now, as in *Anderson*, the *Loftin and Baran* plaintiffs' claims will be severed for prosecution across multiple Texas counties.

In each case, the plaintiffs alleged venue was proper in Orange County under Texas Civil Practice and Remedies Code (hereinafter "CPRC") section 15.003(a)(1), (3) because "all or a substantial part of the events or omissions giving rise to their claims occurred in Orange County and/or one or more of the defendants maintained a principal office in Orange County." Several defendants challenged venue, specifically denying each of the venue facts as pleaded in the plaintiffs' original petition.

Before the trial court heard the defendants' motions to transfer venue, it granted the *Loftin and Baran* plaintiffs' request to sever their claims into single plaintiff lawsuits, which were later consolidated for "pre-trial discovery purposes only." The resulting single plaintiff cases appeared to be crafted to divest the defendants of their ability to seek an *Anderson*-style interlocutory appeal of the trial court's anticipated ruling on the motions to transfer. However, CPRC section 15.003(b) allows the interlocutory appeal of a trial court's determination that each plaintiff in a multi-plaintiff lawsuit independently established proper venue in any suit initiated by more than one plaintiff. Accordingly, the severance did not deprive the defendants of their right to an interlocutory appeal.

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Case Analysis by
Associate, Chandria Jackson

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“court has venue of all of the defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences as the plaintiffs’ claims”

The trial court found that each of the plaintiffs in the lawsuit independently established that venue was proper in Orange County. On appeal, the appealing defendants contended, and the appellate court agreed, that the trial court erred in determining each plaintiff independently established proper venue in Orange County. First, the Court evaluated the plaintiffs’ allegation that Orange County was proper because all or a substantial part of the events or omissions giving rise to their claims occurred in Orange County. The plaintiffs provided no evidence in response to the defendants’ denials of this venue fact. Accordingly, venue could not be maintained in Orange County based on plaintiffs’ allegations.

Next, the Court evaluated whether the plaintiffs could maintain venue as to all of the defendants in this multi-defendant case based on their contention that one or more of the defendants, specifically DuPont, maintained a principal office in Orange County.

In the *Anderson* opinion, the Ninth Court of Appeals advised that in a multi-defendant case, even if plaintiffs establish proper venue for one of the defendants, they must also plead, and if challenged, provide evidence demonstrating proper venue for all defendants. This is done in accord with Texas CPRC section 15.005, which states that the “court has venue of all of the defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences as the plaintiffs’ claims” against the so-called venue defendant.

Here the plaintiffs contended that each suffered from an indivisible injury caused by cumulative exposure to the defendants’ benzene-containing products, such that each exposure comprised the series of transactions or occurrences from which their claims arose. Adding another element to the plot, the *Loftin* and *Baran* plaintiffs also attached excerpts of an expert’s deposition testimony as evidence purporting to establish that the diseases from which they suffered were caused by their cumulative exposure to benzene. Such evidence was not presented in *Anderson*.

Although the plaintiffs raised these points in their responses to the motions to transfer venue, the plaintiffs did not plead the transaction and occurrence venue facts in their original petition. The Court also found the venue facts that were pleaded did not sufficiently allege that claims against DuPont were factually part of the same or similar transaction or occurrence as the plaintiffs’ claims against the other defendants. The appellate court cited both Supreme Court rules and precedent to rule that the plaintiffs’ responses to the motions to transfer venue were not a pleading; therefore, venue could not be sustained based on the transaction and occurrence allegations as it was not properly before the court.



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Upon remand, the Court of Appeals ordered the trial court to transfer all of the plaintiffs' claims and causes of action against the successful appealing defendants for whom the appellate record contained evidence of proper venue to those counties of proper venue. The other successful appealing defendants may provide proof in support of transfer to a county of proper venue in the trial court or the trial court may dismiss the claims and causes of action, as appropriate, in accordance with Texas CPRC section 15.003(a). The plaintiffs' claims against any remaining defendants will stay in Orange County.

After the opinion was issued, the plaintiffs filed a motion for rehearing, which the Court of Appeals denied. Although there is some question as to whether the Supreme Court has the power to review an appeal from an interlocutory order,² it is expected that the *Loftin* and *Baran* plaintiffs will follow the same strategy as the *Anderson* plaintiffs, and seek further appellate review of the Court of Appeals' decision, either through a petition for review or petition for mandamus to the Texas Supreme Court.

END NOTES:

¹ Please see Powers & Frost NewsFlash Vol. 2 Iss.16. Oct. 2007; "*Crown Central, LLC v. Anderson: The Ninth District Court of Appeals Splinters Multi-Plaintiff Case for Litigation in Several Texas Counties*" for a discussion of the *Anderson* opinion. Available at <http://www.powersfrost.com/publications.aspx>

² See, Texas Government Code § 22.225(b) (generally limiting the Supreme Court's jurisdiction over interlocutory appeal)

This article is not intended as legal advice to a specific problem or issue. If you have a question about toxic tort law, please contact the Powers & Frost attorney with whom you work or James H. Powers, Administrative Partner.

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