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Liability in the Oil and Gas Fields: Shooting the Gap Between Your Company and Its Employees

Energy Law, Labor and Employment, Oilfield Service Companies, Torts / August 22, 2017 / Marcy L. Rothman

The Texas courts have continued to evaluate the nature and extent of liability that property owners have for the acts of independent contractors. As indicated in a new opinion from the Eastland Court of Appeals, this is highly relevant for owners, operators, and drillers.

By way of background, the Texas Civil Practice & Remedies Code contains a provision entitled Liability for Acts of Independent Contractors. That provision specifically restricts the exposure of property owners to contractors, subcontractors, and their employees, for personal injury, death, or property damage arising from the failure to provide a safe workplace in circumstances where:

1. the property owner exercises or retains some control over the manner in which the work is performed, other than standard stop work authority, and
2. the property owner had actual knowledge of the danger or condition resulting in the harm and failed to adequately warn.

Tex. Civ. Prac. & Rem. Code § 95.003. The applicability of the statute is also specifically set out. It applies to claims against property owners, contractors, and subcontractors for personal injury, death, or property damage to an owner, a contractor, or a subcontractor, or an employee of a contractor or subcontractor. In addition, the claims must arise from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement. Tex. Civ. Prac. & Rem. Code § 95.002. The statute essentially covers harm arising from construction and repair work being performed by third party contractors.

On its face, the statute clearly reduces the exposure of property owners by relieving them of the old common law exposure for dangers and conditions of which they should have known. The common law standard for this type of exposure historically had been that property owners were liable for dangers and conditions of which they knew or should have known. This statute restricts the liability to those circumstances of which the property owner had actual knowledge.

In 2015, the Texas Supreme Court began to take a closer look at the contours of the statute. Specifically, in *Abutahoun v. Dow Chemical Company*,[1] the Supreme Court issued its pronouncement on the nature of the exposure that the statute covers. It focused on the language requiring the subject claims to arise from the condition or use of an improvement to the real property in question. In doing so, it evaluated the historical obligations of a premises owner to protect against premises defects on the one hand, and dangerous activities or instrumentalities on the other hand. The Court explained that by including the language "condition or use" in the applicability provision, the legislature intended to cover all types of both premises defect and negligent activity claims.

In 2016, the Texas Supreme Court examined whether contractors' employees are entitled to the same protection that their employers enjoy under Chapter 95. In the *Ineos USA, LLC* case,[2] Elmgren was injured while working as a boilermaker

for Zachry Industrial, the maintenance contractor at Ineos' petrochemical plant in Alvin, Texas. He was replacing a valve on a furnace header and one of the lines leading to the furnace apparently had not been properly gas-freed. Some residual gas exploded and Elmgren was burned. He and his family sued Ineos and, of particular importance for this analysis, they also sued the Ineos furnace maintenance team leader.

Generally under Texas law, when a person claims to have been injured by the conduct of an employee of a company, the employee can be sued and the company also can be sued under the doctrine of respondeat superior, which imposes vicarious liability on a company for the acts of its employees. Historically, because companies were available to respond and had deep pockets, plaintiff attorneys refrained from suing employees directly unless there was some other reason to do so, i.e., to create diversity of citizenship in order to avoid removal to federal court or to harass the employee. However, the statute and recent case law have provided the companies with substantial insulation from exposure by requiring a plaintiff to prove the company had actual knowledge of the dangerous condition or use, and this new law did not expressly mention any protections for the individual employees who might allegedly be involved in the incident. So, for energy companies, the issue that this set up was whether their employees could be sued and held liable under the common law, for claims arising in furtherance of company business, even where there is no path to liability against the company itself. Simply stated, energy companies now face the question of whether their employees can be sued and held liable for premises defects and dangerous activity (because they should have known of the threat), even though the company itself is immune because it did not have actual knowledge of that same threat.

In a decision that this writer believes should pose tremendous concern to companies and employees in the industry, the Texas Supreme Court specifically held that the plain language of the statute protects only the property owner, not its employees. The Court discarded all of the arguments that the company team leader made based on his position as Ineos' agent and also based on his proposed application of the doctrine of respondeat superior. As a result, the *Ineos* opinion created a gap in the law through which a property owner can avoid liability to an injured contractor but the property owner's employee may be held directly liable. As the jurisprudence around this statute continues to develop, it will be important for companies to look at their policies around providing protection to their employees from litigation and to conduct insurance audits in order to understand the coverages available to cover the employees caught in the gap.

More recently, the Court of Appeals in Eastland, Texas evaluated the effect of the applicability of the statute to the relationship between an owner/operator and driller. In the *Cuevas* case,[3] Endeavor was the owner/operator and hired Big Dog Drilling to drill a well on one of its leases in the Midland, Texas area. Cuevas was working to repair a cellar jet line and died after the cellar jet line struck him in the head. He had been using a catline to lift the cellar jet line and the catline unexpectedly became stuck in the cathead, causing the accident.

In the legal aftermath, Cuevas' survivors sued both Endeavor and Big Dog, alleging negligence and premises liability. The *Cuevas* opinion focused on the exposure of Endeavor. The plaintiffs originally asserted negligence and premises liability claims. After Endeavor filed a motion for summary judgment on traditional and no-evidence grounds, the plaintiffs supplemented to add claims for negligent hiring, retention, and supervision. The Eastland court referred to the *Ineos* opinion as precedent, pointing out that general knowledge that using catheads were potentially dangerous does not satisfy the requirement of actual knowledge of a dangerous condition resulting in a claimant's injury. The Court also evaluated the claims of negligent hiring, retention and supervision claims to determine whether they were barred as contemporaneous negligent acts occurring on the premises at the time the claimant was injured. The Court determined that the negligent retention and supervision claims were sufficiently contemporaneous and occurred on the premises and therefore were subject to Chapter 95 defenses. However, of critical importance, the Court also determined that the negligent hiring claim occurred away from the premises and prior to the injury and therefore was not protected by Chapter 95. Translated into English, this means that companies may defend themselves from negligent retention and supervision claims by asserting and proving that they did not have actual knowledge of the mechanism of injury. However, boiling the opinion down to its most practical terms, when it comes to claims for negligent hiring, companies are subject to claims that they knew or should have known that the contractors were not competent.

The evolution of this line of cases raises two concerns for energy companies, including oil and gas operators. Under the law as it currently exists, any time there is a situation involving construction or maintenance contractors and the company did not know but potentially should have known of a danger to them, there may be a conflict between the interests of a company and those of its employees that needs to be addressed. In addition, negligent hiring continues to be fully actionable against companies unless the hiring occurs at the job site around the time of the incident.

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[1] *Abutahoun v. Dow Chem. Co.*, 463 S.W. 3d 42 (Tex. 2015).

[2] *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016, pet. denied) (pet. denied, Dec. 16, 2016).

[3] *Cuevas et al. v. Endeavor Energy Res., L.P.*, No. 11-15-00157-CV, 2017 WL 3194649 (Tex. App.—Eastland, July 27, 2017).

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