SOUTHERN SILICA OF LOUISIANA, INC. AND MID STATE SAND AND GRAVEL COMPANY, L.L.C.

VERSUS

LOUISIANA INSURANCE GUARANTY ASSOCIATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 2023

McDONALD, J. CONCURRING:

OCT 24 2007

While I concur with the majority's ruling, I write separately to clarify the analysis of the competing constitutional interests in this case.

First, as the majority correctly notes, once the legislature has declared an Act to apply retroactively (or as in this case to "pending" claims) the question of the law's substantive or procedural effect, otherwise necessary to determine its temporal application, becomes moot. Segura v. Frank, 630 So.2d 714, 721 (La. 1994). If, however, the new law would disturb vested rights *or* impair contractual obligations, it cannot be applied retroactively regardless of the legislative declaration. Id. These interests are distinct and must be weighed *separately* before the legislative amendment to R.S. 22:1386(A) may be retroactively applied.

IMPAIRMENT OF CONTRACTUAL OBLIGATIONS

I disagree that the amended statute impairs contractual obligations. The majority reaches the wrong conclusion partly based on the effective arguments made by Southern Silica. The amended statute is intended to encompass long-term exposure situations. These are distinguishable from normal ordinary torts or a single exposure mass tort. Since exposure generally covers long periods of time, any insurer who provided insurance coverage during any particular exposure period would share the liability with insurers who provided insurance for other exposure periods. Each would the assessed a pro rata share of the exposure depending on the total

time period of exposure and the amount of this time the insurer provided coverage. Thus, the majority's position is incorrect that Southern Silica has no insurance coverage for the years 1977 through 1982. True, they have no coverage from the insolvent insurer, Reliance. However, they still have coverage for this time period from the other insurers who provided previous coverage during earlier periods of exposure.

The majority's conclusions would be correct, however, if the only period of exposure was that covered by Reliance (1977-1982). If an employee only worked for Southern Silica during that five years and his exposure only took place during that time frame, then only Reliance would be liable for this exposure. Because of the insolvency of Reliance there would be no other insurance coverage for this period. In this uncommon situation there would be no other insurance to exhaust and LIGA would have to step in immediately.

I disagree with the majority's assertion that "[t]his amendment creates a new obligation or liability vis-à-vis Southern Silica's solvent insurers by requiring that they provide coverage and pay claims for periods of alleged exposure for Reliance policy years when they had no contractual obligation or statutory duty to provide coverage." If this were true, then the legislature has created a contractual obligation. Obviously this cannot happen. In actuality, the solvent insurers are still only obligated for exposure periods during which they provided coverage. The crux of the analysis should be on "exposure". This amendment applies to long-term exposure situations. If exposure occurred during a portion of the time period that any of these insurers provided coverage, then they have some liability. They will share liability with other insurers who provided coverage during any exposure periods. If exposure occurred during time periods in which an insurer did

not provide coverage then they would have no liability. If exposure **only** occurred between 1977 and 1982 (the Reliance years) then these insurers would have no liability. There being no coverage from anyone but Reliance, all other insurance would have been exhausted and LIGA would have to provide coverage. But, the amended statute provides that the solvent insurers (who share some liability because they provided coverage during some of the exposure years) will now share the liability that would have been covered by Reliance. However, even though they now share the liability that would have been assigned to Reliance, they can only share it up to the amount of their policy limits. Even though they may now have to pay more, they still do not owe more than they contracted to pay.

The majority goes through extensive analysis using the *Segura* case to determine that the amended act created "a change in existing rights and created new obligations and liabilities where none previously existed, at least with regard to Southern Silica's other solvent insurers." The majority thus classifies the statute as a substantive rather than procedural change in the law. This analysis is unnecessary. It is immaterial whether it is substantive or procedural. The majority correctly points out that the legislature specifically expressed its intent that the statute would be applied retroactively to all claims pending on the effective date of the Act. The *Segura* court found it necessary to conduct its analysis of the statute to determine whether it was procedural or substantive because the legislature had not expressed its intent in amending the statute. Since the legislature has provided for retroactive application of the amendment in the case before us, there is no need for any further consideration.

Segura provides a four-step analysis:

1. the court must determine whether the state law would, in fact, impair a contractual relationship
2. if an impairment is found, the court must determine whether the impairment is of constitutional dimension
3. if the state regulation constitutes a substantial impairment, the court must determine whether a significant and legitimate public purpose justifies the regulation
4. if a significant and legitimate public purpose exists, the court must determine whether the adjustment of the rights and responsibilities of he contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption
   Segura at 729

First, the majority finds that "the amendment impairs the contractual relationship of Southern Silica and its solvent insurers by imposing new obligations and liabilities where none had previously existed." The majority classifies this as a creation of coverage that constitutes an impairment of the contractual relationship between Southern Silica and the other insurers. However, there is no impairment of contract. As previously mentioned, there is no increase in coverage. The insurers contracted with Southern Silica to provide liability coverage for any exposure during certain periods of time. Each contract provides for a maximum amount of coverage. This is the most that the insurer will have to pay regardless of what might occur. The amendment does not provide an increase in these limits; in fact, it could not do so. While the insurer may owe more than it would have, it still does not owe any more than the amount it contracted to provide. Even if the amendment did somehow increase the contractual amount that these insurers were obligated to pay, this is an issue to be raised by the insurers, not the insured, Southern Silica. Southern Silica has not been affected by this change. They are still insured by the solvent insurers, who now share the liability previously covered by Reliance. If any claims exceed the policy limits on these insurers, then LIGA steps in to cover the balance. Southern

Silica has not had any of its rights impaired. It contracted for and paid for a certain amount of insurance and still has that amount of coverage.

Secondly, even if there is an impairment of a contractual relationship it is not of a constitutional dimension. As previously mentioned, the majority fails to consider the amendment in light of its application to long-term exposure cases. The majority cites as an example that "retroactive application of the amendment would require Southern Silica to demand that an insurer providing coverage to Southern Silica in 1965 to indemnify and pay claims for alleged exposure in 1982, some eighteen years later. Likewise, Southern Silica would be required to demand in its pending litigation that an insurer later providing liability coverage to Southern Silica, such as in 2003, pay claims for alleged exposure thirty years prior, in 1977." This is absolutely incorrect. This is not what the statute provides. In the first instance, the insurer providing coverage in 1965 would incur liability if there was exposure in 1965 that continued for the next 18 years into 1982. Any insurer providing coverage in the ensuing years would also incur liability if there was exposure during their coverage years. As previously discussed, the key element in this analysis is exposure. If there is no exposure during the coverage period, then there is no liability. In the second instance, if there was exposure in 1977, the insurer that covered this period would incur liability. If exposure continued through 2003, then any insurer providing coverage during these years would incur its pro rata share of liability. If there was no exposure during the period in 2003 covered by that insurer there would be no corresponding liability. If there is no exposure, there is no liability on that insurer. But continued exposure would pass through to the later insurers if there was exposure during the periods they cover. Again, however, even though each insurer would incur liability for

exposure during the period they provided coverage and now must include the period covered by the insolvent insurer, they are not liable for any amount more than the contractual limits. During any periods covered by Reliance, the solvent insurers will now share the pro rata share of Reliance, but only in addition to their pro rata share for exposure during their coverage years and only up to their policy limits. This actually has no contractual effect on Southern Silica and does not impair any of their rights. If any additional rights are created, it is the insurers that have incurred these obligations, not Southern Silica.

Thirdly, I agree with the majority that a significant and legitimate public purpose is fostered by the amendment. It minimizes the unnecessary depletion of LIGA funds and also compensates for losses that citizens would normally incur due to the insolvency of their insurer.

Fourth, is a determination whether the adjustment of rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the adoption of the amendment. With all deference to my colleagues, I have already discussed why I do not believe that the private contractual relationship between Southern Silica and the solvent insurers has been impaired. The contracts cover long-term exposure situations. The majority maintains, "Unlike the instant case, in both Segura and State, the insurers collected a premium for the pertinent policies, which were in effect at all pertinent times. Thus, by virtue of the coverage provided through the policies in effect at the time, those insurers were already subject to some risk." The instant case is not unlike *Segura* and *State*, it is exactly like them. The insurers calculated the potential risk and collected an appropriate premium to provide coverage up to a certain maximum value. They

contracted to provide coverage for anyone exposed during their coverage period. If the exposure occurred during this period, then they incurred liability regardless of what happened in ensuing years. If the employee was continually exposed in following years, then the liability would be shared by the insurers covering those years. By having to cover the years that should have been covered by Reliance, the amount will certainly be greater, but it still cannot exceed the maximum amount of the contract. Simply stated, they contracted to provide insurance coverage up to a certain amount and they are still not liable for any amount greater than that amount.

VESTED RIGHTS

The only compelling argument made by the majority with which I agree is that involving the deprivation of vested rights. Under prior law, Southern Silica would unquestionably be entitled to demand LIGA provide indemnity and defense regarding the years when Reliance maintained their only coverage, without first seeking the same from its other, solvent insurers. It is this right of Southern Silica that would be disturbed should the amendment be retroactively applied. The question that must be answered then is this: Was this right "vested" before the effective date of the statutory amendment? "Once a party's cause of action accrues, it becomes a vested property right that may not constitutionally be divested... Under Louisiana law, a cause of action accrues when the party has the right to sue." Cole v. Celotex Corp., 599 So. 2d 1058, 1063, n.15 (La. 1992). The majority is correct and once the cause of action has accrued it cannot be divested by subsequent legislation. *Bourgeois*, 783 So. 2d at 1259. Further, I ascribe to the position taken by Justice Lemmon in his concurrence in *Bourgeois*:

> True interpretive legislation occurs when the Legislature, upon realizing that a previously enacted law contains an ambiguity or an error, amends the prior law to correct the ambiguity or error

> *before* the law has been judicially interpreted. However, *after* the judicial branch performs its constitutional function of interpreting a law, and the Legislature disagrees with that interpretation, a *new* legislative enactment is a substantive change in the law and is not an interpretive law, because the original law as interpreted by the judicial branch, no longer applies.
> *Bourgeois*, 783 So.2d at 1261.

Southern Silica filed suit on February 1, 2004. The amendment to LSA-R.S. 22:1386(A) became effective on August 15, 2004. Obviously, whatever rights Southern Silica had at the time suit was filed were vested rights based on the court's interpretation of the statute in *Hall v. Zen-Noh Grain Corporation*, 787 So.2d 280 (La. 4/27/01). The amendment is clearly a new legislative enactment and takes away rights that were vested in Southern Silica at the time.

REMAND:

While I do not necessarily disagree with the majority's decision to remand this matter to the trial court for further proceedings, I question exactly what these further proceedings might involve. This is a suit for a declaratory judgment. The issue before the trial court and, therefore, before this court is whether the amended statute should be applied retroactively or not. The trial court found that it should have retroactive effect and we have determined that it is to be applied prospectively only. Since this was the only issue before the trial court and it has now been decided

For these reasons I respectfully disagree with the majority's conclusions that this law impairs contractual obligations. However, I find that it does disturb vested rights and, therefore, agree with the majority's decision to reverse the decision of the trial court and render a decision that the provisions of the Act do not apply retroactively. I also believe all issues

have now been decided and see no reason to remand the case to the trial court. However, I do not necessarily disagree with the decision to remand.