

# 5th Circuit: Mesothelioma Claim Not Preempted By Federal Statute

June 13, 2023

On June 12, 2023, the U.S. Court of Appeal for the Fifth Circuit reversed a grant of summary judgment holding a shipyard immune from Louisiana state law tort claims pursuant to the Longshore and Harbor Workers' Compensation Act. What might the fate of *Barosse v. Huntington Ingalls, Inc.* mean for Louisiana asbestos claims in the future?

Ronald Barosse worked for Avondale Shipyard from February 1969 through June 1977, and was diagnosed with mesothelioma in March 2020. He filed suit in Louisiana state court against Huntington Ingalls, Inc. (HII) as successor to Avondale, and other defendants, claiming his illness was the result of exposure to asbestos. HII removed the case to the Eastern District of Louisiana pursuant to the federal officer removal statute. While Barosse brought a tort lawsuit, he did not claim benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 904, which provides a no-fault compensation remedy to injured workers.

As this was a claim for injury arising from asbestos exposure, Louisiana law requires application of the law in effect at the time of the exposure, which in the case of the claim against HII was 1969 through 1977. HII moved for summary judgment arguing that the state law tort claims were preempted by the LHWCA because they conflicted with and frustrated the purposes of the Act. The District Court agreed and granted summary judgment holding the claims preempted. Barosse appealed to the Fifth Circuit, which released its opinion reversing the decision of the District Court and remanding the case for further proceedings.

The Fifth Circuit found that based on U.S. Supreme Court precedent – from a line of cases beginning in 1942 with *Davis v. Dep't of Labor*, 317 U.S. 249, 253-56 (1942), which held that there could be concurrent remedies under the LHWCA and state law, including state tort law – there was no express preemption of state tort claims by the LHWCA. The Court noted that this precedent could be overturned in the future should the Supreme Court revisit the case, but at this time, and based on those decisions, there was no express preemption.

Conflict preemption of Barosse's state tort law claims was also rejected by the Fifth Circuit. The concurrent remedies in state law and the LHWCA mean that the "limited and unusual circumstances" giving rise to Barosse's state law tort claim do not pose "an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress[,]” as is required for conflict preemption. The Fifth Circuit concluded that if it were to hold otherwise, the LHWCA would "supplant" rather than "supplement" state law by removing the concurrent remedies found by the Supreme Court.

While a plaintiff cannot both receive LHWCA benefits and make a claim in tort under state law, a Louisiana plaintiff such as Barosse who eschewed any LHWCA claim has the option to bring a claim in tort. The Court

noted that its decision was limited to maritime workers in Louisiana whose injury occurred within the “twilight zone” period created by Supreme Court jurisprudence, who neither seek nor obtain LHWCA compensation, and whose injuries are not covered by Louisiana’s worker’s compensation statute. In the context of claims for mesothelioma, this last requirement means that the alleged exposure to asbestos must have occurred before the revision of the Louisiana Worker’s Compensation Statute in 1975 to include mesothelioma as a covered disease.

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*Barosse v. Huntington Ingalls, Inc.*, United States Court of Appeals for the Fifth Circuit, No. 21-30761, June 12, 2023.

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