

# The River of Law

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This paper contains a set of sequential handouts that can be given to students to help them understand the process by which courts interpret laws. In addition to the handouts, an explanation of the cases and the process of the court system is included. The handouts track the development of the law surrounding the Texas Statute of Repose, a statute which protects constructors of improvements to real property from suit more than ten years after substantial completion of a project

**Key words:** Legal process, Repose

## Introduction

It is often difficult for people not intimately involved with the legal system to understand how it works. Students are taught in middle or junior high civic classes “the courts interpret the law”. However this statement has little or no meaning, if not accompanied by an example. This paper describes an interactive activity that can be used to introduce the students to the legal system and gives them an understanding of how courts work, and how they “interpret the laws. This activity, called “The River of Law” follows a particular state court system’s interpretation of a particular statute.

Of particular importance is the analogy of the river. While cases normally go up-river from trial court, to appellate court, to Supreme Court, law flows down river. Law is placed in the river at the branch of the river where the court exists, and this law flows downstream to courts below it. Therefore, law from appellate courts flows only downstream to trial courts below that particular appellate court - law does not flow into courts located on other branches. A visual representation of this concept is often necessary to make the point clear.

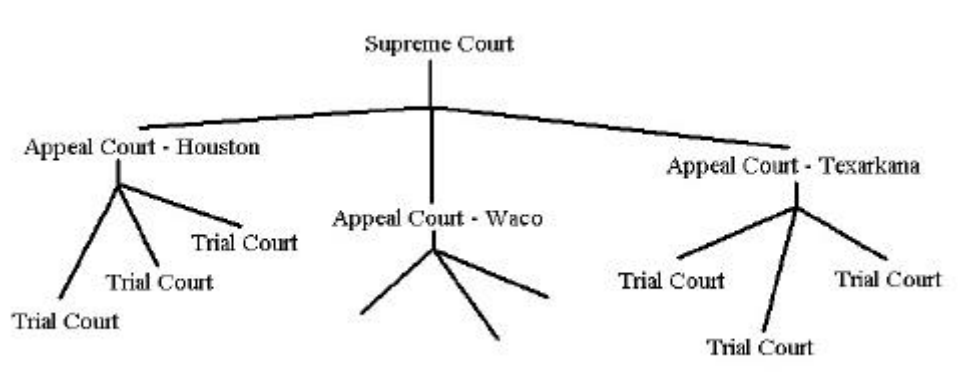


Figure 1. River of Law

Law is placed in the River at the appellate court in Houston and flows down river to the trial courts, which appeal their cases to Houston. Law placed in the River at Waco does not flow into those courts, but only into the trial courts below the Waco trial court. When different appellate courts reach conflicting determinations of the law in similar factual situations, the Supreme Court is more likely to accept a case for review, and decide the issue finally, for all courts in the state. Notice that law placed in the river by the Supreme Court flows down river to all courts below it. This same process works in the federal court system.

### **The Statute to be Analyzed**

The specific statute used in the model is one of the statutes of repose, found at TEX.CIV.PRAC. & REM. CODE §16.009. This statute prevents certain claims against constructors from being filed ten years from the completion of an improvement to real property. Forty-eight states have similar statutes, though some state courts have invalidated the law for reasons, which will not be addressed in this article.

The statute, in its present form, was enacted by the Texas legislature in 1985. It reads, in pertinent part: "A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement....".

In its most basic application, this statute states in order to sue a contractor, the lawsuit must be filed within ten years of substantial completion of the project. This statute is typical of many statutes passed by the legislature: it leaves many unanswered questions. What is an "improvement" to real property? Who is a "person who constructs..."? Is a "person who constructs" ONLY a contractor, or does it include other manufacturers of things attached to realty?

The legislature has not defined these terms. It is up to the courts to do so - this is where the courts "interpret the laws". And so begins a journey into the legal process and an understanding of judge-made law and its relationship to legislation, and an understanding of how the court system works. The activity normally takes an entire class period. Students are divided up into groups of about four or five and are given the first handout (*Figure 1*) containing a fact situation (taken from an actual case) and asked to predict how the court will apply the law. One student in the group writes out a simple analysis and conclusion for the group. It makes no difference how they decide the case. The second handout contains the decision of the court in the prior handout, plus the facts of the next case in the series. There are a total of eight handouts, with the last one being a hypothetical case not yet decided by the court.

The students then talk about the case and come to a conclusion. They often want to know what is an "improvement" and they are told that is the entire issue - they must decide if the law is applicable here or not. Often students want more facts, however, the court decided this case based only upon the facts given - they are to work with those facts, and cannot make up any others. Once the students complete the worksheet, they are given the next handout (*Figure 2*).

**RIVER OF LAW EXERCISE - STATUTE AND CASE #1**

LAW (aka RULE):

TEX.CIV.PRAC. & REM. CODE §16.009. "A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

CASE #1: *Ellerbe v. Otis Elevator*

Location of appeal court: Houston, TX

Facts: Plaintiff is injured by elevator installed more than ten years prior to the date of the accident. Plaintiff sues manufacturer of the elevator. There is no evidence indicating the elevator manufacturer had the repair contract, or in any way had any connection with the elevator for at least ten years. We do not know how, or what specific part of the elevator failed. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Does the above statute prevent the elevator manufacturer from being sued?

QUESTIONS:

What kind of issue is this? (Issue of Fact or Issue of Law). How can you tell?

Who will decide this issue?

Analysis: (Write here, Use reverse side if necessary).

Conclusion: (One word answer to issue above)

*Figure 1. River of Law Exercise - Case #1*

Notice how the student now has two "laws" - the original statute and the court's decision in the *Ellerbe* case. The students can now use both of these to decide whether or not the statute applies to the defendant in the *Reddix* case.

If the students desire a more complete discussion of the case it can be discussed at this point. *Ellerbe v. Otis Elevator Co.* (1982) decided in 1981 out of an appellate district in Houston. In this case an elevator was defined as an improvement. The court said, "An elevator in a multi-storied building obviously constitutes an improvement on real property. The manufacturer of the elevator would be a person performing or furnishing construction of an improvement, even though it did not install it in the building.". The statute applied to the elevator manufacturer and it could not be sued after ten years.

*Ellerbe* has made judge-made law: elevators are improvements. Assume another case involving an elevator and the statute of repose, arises in Houston. The trial judge and the appellate judge should read *Ellerbe* and hold that the second elevator is an improvement. However, an appellate judge in El Paso, Texas, (which is VERY far from Houston, even by Texas standards) who disagrees with

*Ellerbe*, need not apply it. That judge may think the elevator is merely a fixture or a component part. The statute would not apply, and the elevator manufacturer could be sued anytime.

#### RIVER OF LAW EXERCISE - CASE #2

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Elevators are improvements to real property; therefore the defendant is protected by the statute and cannot be sued more than 10 years after the installation of the elevator. *Ellerbe v. Otis*, Houston

CASE #2: *Reddix v. Eaton Corp.*

Location of appeal court: Texarcana

Facts: Plaintiff is injured by electric hoist and hoist link chain that malfunctioned. The electric hoist and hoist link chain were installed in the construction more than 10 years prior to the date of the injury. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Does the above law prevent the electric hoist and hoist link chain manufacturer from being sued?

Analysis:

Conclusion: (One word answer to issue above)

*Figure 2.* River of Law Exercise - Case #2

The next appellate case to interpret the statute was *Reddix v. Eaton Corp.* (1983). The case involved an electric hoist and a hoist link chain that operated an outdoor elevator. The court determined that the hoist was a mere component part, and not protected by the statute. The court also discussed material providers and stated the statute did not protect them because they do not perform any work or labor in installing or putting the products/component part onto the realty.

In connection with items such as paint, wood and screws the *Reddix* court stated they were materials, and not improvements, and therefore the statute did not apply. Remember that the statute only protects "constructors of improvements to real property". The court defined materialman as "a person who has furnished materials used in the construction or repair of a building, structure, etc." The case then goes on to say "[a] "materialman" in Texas case law has been defined as a person who does not engage in the business of building or contracting to build homes for others, but who manufactures, purchases or keeps for sale materials which enter into buildings and who sells or furnishes such material without performing any work or labor in installing or putting them in place". *Reddix* has made law: materials are not improvements and are not given the protection of the statute.

We now have three categories to put items into: improvements, component parts and materials. If an item is an improvement it is protected by the statute, however, if it is material or a component part, it is not. The next case activity (*Figure 3*) involves an air conditioner.

**RIVER OF LAW EXERCISE - CASE #3**

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Elevators are improvements to real property; therefore the defendant is protected by the statute and cannot be sued more than 10 years after the installation of the elevator. *Ellerbe v. Otis*, Houston

Electric hoists and hoist link chains are mere component parts, and not protected by the statute. *Reddix v. Eaton Corp.*, Texarcana

CASE #3: *Dubin v. Carrier Corp.*

Location of appeal court: Houston

Facts: Plaintiff's daughter dies after a forced-air air conditioning/heating unit malfunctions. The unit produced carbon monoxide gas, which caused girl's death. Unit installed in the construction more than 10 years prior to the accident. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Does the law prevent the air conditioner/heating unit manufacturer from being sued?

Analysis:

Conclusion: (One word answer to issue above).

*Figure 3.* River of Law Exercise - Case #3

In *Dubin v. Carrier Corp.* (1987) the court determined a heating unit was an improvement. The court said that improvements are all "betterment[s] to the freehold", and are "[some]thing that permanently enhances the value of the premises". Given this definition into what category would fireproofing material fit? It enhances the value of the premises because it reduces the risk of fires. What about paint? Perhaps paint does not permanently enhance the premises, and therefore is not improvement? However the opposing argument is that: does anything permanently enhance the premises? Buildings and parts of buildings deteriorate if not taken care of. Nothing permanently enhances the premises.

At this point in the development of the law a case was appealed up to the Texas Supreme Court. This case was *Conkle v. Builder's Concrete Products Mfg.* (1988) This case (*Figure 4*) involved a concrete batch plant. The court did not decide whether or not the concrete batch plant was an improvement. The court sent the case back (remanded is the legal term) to the lower court to

decide whether the plant was actually an improvement, given evidence that the plant was portable. The Texas Supreme Court also recognized the category of component part in the *Conkle* case and said: "Manufacturers of component parts do not come within the statutory language of section 16.009. We now have some, but not much, Supreme Court law that is effective in the entire state: a product is not an improvement if it is portable AND manufacturers of component parts are not to be considered "constructors of improvements". All courts in Texas must apply this judge-made law. Remember this is Supreme Court case, so the law it has made flows down river to all courts in Texas.

#### RIVER OF LAW EXERCISE - CASE #4

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Elevators are improvements to real property; therefore the defendant is protected by the statute and cannot be sued more than 10 years after the installation of the elevator. *Ellerbe v. Otis*, Houston

Electric hoists and hoist link chains are mere component parts, and not protected by the statute. *Reddix v. Eaton Corp.*, Texarcana

Air conditioning/heating units are improvements to real property. *Dubin v. Carrier Corp.*, Houston

CASE #4: *Conkle v. Builder's Concrete Products Mfg.*

Location of appeal: Texas Supreme Court

Facts: Plaintiff's husband killed in a concrete batch plant built more than 10 years before. He died while inside, doing repairs, when a switch (which was in the "off" position, short-circuited, and the machinery came on causing him to be crushed. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Does the law prevent the manufacturer of the concrete batch plant from being sued?

Analysis:

Conclusion: (One word answer to issue above)

Figure 4. River of Law Exercise - Case #4

Other cases, which discuss the law, are not included in the exercise to keep it shorter. A heater/air conditioner combination unit was defined as an improvement in the appellate court case of *Rodarte v. Carrier Corp.* (1990). A garage door opener was considered an improvement in the appellate court case of *Ablin v. Morton Southwest Company* (1990).

Asbestos containing fireproofing material was not an improvement in *Corbally v. W.R. Grace & Co.* (19??). If you look at the legal citation for this case, you will see it is different than the other cites. It says "F.Supp" in the cite and the others say "Tex.App." or "Tex". The reason for this is the *Corbally* case is a case in a federal court, not in a Texas state court. Why is this federal court applying the law of Texas to this case? Why not federal law?

**RIVER OF LAW EXERCISE - CASE #5**

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Elevators are improvements to real property; therefore the defendant is protected by the statute and cannot be sued more than 10 years after the installation of the elevator. *Ellerbe v. Otis*, Houston

Electric hoists and hoist link chains are mere component parts, and not protected by the statute. *Reddix v. Eaton Corp.*, Texarcana

Air conditioning/heating units are improvements to real property. *Dubin v. Carrier Corp.*, Houston

A product is not an improvement if it is portable AND manufacturers of component parts are not to be considered "constructors of improvements". *Conkle v. Builder's Concrete Products Mfg.*, Location of appeal: Texas Supreme Court

CASE #5: *Corbally v. W.R. Grace & Co.*

Location of appeal court: 5th Circuit

Facts: Plaintiffs injured by asbestos fireproofing material, installed more than ten years prior to injury. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Does the law prevent the manufacturer of the fireproofing material from suit?

Analysis:

Conclusion: (One word answer to issue above)

**QUESTIONS:**

In what jurisdiction is this case tried? Why?

What law must this court apply? Why

Is *Corbally* law in Texas? Why or why not?

*Figure 5. River of Law Exercise - Case #5*

This case (*Figure 5*) can be used to show the students how the federal and state courts interact. Federal courts do not generally have jurisdiction over state law matters. What is going on? This is one of those instances when a federal court has jurisdiction over a case involving state law issues. If the parties to a case are from different states, either of the parties can force the case into federal court. This is because the framers of the U.S. Constitution thought state courts would give preference to parties from their own states. In order to prevent this injustice, a party from a different state may force the case into federal court. There is another requirement though: the amount in controversy must exceed \$50,000. If the amount the parties are arguing about is \$50,000

or less, then they must go to a state court. The name for this type of jurisdiction is "diversity jurisdiction".

When a federal court has been asked to decide a diversity controversy, it must use the same law, statutory and judge-made, as the state court would have. In the *Corbally* case the federal court must use Texas law. The federal court cannot use federal law. It is not uncommon for courts to be called upon to apply the law of different states or even different countries. Care must be taken when using these cases to predict the law however. A federal case deciding state law is not precedent (law) for the state court. Using the analogy of the river, the federal courts are on their own branches; completely separate and apart from the state court system. The law from federal courts does not flow into any state court river. The only exception to this rule is if the case involves an issue of federal law - then the federal law is dumped into state law rivers that decide federal questions. State courts have jurisdiction over issues of federal law, however the opposite is not generally true: federal courts do not have jurisdiction over state law issues. If a case involving fire-proofing material came before a Texas court, that court could reject the finding of the *Corbally* court and say that fireproofing is in fact an improvement.

Readers are now armed with several categories into which items can be placed: improvements, materials and component parts. Determining into which box an item is to be placed can solve a case.

In order to determine if a product manufacturer is protected by the statute we would apply what has been termed an "improvement" test or analysis. In order to determine if a particular item's manufacturer is protected under the statute, one must decide into which box the item should be placed: improvement, component part or material.

The appellate court in *Williams v. U.S. Natural Resources, Inc.* (1993) however refused to grant protection of the statute to a manufacturer of a furnace installed in a house. This is despite the *Dubin* discussed above in which a heating unit was determined to be an improvement. How could *Williams* come to a different decision than *Dubin*? Because *Williams* was decided by the appellate court in Waco, and *Dubin* by the appellate court in Houston. The appellate court in Waco need not follow the decision of the Houston. Recall the analogy of the river. Waco and Houston courts are on different branches and law that flows out of the Houston court does not flow by the Waco court. The Waco court questioned the reasoning that allowed off-site manufacturers of goods purchased and installed by third parties to come within the protection of the statute. The Waco court did not believe that the Texas legislature meant to protect companies which manufactured items like heaters. It did not think that these entities were "constructors of improvements".

The stage has now been set: two appellate courts have decided factually similar cases differently. A manufacturer of a heater is considered a "constructor of an improvement" in Houston, but not in Waco. The law is in conflict. The time is ripe for the Texas State Supreme Court to hear a case involving this issue (*Figure 6*).



**RIVER OF LAW EXERCISE - CASE #6**

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Elevators are improvements to real property; therefore the defendant is protected by the statute and cannot be sued more than 10 years after the installation of the elevator. *Ellerbe v. Otis*, Houston

Electric hoists and hoist link chains are mere component parts, and not protected by the statute. *Reddix v. Eaton Corp.*, Texarcana

Air conditioning/heating units are improvements to real property. *Dubin v. Carrier Corp.*, Houston

A product is not an improvement if it is portable AND manufacturers of component parts are not to be considered "constructors of improvements". *Conkle v. Builder's Concrete Products Mfg.*, Location of appeal: Texas Supreme Court

Asbestos is a mere component part, and not protected by the statute. *Corbally v. W.R. Grace & Co.* Location of appeal court: 5th Circuit

CASE #6: *Williams v. U.S. Natural Resources, Inc.*

Location of appeal court: Waco

Facts: Plaintiff's family members injured by malfunctioning wall heater unit. Unit installed more than ten years before injury. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Does the law prevent the manufacturer of the unit from being sued?

Analysis:

Conclusion: (One word answer to issue above)

*Figure 6.* River of Law Exercise - Case #6

In 1995 the Texas Supreme Court decided the case of *Sonnier v. Chisholm-Ryder Co., Inc.* (1995). This case (*Figure 7*) involved a commercial tomato chopper, and the issue was, "Is the manufacturer of the tomato chopper a 'constructor of an improvement'". The Texas Supreme Court decided that the Waco court was correct, and that the Houston court was incorrect. In other words, the Supreme Court overturned the Houston court. In fact the Texas Supreme Court overturned several cases that day, including its own decision, *Conkle*. It made a different law, which is explained below.

**RIVER OF LAW EXERCISE - CASE #7**

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Elevators are improvements to real property; therefore the defendant is protected by the statute and cannot be sued more than 10 years after the installation of the elevator. *Ellerbe v. Otis*, Houston

Electric hoists and hoist link chains are mere component parts, and not protected by the statute. *Reddix v. Eaton Corp.*, Texarcana

Air conditioning/heating units are improvements to real property. *Dubin v. Carrier Corp.*, Houston

The case was remanded to the trial court to determine if the concrete batch plant was an improvement to real property given the fact that it was portable. Case settled at some point, and no further law made.

A product is not an improvement if it is portable AND manufacturers of component parts are not to be considered "constructors of improvements". *Conkle v. Builder's Concrete Products Mfg.*, Location of appeal: Texas Supreme Court

Asbestos is a mere component part, and not protected by the statute. *Corbally v. W.R. Grace & Co.* Location of appeal court: 5th Circuit

Heating units are not improvements to the real property and not entitled to the protection of the statute. *Williams v. U.S. Natural Resources, Inc.*, Waco

QUESTIONS:

Do *Dubin* and *Williams* contradict each other?

How can this happen?

What is the next step likely to be?

CASE #7: *Sonnier v. Chisholm-Ryder Co., Inc.*

Location of appeal court: Texas Supreme Court

Facts: Plaintiff injured by a commercial tomato chopper installed in the construction more than 10 years prior to the injury. Court decided issue based only on these facts. You may think the court needs other facts, however the court did believe other facts relevant to its decision on the following issue.

Issue: Is the manufacturer of the tomato chopper a "constructor of an improvement" under the statute? Does the law prevent the tomato chopper manufacturer from being sued?

Analysis: (Use other side if necessary)

Conclusion:

Figure 7. River of Law Exercise - Case #7

### *Effect of Purpose of the Statute in Interpretation*

The Texas Supreme Court looked at the purpose of the statute, not just the literal meaning of the words, in order to reach its decision. What is the statute meant to do exactly? When problems develop in lower courts' interpretations of statutes, judges will often look to the purpose of the statute to make sure that the law is developing in conformity with the purpose. After all it is the purpose of law that is important, not law itself. If the law is NOT developing in conformity with the purpose, it might signal a need to change the law.

What are some of the purposes of this statute? A purpose of a statute of repose is to protect certain people, such as architects, engineers and constructors from liability. This is because they are unable to pre-test and standardize the improvements they design and build. Each construction project is unique, and results in a unique product. The product manufacturer, for example a heater manufacturer, produces standard products for general use. The product manufacturer can test and employ quality control standards at the factory. The manufacturer can change the product to meet new standards discovered after testing. Architects, engineers and constructors generally cannot standardize or pre-test the improvements prior to or after construction.

Case #8 (*Figures 8-A & B*) represents a hypothetical case, which has not yet occurred in Texas. The students can analyze the case using the above law to determine whether or not they think the state court will protect the defendant or not. Case #8 shows the students that the process is ongoing - *Sonnier* did not answer all questions raised in connection with the statute. The hypothetical *Smith v. Jones* case raises an issue that may or may not every be filed. The issue raised is: Does the statute provide protection to an entity that manufactures, but does not install, a custom-made product that is attached to the realty?

The Supreme Court did not address this specific question - it was not an issue in the *Sonnier* case. In fact, had the court discussed the issue it would have been "dicta". Dicta is discussion in a court opinion which is not necessary to the determination of the specific issues raised - it is not law, or precedent for future cases, though it can have an effect on future cases.

The tomato chopper in *Sonnier* was apparently a product generally available for sale to people seeking tomato choppers. What if the tomato chopper had been specially made for the particular plant? What arguments can be made to protect the entity who makes the tomato chopper? What are the contrary arguments?

The argument granting protection is: Since one of the purposes of the statute is to protect constructors of unique products, an off-site manufacturer of a unique product incorporated into the realty should be granted the protection of the statute. Read the statute again. Does it require annexation to the realty as *Sonnier* held? It merely requires that the entity be a "constructor". Another argument is that entities which manufacturer custom-made products cannot pre-test or standardize their products either, so they should be protected.

**RIVER OF LAW EXERCISE - CASE #8 (p. 1 of 2)**

LAW (aka RULE):

Statute: TEX.CIV.PRAC. & REM. CODE §16.009. A person must bring suit for damages for a claim ... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

Electric hoists and hoist link chains are mere component parts, and not protected by the statute. *Reddix v. Eaton Corp.*, Texarcana

A product is not an improvement if it is portable AND manufacturers of component parts are not to be considered "constructors of improvements". *Conkle v. Builder's Concrete Products Mfg.*, Tex. Sup. Ct. Location of appeal: Texas Supreme Court

Asbestos is a mere component part, and not protected by the statute. *Corbally v. W.R. Grace & Co.* Location of appeal court: 5th Circuit

Heating units are not improvements to the real property and not entitled to the protection of the statute. *Williams v. U.S. Natural Resources, Inc.*, Waco

The above statute protects entities that annex products to construction. It is the annexation of the product to the land that is important, not the product itself. It is also important that the product is unique - buildings and other construction works cannot be mass-produced and tested, as can products manufactured in industrial plants. This statute was not meant to be a products liability statute and protect certain products. It was meant to protect certain types of entities. The statute of repose does not protect manufacturers of standard products, such as garage door openers and heaters, unless the manufacturers actually annex the product to the realty. *Sonnier v. Chisholm-Ryder Co., Inc.* Texas Supreme Court

QUESTIONS: (USE REVERSE SIDE IF NECESSARY)

Which "laws" or "rules" disappeared, and why?

Which cases have been overturned? What happened to the plaintiffs in these cases?

How can manufacturers of custom-made products protect themselves under the present law?

What types of manufacturers were protected prior to *Sonnier* that are no longer protected?

How does financial power mold the law?

You will notice these cases deal with the definition of "improvement to real property". There have no cases dealing with the definition of "a person who constructs" or "real property". Why not?

*Figure 8. River of Law Exercise - Case #8-A*

The contrary argument is to more strictly construe *Sonnier*. Since *Sonnier* says annexation is required, then a party that custom-makes a product, but does not annex it to the realty should not be protected (White & Holland, 1997).

**RIVER OF LAW EXERCISE - CASE #8 (p. 2 of 2)**

CASE: Smith v. Jones

Location of trial: Brazos County, Tx.

Facts: Plaintiff's spouse is killed by specially designed and manufactured concrete batch plant equipment manufactured by Defendant. Defendant did not install equipment, but custom-made it for plant.

Issue: Does the law prevent the defendant from being sued?

Analysis #1: (Support a "No" conclusion. Use reverse side)

Conclusion: No.

Analysis #2:

Conclusion: Yes. (It is possible to support a "yes" conclusion using the law from *Sonnier*. Can you do it?) Use reverse side.

*Figure 9. River of Law Exercise - Case #8-B*

*Effect of Sonnier on the Cases*

*Sonnier* had the effect of overturning many, but not all of the lower court decision, which had analyzed the statute, was overturned. Which ones were overturned? *Ellerbe v. Otis Elevator Co.* was overturned because Otis did not annex the elevator to the realty.

*Reddix v. Eaton Corp.* has not been overturned. This was the case involving the elevator hoist, which was determined to be a mere component part, and not an improvement. Component parts were never protected under the judge-made law. *Dubin v. Carrier Corp.* and *Rodarte v. Carrier Corp.* have been overturned as they involved heaters which were not annexed by the defendants. *Ablin v. Morton Southwest Company* is partly overturned. That case involved both the constructor, Morton Southwest, and the garage door opener manufacturer. In connection with the constructor, the case is not overruled - the contractor annexed the garage door opener to the property and is therefore protected under the statute. In connection with the manufacturer the case is overturned; manufacturers of improvements are not protected.

What happens to the plaintiffs in these cases that have been overturned? Nothing happens to them. The *decisions* in those cases still stand; only the *law* has changed. The only actual parties who will be affected by the law are the ones involved in the *Sonnier* case. In fact it is unlikely the parties in the overturned cases are even aware that the law has changed. Many of those cases are over twenty years old and it is unlikely the parties have followed the law. It is also unlikely the attorney in the case will contact the client and tell them things would be different if their lawsuit were filed today.

## Summary

Texas case law interpreting TEX.CIV.PRAC. & REM. CODE §16.009 offers a good method for studying the process by which judge-made law is developed. When the law was passed by the legislature it was not clear if manufacturers were to be protected by the statute or not. To fill this void, which is one of the main purposes of judge-made law, the appellate courts developed an "improvement" test to determine if an item was to be protected or not. An item was an improvement if it improved the value of the realty. However other categories of items, namely component parts and materials, were not protected. One appellate court did not agree with this improvement analysis. Eventually another case involving the same law was decided the Texas Supreme Court. The court rejected the improvement test and adopted what might be called the annexation test. Entities that annexed products or materials to real property were protected.

As is typical, the case law has not answered all of the questions that the law might raise. It is up to future cases to more fully develop the law.

## References

*Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 879 (Tex.App.-Houston 1981 writ ref'd n.r.e.) appl.dis. 103 S.Ct. 24, 459 U.S. 802, 74 L.Ed.2d 39, reh.den. 103 S.Ct. 478, 459 U.S. 1059, 74 L.Ed.2d 625 (1982).

*Reddix v. Eaton Corp.*, 10. 662 S.W.2d 720 (Tex.App.-Texarcana 1983).

*Dubin v. Carrier Corp.*, 731 W.W.2d 651 (Tex.App.-Houston [1st Dist] 1987 no writ), *after remand*, 798 S.W.2d 1 (Tex.App.-Houston [1st Dist] 1990, writ dism'd by agr.).

*Conkle v. Builder's Concrete Products Mfg.*, 749 S.W.2d 489 (Tex. 1988).

*Rodarte v. Carrier Corp.*, 786 S.W.2d 94 (Tex.App.-El Paso 1990, writ dism'd by agr.).

*Ablin v. Morton Southwest Company*, 802 S.W.2d 788 (Tex.App.-San Antonio 1990).

*Corbally v. W.R. Grace & Co.*, 993 F.2d 492 (5th Cir.).

*Williams v. U.S. Natural Resources, Inc.*, 865 S.W.2d 203 (Tex.App.-Waco 1993, no writ).

*Sonnier v. Chisholm-Ryder Co., Inc.* 909 S.W.2d 475 (Tex. 1995). Actually the case involving the tomato chopper was in the federal court. The federal district court (the trial court) entered judgement in favor of the manufacturer, and the injured party appealed to the federal Circuit Court. The federal Circuit Court recognized that the state of the law was uncertain in Texas and asked (certified the question) the Texas Supreme Court to clarify the law. So the Texas Supreme Court did not actually decide the case, it merely outlined the law to be applied.

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