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Toxic Torts and Mass Torts

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ALMOST thirty-five years ago, the Fifth Circuit, applying Texas law, affirmed a jury verdict in favor of an asbestos worker against several manufacturers of asbestos insulation products.[1] The court's opinion in *Borel v. Fibreboard Paper Products Corp.* has been haled as an insightful and well-reasoned application of traditional common law principles in the novel factual context of a toxic tort case involving latent injuries.[2] Throughout the 1980s and much of the 1990s, the Texas courts continued both to expand the ability of persons injured by toxic substances to recover damages and to facilitate the prosecution of aggregate litigation brought by many persons—involving dozens, hundreds, or even thousands of plaintiffs or class members—allegedly injured by the same course of tortious conduct.

Beginning in the mid-1990s, courts in Texas and elsewhere began to curtail the expansion of theories of liability in toxic tort cases and to restrain the aggressive case management techniques developed by trial courts in handling mass tort cases.[3] In its 2003 and 2005 sessions, the Texas Legislature joined the effort, enacting both general and specific legislation aimed at correcting the perceived excesses of the tort system in

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1. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973).

2. *See, e.g.*, Michael D. Green, *The Road Less Well Traveled (and Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377, 382 (1999) (dating "the emergence of the mass toxic substances litigation era to Judge Wisdom's seminal opinion in *Borel*" and noting that although the case arguably "'made' law," "calmer reflection" reveals it to be an "application of traditional principles in a different context"); Harvey Couch, *In Tribute to John Minor Wisdom: A Small Sampling of Judge Wisdom's 'Other' Opinions*, 60 TUL. L. REV. 356, 370 (1985) (describing *Borel* as "a paradigm of legal analysis and judicial craftsmanship" and noting that the decision is referred to as "the Magna Carta for current asbestos litigation").

3. *See, e.g.*, CSR Ltd. v. Link, 925 S.W.2d 591, 593-96 (Tex. 1996) (rejecting exercise of personal jurisdiction over Australian supplier of asbestos even though plaintiffs were exposed to and injured by the asbestos in Texas); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 708, 720, 730 (Tex. 1997) (reversing plaintiff's verdict in case alleging that defendant's drug caused birth defect because plaintiff's proof of causation was legally insufficient).

providing remedies to persons claiming harm from toxic substances and court access to persons alleging a mass tort.

This trend of retrenchment, chronicled in the past four surveys on toxic and mass torts, maintained its momentum in this Survey period. For the most part, courts in Texas continued to discourage the use of class actions and consolidations to resolve cases involving multiple claimants; continued to demand specific, published support for allegations of causation in toxic tort cases; continued to protect defendants from discovery perceived as tangential and overbroad; and continued to define narrowly the duty of corporations to exercise due care with respect to their employees and consumers. Whether the courts have finally achieved an equilibrium in balancing the rights of plaintiffs and defendants in toxic and mass tort litigation, or whether the courts and legislature still perceive the need for additional procedural and substantive restraints on such claims, will provide an interesting topic for the next Survey.

I. TEXAS MULTIDISTRICT LITIGATION TRANSFERS AND PROCEEDINGS

In this Survey period, the Texas Judicial Panel on Multidistrict Litigation ("MDL") established pretrial MDL courts for cases beyond asbestos and silica litigation, appointing pretrial judges to oversee MDL proceedings for personal injury and wrongful death claims arising from a bus fire during the Hurricane Rita evacuation and a design defect claim against automobile manufacturer DaimlerChrysler. This Survey period also saw examination of jurisdictional questions concerning the review of pretrial decisions by the MDL pretrial judges, delineating when that review is with the MDL panel and when it is properly before the appellate courts.

A. NEW TRANSFER ORDERS

1. The Hurricane Rita Evacuation Bus Fire Transfer Order

In *In re Hurricane Rita Evacuation Bus Fire*, the Texas MDL Panel ordered pretrial consolidation of six lawsuits, filed in two counties, involving injuries and deaths suffered when a bus chartered to evacuate residents of an assisted living and health care facility caught fire near Dallas.[4] Because the cases arose from a common incident and would involve examination of the "same large pool of employees and fact witnesses," the MDL Panel concluded that appointment of "one pretrial judge to handle the cases arising from this one tragic event will further [Administrative R]ule 13's laudable goals of efficiency and convenience."[5] The MDL Panel appointed Judge Rose Guerra Reyna of the 206th District Court of Hidalgo County as the pretrial judge, transferring all pending and tag-along cases to her court.

4. 216 S.W.3d 70, 71 (Tex. M.D.L. Panel 2006).
5. *Id.* at 72.

2. *The DaimlerChrysler AG CLK430 Transfer Order*

In *In re DaimlerChrysler AG CLK430 Litigation*, the Texas MDL panel granted an unopposed motion to appoint a single judge to preside over pretrial proceedings in three cases filed in three separate counties alleging that defendants knew of and failed to disclose "a design defect in the low clearance and construction of the front end of the cars for model years 2000-2003."[6] The parties agreed that appointment of a single pretrial judge would serve the goals of Administrative Rule 13, and the MDL Panel itself determined that the "cases involve common factual issues and that their consolidation will serve the convenience of the parties and witnesses, and will promote the just and efficient conduct of the actions."[7] The MDL Panel assigned the pretrial proceedings to Judge Robert H. Frost of the 116th District Court of Dallas County.[8]

3. *The Transfer of Asbestos Cases Filed Prior to September 1, 2003, to the MDL Pretrial Court*

The 2003 legislation creating the MDL procedures applied only to cases filed prior to the effective date of the act, September 1, 2003.[9] As reported in last year's Survey, in its 2005 session, the legislature broadened the statute to allow transfer of asbestos cases filed prior to that date.[10] Pursuant to that statute, the Texas MDL panel transferred all asbestos cases filed prior to September 1, 2003 to the MDL pretrial court supervising the asbestos cases, the Harris County Eleventh District Court in Houston.[11] The judge of that court, Judge Mark Davidson, now has pretrial jurisdiction over all asbestos litigation in Texas.

B. Orders Concerning Review of MDL Pretrial Orders

In *In re Fluor Enterprises*, the Austin Court of Appeals upheld an order from Judge Davidson, the Harris County asbestos MDL pretrial judge, remanding immediately an asbestos case to the transferee court because the defendants waited until just four days before the case was set for trial to move for a MDL transfer.[12] Because Judge Davidson's order remanded the case to the Travis County district court, the Austin Court of Appeals had jurisdiction to review the order. Also, because it did not appear that the remand order was based on a determination that the case was not a tag-along case, jurisdiction to review the order lay in the court

6. 216 S.W.3d 81, 82 (Tex. M.D.L. Panel 2006).
7. *Id.*
8. Judge Bruce Priddy now presides over the 116th District Court of Dallas County.
9. Tex. H.B. 4, 78th Leg., R.S. (2003) (ch. 204, § 23.02).
10. Brent M. Rosenthal, Misty A. Farris & Amanda R. Tyler, *Toxic Torts and Mass Torts*, 59 SMU L. Rev. 1579, 1581 (2006), describing the enactment of Tex. Civ. Prac. & Rem. Code § 90.010(a).
11. Union Carbide v. Adams, No. 03-0895 (Tex. M.D.L. Panel Nov. 29, 2005), *available at* http://www.supreme.courts.state.tx.us/MDL_Orders/2003/030895_2J.htm.
12. 186 S.W.3d 639, 640-41 (Tex. App.—Austin 2006, no pet.).

of appeals and not the MDL panel.[13] Although the case, filed in January 2004, was subject to MDL rules pursuant to Texas Government Code section 74.163, the plaintiffs failed to file a report as required by Texas Civil Practice and Remedies Code section 90.003, however, the defendants failed to transfer the case to the MDL court within thirty days of their answer, as required by the case management order entered by the asbestos MDL pretrial judge. The defendants argued that new Texas Civil Practice and Remedies Code section 90.010(b) still gave them the right to transfer this case. Nevertheless, the court concluded that the provisions of the statute did not revive the defendants' right to transfer cases after the deadline in the case management order.[14] The court further held that section 90.010(d), which provides that cases pending in the MDL court must remain there until a complying report is filed, only governed cases already pending in the MDL court; it did not create a right to transfer cases to the MDL and did not override the procedural requirements for transfer, including the deadlines in the MDL court's case management order.[15] Although the court acknowledged that the report was clearly required under section 90.003, it held that "waiting nearly six months after chapter 90 became law, five months after the case was set for trial, and until the eve of trial before raising the lack of a report as an issue or attempting to transfer the case to the MDL proceeding amounts to a waiver of such a right under the circumstances of this case and as a matter of equity."[16] Thus, the court concluded, the MDL pretrial judge did not abuse his discretion in ordering that the case be remanded for trial despite the plaintiff's failure to serve the required report.[17]

In *In re Silica Products Liability Litigation*, the Texas MDL panel held that it lacked jurisdiction to review the pretrial judge's order remanding a Jones Act case for silica-related injuries to the transferee court.[18] The plaintiff sued his former employer under the Jones Act for injuries resulting from exposure to asbestos and silica on the ship where he was employed. The defendant filed a notice of transfer in the trial court under section 90.010(b) of the Texas Civil Practices and Remedies Code based on the plaintiff's failure to file a report as required under section 90.004 for cases filed before September 1, 2003. Upon the plaintiff's objection that the Jones Act preempted the reporting requirements, the MDL pretrial court remanded the claim to the trial court. The defendant moved for a rehearing by the MDL panel, but the panel dismissed the motion for want of jurisdiction, explaining that, under Rule 13 of the Rules of Judicial Administration, the "MDL Panel's appellate jurisdiction is limited to reviewing pretrial court orders that grant or deny remand on the ground

13. *Id.* at 643 (citing Tex. R. Jud. Admin. 13).
14. *Id.* at 644.
15. *Id.*
16. *Id.* at 647.
17. *Id.* at 647-48.
18. 216 S.W.3d 87, 88 (Tex. M.D.L. Panel 2006).

that a case is or is not a tag-along case."[19] Because remand by the pretrial court was based on preemption, it was subject to review only by the court of appeals. The MDL panel also noted that its opinion was consistent with *In re Fluor Enterprises*, in which the Austin Court of Appeals determined that it had power to review an MDL pretrial remand order because the order was not based on a finding that the case was not a tag-along case.[20]

C. Orders of the State Asbestos MDL Pretrial Court

The Texas district judge overseeing the Texas multidistrict litigation for asbestos cases, Judge Mark Davidson, issued a remarkable letter opinion in *Richards v. Carver Pump* denying the defendants' motion to dismiss a case brought by a Maine resident on forum non conveniens grounds.[21] Judge Davidson first acknowledged that there was "absolutely no connection between the State of Texas and any element of negligence, causation or damages," and pondered how "any attorney could argue with a straight face that the case belongs in Texas."[22] But Judge Davidson then noted that the parties had advised him that if the case were dismissed and refiled in Maine, the defendants would remove it to federal court and the case would then be transferred to the federal MDL court in Philadelphia, Pennsylvania. The court noted the federal MDL court's reputation as a "black hole," and, citing a published opinion describing the federal MDL court's practices, stated that transfer to the federal MDL would render it "certain that Mr. Richards . . . will die without knowing whether or not his widow will get a recovery from this case."[23] With extraordinary candor, the court observed that a "system of justice that would mandate such a result has nothing to do with the concept of justice," and noted that under these circumstances it was "unable to conclude that it is in the interests of justice to decline to accept jurisdiction over this case."[24] The court advised that it might be more receptive to forum non conveniens motions in future cases "if a waiver of removal to federal court is offered by Defendants."[25]

D. Orders of the Federal Silica MDL Pretrial Court

During the last Survey period, United States District Judge Janis Graham Jack brought national attention to mass tort and toxic tort litigation with her sharp criticism of silica claim screening practices, suggesting that

19. *Id.* at 92.
20. *Id.*
21. Letter ruling in Richards v. Carver Pump, No. 2006-22, 116 (Tex. Dist. Ct. Harris Cty., Sept. 5, 2006), *available at* http://www.justex.net/Courts/Civil/CourtSection.aspx?crt=1&sid=4 (follow "ENC Ruling" hyperlink).
22. *Id.* at 1.
23. *Id.* at 2.
24. *Id.*
25. *Id.*

thousands of claims had been "manufactured for money."[26] In the current Survey period, we again find Judge Jack voicing strong words of disapproval, this time of actions taken by Texas Attorney General Greg Abbott, who seized thousands of x-rays that were under the jurisdiction of the federal MDL court.[27] In June 2006, without having requested the court's permission to access the documents, armed investigators from the Texas Attorney General's office demanded under threat of arrest that the depository turn over x-rays and other documents produced in the litigation and transported the documents from Corpus Christi to Austin. Judge Jack rebuked the Office of the Attorney General's disregard of the court's orders and commented that such conduct suggested "an unfamiliarity with the United States Constitution."[28] After the x-rays were returned, the court ordered the Texas Attorney General to identify the individuals involved in the decision to seize the documents and those who had access to the documents.[29] She further ordered that the U.S. Attorney's office for the Southern District of New York, the United States Department of Justice, and the Congressional Oversight and Investigations Subcommittee be notified regarding the removal of the documents by the Texas Attorney General and the apparent disappearance of 152 x-rays.[30]

II. DEVELOPMENTS IN CASE LAW

A. PROCEDURAL ISSUES

1. Class Certification

During the Survey period, the courts continued to approach mass tort class actions with the type of skepticism displayed by the Texas Supreme Court in *Southwestern Refining Co. v. Bernal*[31]and by the United States Supreme Court in *Amchem Products, Inc. v. Windsor*[32] and *Ortiz v. Fibreboard Corp.*[33] In *Citgo Refining and Marketing, Inc. v. Garza*, the Corpus Christi Court of Appeals revisited a Dickensian class action initially brought on behalf of property owners against Citgo and other refineries in which the plaintiffs alleged that the defendants' emission of airborne toxins diminished the value of their property.[34] The trial court certified the class in 1995; the court of appeals affirmed the decision and the Texas Supreme Court declined review of the order for want of jurisdiction. The class plaintiffs and Citgo then reached a settlement agreement and, as required by the class action rule, sought approval from the trial court. The trial court refused to approve the settlement, finding de-

26. *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 635-36 (S.D. Tex. 2005).
27. *In re* Silica Prods. Liab. Litig., No. 1553, 2006 WL 2443250, at *1-2 (S.D. Tex. Aug. 22, 2006).
28. *Id.* at *1.
29. *Id.* at *3.
30. *Id.*
31. 22 S.W.3d 425, 435 (Tex. 2000).
32. 521 U.S. 591, 629 (1997).
33. 526 U.S. 815, 838-46 (1999).
34. 187 S.W.3d 45, 50 (Tex. App.—Corpus Christi 2005, pet. abated).

fects in the allocation of the settlement proceeds to certain class members. The plaintiffs and Citgo then attempted to recast the agreement to satisfy the concerns of the trial court. In the meantime, both the factual circumstances and the legal context of the case shifted: the plaintiffs settled with the other defendants, Citgo settled with some of the class members outside the class action, and the Texas Supreme Court decided *Bernal.* Unable to persuade Citgo to agree to an amended settlement, the plaintiffs sought to enforce the original one, arguing that the allocation issues had been resolved by the intervening developments. The trial court agreed and granted summary judgment on the plaintiffs' breach of contract claim against Citgo. The court of appeals, however, reversed, finding that the plaintiffs had effectively waived their ability to enforce the settlement by engaging in "intentional and, indeed, aggressive conduct inherently inconsistent with the pursuit of rights" under the agreement.[35] In the absence of a settlement, the plaintiffs still had their class action claims against Citgo; however, the court of appeals remanded the case to the trial court directing it to reconsider Citgo's motion to decertify the class in light of the rigorous standards for class certification announced in *Bernal* and the changed factual circumstances of the case.[36]

In *Klein v. O'Neal, Inc.*, the United States District Court for the Northern District of Texas denied a motion to convert an opt-out plaintiff class certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure to a non-opt-out limited fund class pursuant to Rule 23(b)(1)(B).[37] The plaintiffs had sued manufacturers and distributors of E-Ferol Aqueous Solution, a pharmaceutical product, asserting claims of negligence, breach of warranty, products liability, and misrepresentation, after reports surfaced of deaths and serious illnesses in infants who had received the product and after the criminal convictions of the defendants for violations of the Federal Food, Drug, and Cosmetic Act. The plaintiffs reported that during discovery, information regarding the large number of class members raised concerns as to whether the funds available would be sufficient to satisfy all claims. Citing *Ortiz v. Fibreboard Corp.*,[38] the court observed that "denial of both Seventh Amendment jury trial rights and Fifth Amendment due process principles regarding the right to a 'day in court' are implicated in aggregating mass torts" and emphasized the requirement set forth by the Supreme Court that the totals of the aggregated claims and the fund available for satisfying them demonstrate the inadequacy of the fund.[39] Recognizing that "constitutional concerns m[ight] prove less burdensome in the certification of a litigation class" such as the present case, rather than a settlement class as seen in *Ortiz*, the court nevertheless determined that the holding in *Ortiz* was not limited to set-

35. *Id.* at 65.
36. *Id.* at 80.
37. No. 7:03-CV-102-D, 2006 WL 325766, at *6 (N.D. Tex. Feb. 13, 2006).
38. 527 U.S. 815, 838-46 (1999).
39. *Klein*, 2006 WL 325766, at *2-3.

tlement classes.[40] As the case before the court was not a mature tort and there was no evidence of jury verdicts, the court rejected the plaintiffs' argument that the total value of the aggregated claims could be reliably estimated.[41] Further, the court found that the plaintiffs had failed to demonstrate the size of the fund available to satisfy the claims.[42]

In *Norwood v. Raytheon Co.*, the United States District Court for the Western District of Texas declined to certify a class of radar technicians, operators, and mechanics who alleged that they suffered injuries as a result of exposure to radiation caused by radar devices, finding that common issues did not predominate over individual issues.[43] The plaintiffs sought certification of an "issues class," proposing that three issues—the government contractor defense, general causation, and general negligence—be decided on a class-wide basis and the remaining issues be adjudicated individually. The court first considered whether the certification of an issues class would allow the plaintiffs to isolate individual issues so as to reduce or eliminate the significance of the predominance inquiry. Quoting from *Castano v. American Tobacco Co.*,[44] the court pointed out that "each 'cause of action, as a whole, must satisfy the predominance requirement,'" and that the court "must balance the severed common issues against the remaining individual issues to determine whether the common issues predominate. . . ."[45] In considering the individual issues, the court observed that potential plaintiffs alleged different injuries arising from radiation exposure in different geographical locations over a thirty-six year period through the use of many different types of radar equipment and radar systems. The court also determined that the application of various state and foreign laws would further complicate the adjudication of the legal issues in a worldwide class action.[46] Finally, the court noted that plaintiffs had not shown that the proffered common issues would be central to the litigation.[47]

2. *Consolidation*

In this Survey period, the courts appeared hostile to consolidation of even the smallest grouping of toxic tort cases. In *In re Shell Oil Co.*, the Beaumont Court of Appeals conditionally granted a petition for writ of mandamus challenging a trial court's order consolidating for trial the cases of two petrochemical workers who were allegedly injured by exposure to benzene at the petrochemical plants where they worked.[48] The court of appeals applied the so-called Maryland factors adopted by the

40. *Id.* at *3-4.
41. *Id.* at *5.
42. *Id.* at *6.
43. 237 F.R.D. 581, 601 (W.D. Tex. 2006).
44. 84 F.3d 734, 745 n.21 (5th Cir. 1996).
45. *Norwood*, 237 F.R.D. at 589.
46. *Id.* at 589, 600.
47. *Id.* at 601.
48. 202 S.W.3d 286, 272 (Tex. App.—Beaumont 2006, no pet. h.).

Texas Supreme Court in *In re Ethyl Corp.*[49]—including the commonality or similarity of the plaintiffs' exposure sites, the plaintiffs' occupations, the time of their exposure, the type of diseases alleged, the type of cancer specifically, the status of discovery, the identity of counsel, and whether the plaintiffs were living or deceased—in considering whether the joint trial of the two cases would be unduly prejudicial. The court determined that the differences between the plaintiffs' circumstances of exposure outweighed the similarities, and that medical differences (the defendants contended that the two workers suffered from different types of cancer, and one was alive and the other deceased) also militated against consolidation. While the court acknowledged that two of the factors—commonality of representation and the status of discovery—favored consolidation, those factors were to be given less weight and, therefore, were insufficient to support consolidation in light of the factual differences.[50]

3. *Personal Jurisdiction*

In *Verizon California Inc. v. Douglas*, the First District Court of Appeals in Houston ruled that a California company did not have minimum contacts with Texas sufficient for the state's long-arm statute to confer general jurisdiction on the state's courts.[51] The plaintiff filed a wrongful death action against Verizon California, Inc. and other defendants in Galveston County District Court, alleging that the decedent, her mother, had been exposed to asbestos fibers from the work clothes of the plaintiff's father who was employed by the company while living in California. The defendant made a special appearance, which the trial court denied, and the defendant took an interlocutory appeal from the denial. The court of appeals found that the defendant's contacts with Texas, including its parent company's operation of a Texas office, the physical presence of a corporate officer in Texas, and the issuance of a corporate tariff statement from a Texas address were insufficient to support the exercise of general jurisdiction.[52]

4. *Forum Non Conveniens*

In *Bund Zur Unterstutzung Radargeschadigter E.V. v. Raytheon Co.*, the United States District Court for the Western District of Texas declined to dismiss on forum non conveniens grounds a mass tort class action seeking damages for injuries sustained by German and American military personnel from exposure in Germany to ionizing radiation emitted from the defendants' radar devices.[53] The defendants, which were

49. 975 S.W.2d 606, 614-16 (Tex. 1998).
50. *In re Shell Oil*, 202 S.W.3d at 291-92.
51. No. 01-05-00707-CV, 2006 WL 490888, at *7 (Tex. App.—Houston [1st Dist.] Mar. 2, 2006, no pet.).
52. *Id.* at *5-7.
53. No. EP-04-CV-127-PRM, 2006 WL 3197645, at *11-12 (W.D. Tex. Aug. 30, 2006).

incorporated or maintained their principal places of business in the United States, argued that private and public interest factors supported dismissal of the case with an opportunity to refile in Germany. With regard to private interest factors, the defendants argued that evidence regarding exposure, the German government's knowledge of radiation risks, and the plaintiffs' awareness of the likely cause of their injuries would be found primarily in Germany. The court acknowledged that evidence on these issues would be found in Germany, but observed that considerable relevant evidence would be found in the United States as well. The court also noted that burdens related to compelling attendance of foreign witnesses and transporting willing witnesses to court would exist in either forum. The only private interest factor that might favor dismissal, the court observed, was the defendant's inability to implead foreign parties. Giving appropriate deference to the plaintiffs' choice of forum, the court determined that private interest factors did not weigh in favor of dismissal.[54] In evaluating the public interest factors, the court determined that "'the local community had a substantial interest in' the resolution of claims of American citizens and El Paso residents against American corporations," that there was no evidence that a German forum would be faced with a less congested docket, and that the problems of resolving conflicts of law and application of foreign law would arise in either forum.[55] Thus, the court concluded that neither private nor public interest factors weighed in favor of dismissal.[56]

5. Discovery

In *In re Graco Children's Products*, the Texas Supreme Court continued its pattern of confining discovery in a products liability case to the product that caused the injury alleged in the case rather than allowing discovery regarding all similar products to expose business practices or the corporate state of mind.[57] In *Graco*, the plaintiff sued the manufacturer of an infant car seat alleging that defects in the harness clip of the seat failed to restrain her infant son during a roll-over car accident. The plaintiff sought discovery related to the recent announcement of a $4 million civil penalty imposed on the defendant by the Consumer Products Safety Commission. The penalty was based on numerous defects in the company's products, but did not identify any violation involving the harness buckles or the car seat at issue. The supreme court concluded that because the products identified in the sanction announcement were not shown to be similar to the product that caused the plaintiff's injury, the discovery request was not reasonably tailored to the relevant product defect.[58] Although the plaintiff argued that the documents would allow her

54. *Id.* at *6-9.
55. *Id.* at *10-11.
56. *Id.* at *11-12.
57. 210 S.W.3d 598, 598 (Tex. 2006).
58. *Id.*

to determine whether other products had harnesses like the one at issue, the supreme court determined that there were more narrowly tailored means of obtaining that information.[59] The plaintiff also argued that such discovery was relevant to show that the manufacturer failed to test its products for rollovers, but the supreme court observed that, because the defendant had already conceded that fact, additional discovery on the issue would not have a tendency to make consequential facts more or less probable.[60] Finally, in response to plaintiff's argument that the documents would provide relevant information on the corporate defendant's "state of mind," the supreme court acknowledged that the corporate defendant's state of mind regarding a particular product may be discoverable, but it rejected plaintiff's attempt to inquire into every product the defendant made.[61]

6. Jury Selection

In *Brooks v. Armco, Inc.*, the Texarkana Court of Appeals upheld a defense verdict in an asbestos case, finding that the trial court did not abuse its discretion in refusing to strike certain jurors for cause or in limiting cross-examination of the defendant's counsel regarding his reasons for striking some panel members.[62] The court of appeals also found that it was not error for the trial court to allow the defendant a substituted peremptory strike in place of a strike that was voided because it was made on a discriminatory basis. The court added that, even if the trial court had erred in allowing the strike, the error was harmless given that all twelve jurors found for defendants, and only ten of twelve votes were necessary to support the verdict reached.[63]

7. Admissibility and Sufficiency of Scientific Evidence of Causation

In the last Survey, we reported that in *Borg-Warner Corp. v. Flores*, the Corpus Christi Court of Appeals affirmed the judgment in favor of the plaintiff in an asbestos case, holding that the evidence was sufficient to support the jury's finding that the manufacturer was negligent and that the defendant acted with malice.[64] During the current Survey period, the Texas Supreme Court granted review in *Borg-Warner Corp. v. Flores* and heard oral argument on September 26, 2006. At trial, Arturo Flores, an automobile mechanic, alleged that exposure to dust produced by grinding the defendant's asbestos-containing disk brake pads caused his asbestosis. The court of appeals affirmed, finding that the plaintiff presented evidence that (1) the brake products contained asbestos fibers, (2) the brake products, when ground, can emit dust containing respirable asbestos fi-

59. *Id.*
60. *Id.*
61. *Id.* at 601.
62. 194 S.W.3d 661, 668 (Tex. App.—Texarkana 2006, pet. denied).
63. *Id.* at 667.
64. Borg-Warner Corp. v. Flores, 153 S.W.3d 209, 215-17 (Tex. App.—Corpus Christi Dec. 16, 2004), *rev'd*, No. 05-0189, 2007 WL 16505784 (Tex. June 8, 2007).

bers that can cause asbestosis, and (3) the plaintiff suffers from asbestosis. Based on those findings, the court concluded that there was more than a scintilla of evidence on causation.[65] The court of appeals also concluded that the brake manufacturer's failure to invest in research regarding the health effects of asbestos despite the widely known danger of asbestos was more than a scintilla of evidence of malice supporting the imposition of punitive damages.[66] The supreme court is currently reviewing the court of appeals' rulings that the evidence was legally sufficient to support the jury's findings of causation and malice.

In *Dori v. Bondex International, Inc.*, the Eastland Court of Appeals affirmed a judgment in favor of the defendant based on a jury verdict awarding no damages to the plaintiff, notwithstanding the jury's finding that a design defect in the asbestos-containing joint compound product manufactured by the defendant was a producing cause of the plaintiff's asbestos-related injuries.[67] On appeal, the plaintiff argued that the jury's finding that a design defect caused the plaintiff's injuries required it to award *some* damages and that the jury's failure to award damages was, therefore, against the great weight and preponderance of the evidence. The court of appeals disagreed, finding that the defendant's evidence concerning the duration and proximity of the plaintiff's exposure to Bondex joint compound in support of its contention that the plaintiff's mesothelioma was not caused by exposure to Bondex was sufficient to support the jury's finding of no damages.[68] The court also observed that the plaintiff's factual sufficiency challenge was actually a complaint that the jury's answers regarding causation and damages were in conflict, but that the plaintiff had waived that issue by failing to raise it before the jury was discharged.[69]

In *Mobil Oil Corp. v. Bailey*, the Beaumont Court of Appeals reversed a judgment based on a jury verdict in favor of plaintiffs who claimed that their decedent's lung cancer was caused by exposure to asbestos on the defendant's premises.[70] The primary inquiry on appeal was whether the plaintiffs' expert opinion that the decedent's lung cancer was caused by his asbestos exposure was scientifically reliable in the absence of other indicators that the decedent was significantly exposed to asbestos, such as the presence of asbestos fibers in the decedent's lung tissue, x-ray evidence of lung scarring, or pleural thickening. The court found one study cited by the plaintiffs' expert, which suggested that "asbestos is associated with lung cancer even in the absence of radiologically apparent pulmonary fibrosis,"[71] to satisfy the standards of admissibility of epidemiologi-

65. *Id.* at 215.
66. *Id.* at 217.
67. No. 11-04-00179-CV, 2006 WL 1554614, at *1, *8 (Tex. App.—Eastland June 08, 2006, no pet.).
68. *Id.* at *8.
69. *Id.* at *3.
70. 187 S.W.3d 265, 266 (Tex. App.—Beaumont 2006, pet. denied).
71. *Id.* at 274-75.

cal evidence described by the Texas Supreme Court in *E.I. duPont de Nemours & Co. v. Robinson*[72] and *Merrell-Dow Pharmaceuticals, Inc. v. Havner.*[73] But the court determined that the single reliable study cited by the expert was insufficient to raise a fact issue on causation because the plaintiffs' experts failed to explain other epidemiological studies which yielded contrary results and failed to negate with reasonable certainty the smoking history of the decedent as a plausible cause of his lung cancer. The court concluded that the plaintiffs' medical causation testimony was unreliable, inadmissible, and insufficient to support the jury's verdict.[74] Justice Gaultney dissented, opining that a learned treatise offered by the plaintiffs should have been considered because the defendant failed to make a specific objection as to its reliability when it was offered into evidence, and finding that more than a scintilla of evidence supported the jury verdict.[75]

In *Matt Dietz Co. v. Torres*, the San Antonio Court of Appeals reversed a judgment based on a jury verdict in favor of employee Modesto Torres, who had alleged that occupational exposure to dangerous pesticides used during farming operations caused his laryngeal cancer.[76] The court rejected the testimony of plaintiff's expert regarding general causation because the study upon which he relied for his opinion reported an increased rate of laryngeal cancer among farm workers generally, but did not identify any specific substances as having a statistically significant association with laryngeal cancer. The court also found that there was no evidence of specific causation, as no reliable basis supported the expert testimony regarding the level of the worker's exposure to hazardous substances, and there was no evidence that his exposure was comparable to or greater than that of subjects involved in any of the studies in the record.[77]

B. Substantive Issues

1. Duty to Household Members

It has long been axiomatic that the peculiar characteristics of asbestos have required courts in Texas and elsewhere to apply legal principles to fact situations unanticipated by the courts and legislatures that developed those principles. The tendency of asbestos to cause disease only after many years following exposure required courts to grapple with and clarify the "discovery rule" in applying the statute of limitations.[78] The typical

72. 923 S.W.2d 549, 557 (Tex. 1995).
73. 953 S.W.2d 706, 714-24 (Tex. 1997)
74. *Mobil Oil Corp.*, 187 S.W.3d at 774.
75. *Id.* at 275-80 (Gaultney, J., dissenting).
76. 198 S.W.3d 798, 801-05 (Tex. App.—San Antonio 2006, pet. denied).
77. *Id.* at 804-05.
78. *See, e.g.*, Strickland v. Johns-Manville Int'l Corp., 461 F. Supp. 215, 216-19 (S.D. Tex. 1978) (applying discovery rule to claims of asbestos-related diseases); Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643, 653 (Tex. 2000) (applying separate limitations periods for separate diseases caused by the same asbestos exposures).

scenario of exposure, involving a plaintiff exposed to dozens (perhaps hundreds) of different asbestos-containing products during a long career, forced courts to consider novel issues of causation and apportionment of damages.[79] The synergistic effect produced by asbestos exposure and tobacco use presented courts with a new context in which to apply the doctrine of comparative responsibility.[80]

In this Survey period, the Texas courts encountered yet another unfortunate characteristic of asbestos: its ability to cause disease away from the place where it was used in persons other than the user. In *Exxon Mobil Corp. v. Altimore*, the plaintiff alleged that she developed mesothelioma as a result of her exposure to asbestos brought home on her husband's work clothes.[81] The plaintiff's husband was exposed to asbestos while working as a machinist at an Exxon refinery from 1942 until 1972. The plaintiff alleged that Exxon was negligent in allowing her husband to work around asbestos and to leave its premises with work clothes contaminated by asbestos. Exxon countered that the risk to the plaintiff was not foreseeable and that it thus owed no duty to protect her from the risk of asbestos exposure. The jury found for the plaintiff and awarded her compensatory and punitive damages. After offsetting the compensatory award by the amounts of settlements from other defendants, the trial court entered judgment for the plaintiffs.

Courts in other jurisdictions have split on the issue of whether a premises owner or employer could be liable for asbestos-related injuries sustained by a household member of the person initially exposed to asbestos, with Louisiana and New Jersey allowing such claims and Georgia and New York finding no liability.[82] The Fourteenth District Court of Appeals in Houston joined those jurisdictions siding with the defendant, reversing the judgment and rendering judgment for Exxon on the theory that the risks of household exposure were unforeseeable until after the period of the plaintiff's exposure to asbestos.[83] In reaching its decision the court engaged in a fact-intensive inquiry, framing the question of duty as "what did Exxon know about the risks associated with asbestos expo-

79. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094 (5th Cir. 1973) (holding that each defendant's product was a cause-in-fact to some injury sustained by the plaintiff and that defendants were jointly and severally liable for plaintiff's damages); Gaulding v. Celotex Corp., 772 S.W.2d 66, 68, 71 (Tex. 1989) (rejecting theories of alternative liability, concert of action, enterprise liability, and market-share liability in case in which manufacturer of product could not be identified).

80. *See, e.g.*, Owens-Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467, 475-79 (Ky. 2001), Champagne v. Raybestos-Manhattan, Inc., 562 A.2d 1100, 1118 (Conn. 1989) *and* Brisboy v. Fibreboard Corp., 418 N.W.2d 650, 655-56 (Mich. 1988) (all allowing jury to consider plaintiff's smoking as comparative negligence in asbestosis case).

81. No. 14-04-01133-CV, 2006 WL 3511723, at *1 (Tex. App.—Houston [14th Dist.] Dec. 7, 2006, no pet.).

82. *Compare* Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006) *and* Zimko v. Am. Cyanamid, 905 So. 2d 465, 482-83 (La. Ct. App. 2005) *with* CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 209 (Ga. 2005) and Holdampf v. A.C. & S., Inc. (In re N.Y.C. Asbestos Litig.), 840 N.E.2d 1115, 1116 (N.Y. 2006).

83. *Altimore*, 2006 WL 3511723, at *8.

sure, and when did Exxon know it. . . ."[84] The court concluded that Exxon was not "put on notice" of the risk of exposure to asbestos-laden work clothes until 1972, when OSHA promulgated regulations prohibiting employers from allowing workers who had been exposed to asbestos to wear their work clothes home.[85] The court explicitly rejected the plaintiff's argument that under Texas law, "knowledge of a risk of harm to someone, creates a duty of care to everyone."[86]

2. *Duty of Successor Corporation/Provider of Safety Services*

In *Wortham v. Dow Chemical Co.*, the Fourteenth District Court of Appeals in Houston affirmed a summary judgment holding that Dow Chemical was not the successor-in-interest to Dow Badische and therefore was not liable for the decedent's lung cancer and death resulting from exposure to asbestos at the premises of Dow Badische.[87] On appeal, the plaintiffs argued that Dow Chemical had failed to negate their claim that Dow Chemical and Dow Badische were a "single business enterprise," but the court of appeals did not consider the argument because the plaintiffs had not pled or otherwise raised the single business enterprise theory in the trial court.[88] The court added that the plaintiffs had shown no basis for successor liability because they presented no evidence that Dow Chemical owned the Dow Badische premises at the time of Wortham's exposure or that Dow Chemical had ever operated the Dow Badische facility.[89] The court further noted that the fact that Dow Chemical provided health and safety services to the worker's employer did not preclude summary judgment because there was no evidence that the worker's injuries were caused by Dow Chemical's negligence in providing those services.[90]

3. *Products Liability—Adequacy of Warning*

In *McNeil v. Wyeth*, the United States Court of Appeals for the Fifth Circuit applying Texas law reversed a summary judgment in favor of a drug manufacturer, finding a genuine dispute concerning the adequacy of warnings provided for the prescription drug Reglan.[91] The district court had held that the adequacy of the label was established as a matter of law because the label specifically mentioned the risk of developing the condition suffered by the plaintiff (tardive dyskinesia). The Fifth Circuit disagreed, explaining that when the manufacturer warns a learned intermediary of a lower risk than the actual risk, the warning could be

84. *Id.* at *3.
85. *Id.* at *8.
86. *Id.*
87. 179 S.W.3d 189, 200 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, no pet.).
88. *Id.* at 196.
89. *Id.* at 203.
90. *Id.*
91. 462 F.3d 364, 373 (5th Cir. 2006).

rendered misleading and ineffective.[92] The court found that genuine issues of fact existed as to whether there were significant differences between the disclosed risk and the actual risk of developing tardive dyskinesia following long-term use of the drug. In reaching this conclusion, the court found that the defendant was, or should have been, aware that the majority of Reglan sales were for off-label long-term use despite product indication for use not longer than twelve weeks.[93]

4. Medical Monitoring

In *Norwood v. Raytheon Co.*, the United States District Court for the Western District of Texas predicted that the Texas Supreme Court would not recognize medical monitoring as an independent cause of action.[94] The named plaintiffs sought certification of a class consisting of radar operators, technicians, and mechanics exposed to radiation "but *not yet affected* with an illness or injury caused by such exposure."[95] The district court noted that in *Temple-Inland Forest Products Corp. v. Carter*,[96] the Texas Supreme Court rejected a claim for mental anguish damages resulting from exposure to asbestos in the absence of physical injuries. The court found the policy considerations cited in the *Temple-Inland* decision—difficulty of evaluating the seriousness of the claims, the unpredictability of liability, and the potential competition with manifest physical injury claims for judicial resources—to be equally applicable to claims seeking damages for medical monitoring claims. The court also acknowledged the Fifth Circuit's reluctance to create a cause of action not currently recognized in the forum state. The court thus dismissed the plaintiffs' complaint for failure to state a claim.[97]

5. Constitutional Issues in Application of Legislation

In *Robinson v. Crown Cork & Seal Co.*, the Fourteenth District Court of Appeals in Houston rejected a challenge under the Texas Constitution to a statute contained in and passed with House Bill 4 capping the liability for asbestos-related injuries of certain successor corporations.[98] The plaintiffs alleged that Mr. Robinson developed mesothelioma as a result of exposure to asbestos while working on machinery and equipment lined with asbestos products, including products made by the predecessor of defendant Crown Cork & Seal. While the plaintiffs' suit was pending, the Texas Legislature passed House Bill 4 which included a new affirmative defense limiting the liability of successor corporations for asbestos-related claims, now codified in Chapter 149 of the Texas Civil Practice &

92. *Id.* at 368.
93. *Id.* at 369.
94. 414 F. Supp. 2d 659, 667 (W.D. Tex. 2006).
95. *Id.* at 661 (quoting plaintiffs' pleadings).
96. 993 S.W.2d 88, 92-93 (Tex. 1999).
97. *Norwood*, 414 F. Supp. 2d at 668.
98. No. 14-04-00658-CV, 2006 WL 1168782, at *1 (Tex. App.—Houston [14th Dist.] May 4, 2006, pet. filed).

Remedies Code. The stated purpose of the statute is to limit cumulative "successor asbestos-related liabilities" to the total gross assets of the transferor corporation at the time of merger or consolidation.[99] After the statute became effective, the trial court granted summary judgment in favor of Crown Cork based on proof that already paid out damages exceeding the cap. The plaintiffs appealed, arguing that the application of the cap to a cause of action that had already accrued was unconstitutionally retroactive because it extinguished a vested right. The court of appeals disagreed, holding that the statute "was a valid exercise of the Legislature's police power and that the beneficial reasons for its enactment outweigh the negative impact on [the plaintiff's] right to address the untimely death of her husband" and adding that "the Statute benefited the State as a whole and is not a special law."[100] Justice Kem Thompson Frost dissented, maintaining that the language in Section 29 of the Texas Bill of Rights expressly withholds from the Legislature the authority to enact retroactive laws in violation of section 16 of the Texas Bill of Rights and finding that the statute in question was unconstitutionally retroactive as applied.[101]

6. Insurance Coverage

In *Samsung Electronics America, Inc. v. Federal Insurance Co.*, the Dallas Court of Appeals affirmed in part and reversed in a declaratory judgment holding that an insurer had no duty to defend or indemnify a manufacturer of cellular phones in two class actions in which the plaintiffs alleged that the manufacturer was liable for misrepresentation and unjust enrichment in marketing its products and services.[102] In one of the cases the plaintiffs specifically alleged that class members had sustained "biological injury" and "cellular dysfunction"; in the other the plaintiffs disclaimed damages for personal injuries. The court of appeals noted that courts have held that allegations of injury at the cellular level triggers a duty to defend under the typical "bodily injury" provision in an insurance contract, while other courts have refused to find coverage for claims alleging a mere risk of future disease but no current physical harm.[103] Finding these authorities persuasive, the court found coverage for the class action in which the plaintiffs alleged cellular damage, and found no duty to defend or indemnify in the case in which the class disclaimed damages for personal injuries.[104]

99. TEX. CIV. PRAC. & REM. CODE ANN. § 149.004.
100. *Robinson*, 2006 WL 1168782, at *17.
101. *Id.* at *17-26 (Frost, J., dissenting).
102. 202 S.W.3d 372, 374 (Tex. App.—Dallas 2006, pet. filed).
103. *Id.* at 383.
104. *Id.* at 383-84.