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Toxic Torts and Mass Torts

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IN last year's Survey, we noted that over the past four years the courts in Texas had gradually curtailed remedies available to persons claiming harm from toxic substances and seeking redress for mass torts. We queried whether the courts "finally achieved an equilibrium in balancing the rights of plaintiffs and defendants in toxic and mass tort litigation" or whether they "still perceive the need for additional procedural and substantive restraints on such claims."[1]

In the summer of 2007, the Texas Supreme Court provided a dramatic answer. In *Borg-Warner Corp. v. Flores*,[2] the supreme court unanimously reversed a modest award for a plaintiff claiming damages for a nonmalignant asbestos-related disease, holding that the plaintiff had not presented legally sufficient evidence that exposure to asbestos from the defendant's product was a "substantial factor" in causing his injury. The decision conclusively disproved the assumption long held by practitioners that the plaintiff in an asbestos case satisfies his burden of production if he can show that "the defendant supplied *any* of the asbestos to which the plaintiff was exposed."[3] *Borg-Warner* was quickly followed by the Texas Supreme Court's opinion in *In re Allied Chem. Corp.*[4] In that case, the supreme court held that a trial court cannot set a mass tort case for trial until the plaintiff identifies an expert who will testify that a particular defendant's product or substance caused the plaintiff's specific injuries.[5] The decision effectively creates, in the words of one dissent, "an inactive

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1. Brent M. Rosenthal, Misty A. Farris, & Sharon D. Bautista, *Toxic Torts and Mass Torts*, 60 SMU L. REV. 1345, 1346 (2007).

2. 232 S.W.3d 765 (Tex. 2007) (decided June 8, 2007).

3. *Id.* at 773 (emphasis supplied by court) (quoting the court of appeals' opinion).

4. 227 S.W.3d 652 (Tex. 2007) (decided June 15, 2007).

5. *Id.* at 652.

docket" for mass tort cases like this one.[6]

National law firms representing defendants in toxic and mass tort litigation duly reported these developments on their websites, with one firm declaring that these decisions "signal a significant re-shaping of toxic tort and mass tort litigation in Texas."[7] One publication company sponsored a full-day seminar on the sole topic "Life after *Borg-Warner v. Flores*."[8]

Neither state nor federal legislatures enacted any statutes specifically addressing toxic or mass tort legislation during the Survey period. But it is undoubtedly true that the decisions of the Texas Supreme Court, and similar decisions of the courts of appeals described in this article, have significantly altered the landscape for toxic and mass tort litigation in Texas.

I. TEXAS MULTIDISTRICT LITIGATION TRANSFERS AND PROCEEDINGS

In 2003, the Texas Legislature enacted the Texas Multidistrict Litigation ("MDL") Statute to authorize the transfer of multiple cases involving the same parties and issues to a single Texas district court for consolidated or coordinated pretrial proceedings.[9] Although neither the statute nor its legislative history identify mass tort litigation as a particular target of the enactment, observers typically consider complex mass tort cases—often involving hundreds of plaintiffs asserting virtually identical allegations against the same defendants—to be most suitable for MDL transfer.[10] The first transfers pursuant to the Texas MDL statute were the asbestos cases, the silica cases, and the Firestone tire tread separation cases[11]—quintessential mass tort litigation.

But in this Survey period, the Texas MDL panel did not transfer any actual or potential mass personal injury case to a pretrial court for coordinated proceedings. It did receive a suggestion to transfer cases pending in Tarrant and Burleson Counties in which the plaintiffs alleged that they had developed diseases as a result of exposure to chemicals at a railroad

6. *Id.* at 664 (Jefferson, C.J., dissenting).

7. "Leveling the Playing Field in Mass Tort Litigation: Texas Mass Tort Plaintiffs Required to Present Causation Evidence Prior to Trial Setting," Latham & Watkins LLP website, http://www.lw.com/Resources.aspx?page=ClientAlertDetail&publication=1921.

8. "Texas Asbestos & Silica Litigation: *Life After Borg-Warner v. Flores*," Oct. 16, 2007, HarrisMartin Publishing Co., described at http://www.harrismartin.com/conference detail.cfm?confid=47.

9. TEX. GOV'T CODE ANN. §§ 74.161-63 (Vernon 2005) are modeled after the federal multistate litigation statute, 28 U.S.C.A. § 1407 (West 2005).

10. *See* Lynne Liberato & Laurie Ratliff, *Not Just for Toxic Tort Cases: Strategic Use of Multidistrict Litigation Consolidation*, 71 TEX. B.J. 98, 99 (Feb. 2008) ("[M]ost expect pretrial transfers under Rule 13 to be in mass tort cases with hundreds of cases and virtually identical allegations. . . .").

11. Union Carbide v. Adams, 166 S.W.3d 1 (Tex. Jud. MDL Panel 2003); *In re* Silica Prods. Liab. Litig., 166 S.W.3d 3 (Tex. Jud. MDL Panel 2004); *In re* Firestone/Ford Litig., 166 S.W.3d 2 (Tex. Jud. MDL Panel 2004).

tie treatment plant in Somerville, Texas, which it summarily denied.[12] It also denied a motion to transfer twenty cases involving personal injuries sustained by maritime workers aboard various company dredges to a single pretrial court, noting that the cases involved plaintiffs "injured at different times, in different states, on different vessels, while engaging in different activities, resulting in different injuries."[13] And it granted a request to transfer ninety-one claims—including several wrongful death claims and many more property damage claims—arising out of a massive fire in the Texas Panhandle allegedly caused by the negligence of oil and gas operators in maintaining their electrical wires and equipment.[14] But it did not consider, or even receive, any request to transfer the type of classic mass tort, involving hundreds or thousands of claims involving injuries allegedly caused by a defective consumer or industrial product, or a medical drug or device, or a toxic waste site, that it had considered in previous years.

The reason for this dearth of MDL transfer requests of mass tort cases is difficult to prove but hard to dispute: mass tort plaintiffs have been discouraged from filing claims in Texas by years of adverse rulings and legislation. Because the plaintiffs bar perceives Texas state courts to be inhospitable to mass and toxic tort plaintiffs, it has chosen to pursue such cases, if at all, in other jurisdictions. As a result, the Texas MDL Panel did not entertain a single motion to transfer a mass tort to a district court for coordinated pretrial proceedings, as it had in prior years.

MDL pretrial courts already presiding over mass tort cases avoided making any sweeping global legal rulings, largely focusing on managing discovery and remanding cases for trial. An exception was the asbestos MDL pretrial court's decision on summary judgment motions on the issue of causation asserted by the defendants in the wake of the Texas Supreme Court's landmark decision in *Borg-Warner Corp. v. Flores*. Both *Borg-Warner* and the MDL pretrial court's application of the decision are discussed in detail later in this article.

II. DEVELOPMENTS IN CASE LAW

A. Procedural Issues

1. Class Certification

In previous years, Texas courts provided a key arena for the debate on whether mass torts can be resolved through the class action device. A series of opinions from the Texas Supreme Court, beginning with *South-*

12. *In re* The Somerville R.R. Tie Treatment Plant, MDL No. 07-0380, *available at* http://www.supreme.courts.state.tx.us/MDL_Orders/2007/070380order.pdf (July 10, 2007).

13. *In re* Pers. Injury Litig. Against Great Lakes Dredge & Dock Co., LLC, MDL No. 07-0025, *available at* http://www.supreme.courts.state.tx.us/MDL_Orders/2007/070025op.pdf (July 25, 2007), at *2.

14. *In re* Cano Petroleum, No. 07-0593 (order entered Sept. 25, 2007) *available at* http://www.supreme.courts.state.tx.us/MDL_Orders/2007/070593op.pdf (Jan. 2, 2008).

western Refining Co. v. Bernal[15] and continuing in non-mass tort cases such as *BMG Direct Marketing, Inc. v. Peake*,[16] appears to have put that debate to rest: the consensus view among practitioners is that the typical mass tort simply presents too many significant individual issues for the case to qualify as a certifiable class action under Rule 42 of the Texas Rules of Civil Procedure.[17] Consequently, neither the Texas Supreme Court nor the Texas appellate courts issued any decisions concerning the propriety of an order certifying a class action in a mass tort case. Instead, the courts have turned their attention to other procedural issues typical in mass and toxic tort litigation, including the timing and number of cases that may be set for trial, the scope of discovery appropriate in a complex toxic tort case, the standing of parties to sue and the availability of mandamus to correct defects in standing, the venue permissible for a toxic tort case, the application of the statute of limitations to a claim based on latent injury, and the availability of federal removal jurisdiction.

2. *Case Management / Discovery Issues*

In *In re Allied Chemical Corp.*,[18] the majority continued the Texas Supreme Court's trend of discouraging the use of consolidation to resolve "immature" mass torts, while the dissent questioned the use of an extraordinary remedy for an issue that had become moot.[19] Nearly 1,900 plaintiffs sued thirty defendants for exposure to chemicals from sites where pesticides had been mixed or stored.[20] Five years after filing, the trial court set the first trial for five plaintiffs who varied by age, distance from exposure site, years of exposure, and types of injury.[21] Shortly thereafter, the supreme court issued *In re Van Waters & Rogers, Inc.*,[22] reversing "the same kind of order in the same kind of case in the same county."[23] Pointing out that it has allowed consolidated trials for mature torts such as asbestos, the supreme court urged "extreme caution" in consolidating trials of immature mass tort claims.[24] The defendants brought the *Van Waters* opinion to the attention of the trial court, but the court declined to change the trial setting, and the Corpus Christi Court of Appeals denied mandamus. When the supreme court stayed the case and requested full briefing, the plaintiffs "retreated," seeking to proceed to trial on just one plaintiff's claims.[25]

Rejecting the dissent's conclusion that this rendered the issue moot, the Texas Supreme Court, in an opinion by Justice Brister, stated it would not

15. 22 S.W.3d 425 (Tex. 2000).
16. 178 S.W.3d 763 (Tex. 2005).
17. *See* TEX. R. CIV. P. 42.
18. 227 S.W.3d 652 (Tex. 2007).
19. *Id.* at 654, 664-66.
20. *Id.* at 654.
21. *Id.*
22. 145 S.W.3d 203, 211 (Tex. 2004).
23. *Allied Chem.*, 227 S.W.3d at 654.
24. *Van Waters*, 145 S.W.3d at 208.
25. *Allied Chem.*, 227 S.W.3d at 654.

encourage parties "to manipulate pretrial discovery to evade appellate review."[26] The court found the issue paralleled that in *Able Supply Co. v. Moye*:[27] the plaintiffs in a complex mass tort case had failed to identify the medical experts who could identify the link between the plaintiffs' diseases and the defendants' products.[28] The supreme court noted that although it generally does not consider interlocutory complaints about trial settings, it did in *Able Supply*, and must do so in this case for three reasons. First, the discovery order imposes a disproportionate burden on one party; the burden of making thirty defendants prepare "in the dark" for 1,900 claims outweighs the benefit of giving the plaintiffs more time, after five years, to decide what injured them.[29] Second, the denial of discovery "goes to the heart of a party's case."[30] Third, the discovery order severely compromises a party's ability to present a case at trial, as this is a complex case and a bellwether trial.[31] The supreme court prohibited setting "any of the plaintiffs' claims for trial until the defendants have a reasonable opportunity to prepare for trial after learning who will connect their products to plaintiffs' injuries."[32] In his concurrence, Justice Hecht reiterated the supreme court's concern with perceived patterns of abuse in this type of case and the risk that such abuse will coerce settlements irrespective of the merits of the claims.[33]

In dissent, Chief Justice Jefferson, joined by Justices O'Neill, Wainwright, and Johnson, found the issue moot because nearly two years earlier the plaintiffs supplemented their discovery responses, identifying causation witnesses and producing expert reports.[34] Moreover, although the Texas Supreme Court had conditionally granted the writ to resolve an *Able Supply* issue, that issue was not actually before the supreme court in the current case, as the defendants never claimed plaintiffs' supplementation was inadequate. In contrast, the *Able Supply* plaintiffs had refused to answer, and the trial court had declined to compel, interrogatory answers. Nevertheless, the dissent complained, the majority used this case "to create a procedural rule that, for the first time, creates an inactive docket for 'complex mass tort cases like this one.'"[35] The dissent suggested that the problem perceived by the majority would best be resolved by rulemaking procedures or legislation, not judicial decree.[36] In his own dissent, Justice Wainwright added that if the court does "not require litigants to avail themselves of the existing avenues for relief before seeking unique and extraordinary mandamus remedies, then mandamus relief will

26. *Id.* at 655 (Brister, J., dissenting).
27. 898 S.W.2d 766 (Tex. 1995).
28. *Allied Chem.*, 227 S.W.3d at 656.
29. *Id.* at 658.
30. *Id.*
31. *Id.*
32. *Id.* at 659.
33. *Id.* at 660-61 (Hecht, J., concurring).
34. *Id.* at 664 (Jefferson, J., concurring).
35. *Id.*
36. *Id.* at 666.

cease being extraordinary. . . ."[37]

The tragic and well-publicized explosion at the British Petroleum ("BP") refinery in Texas City on March 23, 2005, is certain to generate several opinions of interest to followers of mass tort litigation, but the opinions from the case issued during this Survey period concerned the important but relatively mundane areas of discovery and trial process. Shortly after the explosion, BP reported to the Securities and Exchange Commission ("SEC") that it had created a $700 million reserve to cover claims for personal injury and death arising from the incident.[38] The plaintiffs sought discovery of the materials used by BP's in-house counsel to compute the reserve figure. Opposing production, BP argued that the documents were protected by the attorney-client and attorney work product privileges and produced an affidavit prepared by its in-house counsel describing the manner in which the estimate was prepared and the confidential materials used to prepare the estimate. The trial court held that the affidavit was conclusory and did not constitute a prima facie showing that the documents were privileged, and ordered production. In an opinion designated for publication, the First District Houston Court of Appeals disagreed, holding that the affidavit was sufficiently detailed to support BP's objection.[39] The court of appeals also rejected the trial court's conclusion that BP waived its claims of privilege by disclosing the existence of the reserve to the SEC and the media, noting that BP had limited its disclosure to the reserve figure itself and did not share its methodology with any outside personnel.[40] The court thus directed that the trial court consider BP's privilege objection on the merits.

Less than a month later, the First District Houston Court of Appeals[41] granted mandamus to set aside the trial court's order authorizing "gavel to gavel" television coverage of the first trial.[42] The court noted that Rule 18(c) of the Texas Rules of Civil Procedure allows broadcasting of court proceedings only pursuant to rules promulgated by the Texas Supreme Court, when the dignity of the proceedings will not be impaired and the parties consent, or when the proceedings are ceremonial.[43] The court easily concluded that none of the conditions allowing the broadcast of proceedings had been met and directed that the trial not be televised.[44]

In *In re Exxon Corp.*,[45] the Beaumont Court of Appeals continued the

37. *Id.* at 667 (Wainright, J., dissenting).

38. *In re* BP Prods. N. Am. Inc., No. 01-06-00679-CV, 2006 WL 2973037 (Tex. App.—Houston [1st Dist.] Oct. 13, 2006, orig. proceeding).

39. *Id.* at *6.

40. *Id.* at *9.

41. *Id.*

42. *In Re* BP Prods. N. Am. Inc., No. 01-06-00980-CV, 2006 WL 3230760 (Tex. App.—Houston [1st Dist.] Nov. 9, 2006, orig. proceeding).

43. *Id.* at *2; *see* TEX. R. CIV. P. 18(c).

44. *BP Prods.*, 2006 WL 3230760, at *2.

45. 208 S.W.3d 70 (Tex. App.—Beaumont Oct 12, 2006, orig. proceeding). Baron & Budd, P.C., the employer of each of the co-authors of this article, represents the plaintiffs in this case.

recent trend of protecting a toxic tort defendant from discovery requests perceived as overbroad. The plaintiffs alleged development of cancer from exposure to benzene while working on Exxon's premises. During discovery, Exxon produced thousands of pages and made another 100,000 documents available for inspection. The plaintiffs deposed two witnesses regarding Exxon's documents and their production; neither could confirm that the plaintiffs had been given all responsive documents. The trial court granted the plaintiffs' motion to compel Exxon to produce a deponent fully responsive to the plaintiffs' queries regarding Exxon's document production.[46]

Conditionally granting Exxon's petition for writ of mandamus, the Beaumont Court of Appeals directed the trial court to vacate its orders mandating Exxon's deposition.[47] First, the court noted that the plaintiffs' initial discovery requests were "strikingly similar" to those held to be overbroad in a prior benzene exposure case.[48] Second, the court found that attorney work product was necessarily involved when the plaintiffs attempted to depose on Exxon attorney concerning the process by which Exxon responded to production requests, and further noted that compelling testimony from an attorney regarding his current litigation is "inappropriate under most circumstances."[49] Because the plaintiffs could not show that any document had been withheld or that Exxon had otherwise engaged in discovery abuse, they failed to establish the necessity for the deposition.[50]

3. *Standing*

During the Survey period, the Texas courts continued to demonstrate a growing enthusiasm to exercise mandamus jurisdiction to supervise trial court proceedings. In *In re Premcor Refining Group,*[51] the Beaumont Court of Appeals conditionally granted mandamus in a per curiam opinion, directing the trial court to dismiss the plaintiffs' permanent nuisance claims for lack of standing because it was uncontested that the plaintiffs, many of them minors, were not the record landowners at the time of the initial injury to the property fifty or more years ago.[52] As the court pointed out, a permanent nuisance claim, which encompasses lost value as well as loss of enjoyment of the property, can be made only by the landowner.[53] The court rejected the plaintiffs' argument that, because they had personal injury claims, they also had viable claims for loss of use and enjoyment of the property on which they were injured.[54] Because

46. *Id.* at 73-74.
47. *Id.* at 77.
48. *Id.* at 75.
49. *Id.* at 76.
50. *Id.* at 75-77.
51. 233 S.W.3d 904 (Tex. App.—Beaumont 2007, orig. proceeding).
52. *Id.* at 910.
53. *Id.* at 909.
54. *Id.*

the claims were for the release of "noxious fumes, vapors, odors, hazardous materials and other particulate matters,"[55] it is possible that temporary nuisance claims would have been more successful. But the court noted that characterizing the nuisance as permanent was consistent with Texas law because discharge of such fumes and particulates from the defendant's refinery, in operation since 1901, could be "presumed to continue indefinitely."[56] The most provocative aspect of the opinion is the court's determination that the issue was appropriate for mandamus. Noting that the court would not usually grant mandamus to address pleas to the jurisdiction because appeal is an adequate remedy, the court seemed to find the issue appropriate for mandamus jurisdiction simply because, in essence, mass toxic tort litigation is different.[57] The court quoted the defendant's representation that the plaintiffs' lawyer "threatens lawsuits on behalf of thousands" of minor claimants who had no imminent deadline for filing suit, and the court found "nothing in plaintiffs' response that denies or takes issue with the gist of this statement . . . ."[58] The court concluded that "because of the size and complexity of the toxic tort litigation in question, it would be a prudent use of judicial resources to permit a preliminary resolution of the issue of permanent nuisance" even though the personal injury claims would survive and the case would therefore continue.[59]

4. Venue

In *Gilcrease v. Garlock, Inc.*,[60] the El Paso Court of Appeals delivered a stern lesson to plaintiffs who regret their choice of forum after filing suit and would consider trying to change it. Fred Gilcrease developed mesothelioma, a fatal form of cancer invariably attributed to asbestos exposure, from working with Garlock gaskets among other products. Mr. and Mrs. Gilcrease brought suit in Bexar County, and the court denied Garlock's motion to transfer. After Mr. Gilcrease died, his children were added as plaintiffs. The plaintiffs non-suited their claim against Garlock, and the next day they asserted identical claims against Garlock in a new suit in El Paso County. The trial court denied Garlock's motion to transfer to Bexar County and tried the case to verdict. The jury awarded compensatory damages of over $2.5 million and punitive damages of $1 million, but the combined amount of the award was exceeded by the amount of plaintiffs' settlements with other parties. The trial court entered a take-nothing judgment. On appeal, the court first held that the trial court erred in offsetting the punitive damages award by settlements received from other parties, reasoning that a punitive damages award is

55. *Id.* at 907.
56. *Id.*
57. *Id.* at 909.
58. *Id.*
59. *Id.*
60. 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet.).

not intended to compensate but to punish and is defendant-specific.[61] The court further held that even though settlements exceeded the compensatory award and thus rendered the entire award uncollectable, the plaintiffs were not prohibited from collecting the punitive award.[62] The court acknowledged the rule that a plaintiff may not recover punitive damages unless the jury also awards compensatory damages, but reasoned that in this case the jury *did* award compensatory damages; those damages were just not recoverable because of the offset.[63]

On the verge of affirming a $1 million punitive damages award, the court of appeals proceeded to void the results of the proceedings below, holding that venue was improper in El Paso County. The court noted that a "venue determination made prior to a nonsuit is conclusive in a subsequent refiling of the same cause of action against the same parties," and ruled that when the Bexar County court denied the motion to transfer, "the venue determination was fixed with regard to any subsequent filing."[64] The court thus reversed the judgment in favor of Garlock and remanded the case with instructions to transfer the matter to Bexar County.[65]

In another, less painful venue case, the United States District Court for the Eastern District of Texas overruled the plaintiff's choice of forum and transferred a toxic tort case to the place of the plaintiff's exposure.[66] In *Overson v. Berryman Products,* the plaintiff alleged personal injury from exposure to benzene products in Arizona, and sued companies from various states in the United States District Court for the Eastern District of Texas.[67] In his first amended complaint, the plaintiff added as a defendant an Arizona company, which would destroy diversity. After the court denied the defendants' motion to transfer venue to Arizona, the plaintiff moved to dismiss the Arizona defendant. On defendants' motion for reconsideration, the court vacated its prior order and granted the defendants' motion to transfer venue to the District of Arizona. In reaching this decision, the court determined (and no party disputed) that jurisdiction would be proper in the District of Arizona.[68] Next, the court analyzed the convenience to the parties and witnesses by weighing all private and public interest factors. The court acknowledged that plaintiffs' choice of forum weighed against transfer, but found this outweighed by the many factors favoring transfer. In making this decision, the court considered the fact that the benzene exposure and all other significant events occurred in Arizona, that Arizona had a local interest to adjudicate a dispute involving a local chemical exposure, that Arizona law would likely

61. *Id.* at 457.
62. *Id.*
63. *Id.* at 458-59.
64. *Id.* at 460.
65. *Id.*
66. Overson v. Berryman Prods., 461 F. Supp. 2d 537, 538 (E.D. Tex. 2006).
67. *Id.* at 540.
68. *Id.* at 539.

apply, and "the most important factor" that a transfer would inconvenience key factual witnesses located in Arizona.[69] Finally, the court noted that since it was early in the litigation, the plaintiffs would not be prejudiced by the transfer.[70]

5. Statute of Limitations

As discussed in previous Surveys,[71] the long latency period that can occur between toxic exposure and the manifestation of disease has raised novel questions regarding the application of statutes of limitations as well as related questions such as the timing of accrual and the retroactive application of statutes. To avoid barring latent injury claims before they are discovered, Texas courts apply the discovery rule, which tolls the statute of limitations until the person filing suit knows or should have discovered the nature of his injury. In the present Survey period, the facts presented in two contrasting cases illustrate the circumstances under which the statute of limitations will or will not be tolled by the Texas discovery rule.

In *Avance v. Kerr-McGee*,[72] the United States District Court for the Eastern District of Texas held that evidence of similar contamination from a different source was not sufficient to show that the plaintiffs had been put on notice of the nature of their claims.[73] The plaintiffs in *Avance* sought damages caused by their alleged exposure to defendant's creosote and pentachlorophenol from 1960 to 2004. The defendant moved for summary judgment, contending that the plaintiffs' claims were time-barred because they had actual or constructive knowledge of the nature of their injury more than two years before they filed suit. In support, the defendant offered evidence of extensive publicity regarding health hazards caused by creosote contamination from a different source in the Texarkana area. The defendant also introduced evidence that several lawsuits had been filed by area residents for personal injuries arising out of their exposure to creosote in 1987 and that Congress had appropriated $5 million for a federal buyout of the residents of Carver Terrace in 1990.[74]

The plaintiffs did not dispute that there had been extensive coverage of creosote contamination, but they asserted that, because there was no evidence that any of the plaintiffs lived in or near the areas that were the subject of the publicity, a jury could reasonably conclude that they did not have constructive knowledge regarding the cause of their injuries. Additionally, the plaintiffs indicated that their doctors had not told them their medical conditions were related to environmental exposure, and

69. *Id.* at 540.
70. *Id.* at 540-41.
71. *See, e.g.*, Brent M. Rosenthal et al., *Toxic Torts and Mass Torts*, 60 SMU L. REV. 1345, 1357 (2007); Brent M. Rosenthal et al., *Toxic Torts and Mass Torts*, 59 SMU L. REV. 1579, 1589 (2006).
72. No. 5:04-CV-209-DF, 2007 WL 1229710, at *1 (E.D. Tex. Apr. 26, 2007).
73. *Id.* at *12.
74. *Id.* at *4-7.

they provided affidavits to negate a finding of actual knowledge.[75] Finding that the defendant's evidence was based primarily on other lawsuits and publicity regarding hazards at other sites, the court held that there was a genuine issue as to when the plaintiffs should have reasonably known that their alleged injuries were caused or contributed to by the substances at issue and denied summary judgment.[76]

By contrast, in *Podolny v. Elliott Turbomachinery Co.*,[77] the Corpus Christi Court of Appeals affirmed the trial court's grant of summary judgment on limitations grounds. Podolny, who was diagnosed with pleural calcification before 1996 and lung cancer in 1996, filed suit against Elliott on August 22, 2002. Podolny claimed he was not aware that his lung cancer was attributable to asbestos exposure any sooner than October 2000, when he was told by an attorney that his lung cancer was likely caused by asbestos. He also contended that it was at least arguable that the running of the limitations period was not triggered until January 2002, when a medical doctor first attributed his lung cancer to asbestos exposure. Other evidence was introduced, however, showing that Podolny had been diagnosed with asbestosis in 1984, that six reports dated from 1985 to 1996 referred either to his past asbestos exposure, asbestosis, or the presence of pleural plaque or pleural calcification on his lungs, and that a radiology report from April 2000 included the following notation: "Diagnosis: lung ca aesbestos [sic] exposure."[78] Given that evidence, the court found that, had Podolny exercised due diligence, he would have discovered, before August 22, 2000, that his lung cancer was caused by asbestos exposure.[79]

6. *Federal Removal Jurisdiction*

Defendants in mass tort actions filed in state courts in Texas and elsewhere often remove the cases to federal courts, which they perceive to provide a more hospitable forum. In *Philip Morris v. Watson*,[80] the United States Supreme Court limited the ability of defendants to remove cases under the federal officer removal statute, which permits removal of any state court action brought against "any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . . ."[81] The plaintiffs in *Watson* filed suit in an Arkansas state court alleging that Philip Morris, in violation of Arkansas consumer law, had falsely marketed its cigarettes as "light" (containing less tar and nicotine), when in fact the cigarettes delivered more tar and nicotine than the adjec-

75. *Id.* at *11.
76. *Id.* at *12.
77. No. 13-04-499-CV, 2007 WL 271118, at *1 (Tex. App.—Corpus Christi Feb. 1, 2007, no pet.).
78. *Id.* at *1.
79. *Id.* at *3.
80. 127 S. Ct. 2301 (2007).
81. 28 U.S.C. § 1442(a)(1) (2000).

tive "light" indicates. The plaintiffs further alleged that in testing its light cigarettes with a method prescribed by the Federal Trade Commission, Philip Morris obtained lower measurements of tar and nicotine than the levels that would be generated by ordinary use of the products. Philip Morris removed the case to federal court on the theory that because its testing method was dictated by federal regulations, it was a "person acting under" a federal officer within the meaning of the federal removal statute.[82] Both the district court and the United States Court of Appeals for the Eighth Circuit upheld the removal, but the United States Supreme Court, in a unanimous opinion authored by Justice Breyer, reversed.[83] The Court noted that although a private person assisting a federal officer in the performance of her duties may be a "federal officer" within the meaning of the statute, "the help or assistance necessary to bring a private person within the scope of the statute does not include simply complying with the law."[84] This remains true, the Court said, "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored."[85]

B. Substantive Issues

1. Scope of Duty

Another distinctive characteristic of toxic torts—the tendency for toxic substances to migrate and cause injury away from the location in which they were actually used—raises the novel issue of whether an actor has a duty to avoid causing injury to persons situated outside of the vicinity of the product's use. In the context of toxic injury cases, Texas courts have been reluctant to impose upon defendants a duty to use care to avoid injury caused by toxic substances that have migrated beyond the area of use.[86] In determining whether such a duty should be imposed, Texas courts have focused on whether the defendant could have reasonably foreseen that its conduct or premises condition would create a risk of injury to persons in the circumstances of the plaintiff. At this time, however, Texas case law does not offer much certainty as to what evidence is necessary to show that manufacturers, premises owners, and other actors could have reasonably foreseen the risks associated with "take-home" exposure to asbestos.

This lack of a clear direction in existing case law likely explains, at least in part, the profound difficulty experienced by the Fourteenth District Houston Court of Appeals in issuing a final opinion in *Exxon Corp. v. Altimore*.[87] The court initially decided the case on August 1, 2006, but

82. *Watson*, 127 S. Ct. at 2304.
83. *Id.* at 2310.
84. *Id.* at 2307.
85. *Id.* at 2308.
86. *See, e.g.*, Exxon Mobil Corp. v. Altimore, No. 14-04-01133-CV, 2008 WL 885955, at *9 (Tex. App.—Houston [14th Dist.] Apr. 3, 2008, no pet.); Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 462 (Tex. App.—Dallas 2007, pet. filed).
87. *Altimore*, 2008 WL 885955.

withdrew and reissued its opinion three times, most recently on April 3, 2008.[88] As explained in last year's Survey,[89] *Altimore* involved a typical "take-home" exposure fact pattern: a wife contracted mesothelioma allegedly caused by her exposure to asbestos dust transported into the home on the work clothes of her husband. The jury in *Altimore* found that Exxon, the husband's employer, acted negligently and with malice in allowing the husband to leave its premises with asbestos-laden clothing, and awarded compensatory damages (entirely offset by settlements from other defendants) and punitive damages. In its first opinion, issued on August 1, 2006, the court of appeals reversed and rendered judgment for Exxon, holding that because the risk of harm to the wives of its employees was not reasonably foreseeable, Exxon owed no duty to Mrs. Altimore. The court issued revised opinions on December 7, 2006, and April 19, 2007, adhering to the result but explaining why, in its view, the evidence presented by Mrs. Altimore did not establish a basis for imposing a duty on Exxon. The latter opinion, however, drew a concurrence from Justice Seymour, who argued that the majority should have decided the case on the narrower ground that the evidence was legally insufficient to support the jury's award of punitive damages.

Mrs. Altimore filed a fourth motion for rehearing. By the time the court considered the motion, the two members of the majority had left the court. On April 3, 2008, the court again denied the motion for rehearing, but its revised opinion—this time authored by Judge Seymour—assumed without deciding that Exxon owed a duty to Mrs. Altimore as a household member of an employee occupationally exposed to asbestos.[90] Invoking the heightened standard required for an assessment of punitive damages, the court held that it could not find clear and convincing evidence that, "when viewed objectively from Exxon's standpoint, there was an extreme risk of serious injury to [Mrs. Altimore] during the relevant period of time."[91] As of this date, no motion for rehearing or petition for review in the Texas Supreme Court has been filed, so the parties' three-year appellate odyssey appears to be at an end.

In a second "take-home" exposure case, *Alcoa, Inc. v. Behringer*,[92] the Dallas Court of Appeals required only one opinion to decide that the defendant Alcoa did not owe a duty to avoid exposing the family member of an employee to asbestos through "take-home" exposure. In that case, the plaintiff, who was diagnosed with mesothelioma in 2003, alleged that the disease was caused by asbestos transferred from the Alcoa plant in Rockdale, Texas, into her home via her husband's work clothes during

88. Although the court's withdrawn opinions are no longer available on Westlaw, the procedural history of the case may be found on the Fourteenth District's website, http://www.14thcoa.courts.state.tx.us/opinions/case.asp?FilingID=86579.

89. Brent M. Rosenthal et al., *Toxic Torts and Mass Torts*, 60 SMU L. REV. 1345, 1357-59 (2007).

90. *Altimore*, 2008 WL 885955, at *1.

91. *Id.* at *9.

92. Alcoa, Inc. v. Behringer, 235 S.W.3d 456 (Tex. App.—Dallas 2007, pet. filed).

the 1950s. The court considered whether the evidence was sufficient to support the jury's finding that an employer that used, but did not manufacture, asbestos could foresee the risk of injury from take-home exposure. As evidence of foreseeability, the plaintiff pointed to case reports from the 1930s concerning respiratory disease in asbestos workers, a 1948 Alcoa memorandum noting a requirement that employees change clothes and shower following exposure to a chemical product, the 1952 Walsh-Healy Public Contracts Act which mandated that workers not be exposed to hazardous concentrations of contaminants, and a 1958 Texas regulation setting maximum permissible concentrations of atmospheric contaminants.[93] The court was not persuaded. Instead, relying on a 1965 case study that first discussed non-occupational exposure and the 1972 OSHA regulations that first imposed restrictions related to "take-home" exposure, the court found that the risk would not have been foreseeable in the 1950s. The court thus reversed the $15.6 million judgment, holding that the defendant did not owe a duty to the plaintiff at the time of her exposure.[94]

2. *Breach of Duty*

In *Parker v. Three Rivers Flying Service, Inc.*,[95] the Eastland Court of Appeals affirmed the grant of summary judgment in favor of defendants performing aerial pesticide application, finding that there was no evidence that the defendant breached the applicable standard of care.[96] The plaintiffs alleged that the defendants were negligent in spraying malathion, and that Joyce Parker suffered personal injuries as a result of exposure to the pesticide. On appeal, the plaintiffs contended that the doctrine of *res ipsa loquitur* should have been applied to show that the defendant breached its duty and that, even if the doctrine did not apply, the evidence was sufficient to raise a fact issue as to whether the defendants breached the standard of care during pesticide applications.[97]

In support of the *res ipsa loquitur* issue, the plaintiffs relied on *Farm Services, Inc. v. Gonzalez*,[98] in which the court found that "the sudden discharge of a large amount of concentrated, toxic pesticide by a crop-dusting airplane en route to its destination is an event which ordinarily would not occur in the absence of negligence."[99] The court distinguished *Gonzalez* by noting that it had "involved the sudden and unexpected discharge of pesticide resulting from a defect or [equipment] failure" rather than "off-target movement" of pesticide during application, as occurred in the present case.[100] The court explained that pesticide drift of this na-

93. *Id.* at 461-62.
94. *Id.*
95. 220 S.W.3d 160 (Tex. App.—Eastland 2007, no pet.).
96. *Id.* at 171.
97. *Id.* at 162-63.
98. 756 S.W.2d 747 (Tex. App.—Corpus Christi 1988, writ denied.)
99. *Parker*, 220 S.W.3d at 168 (quoting *Gonzalez*, 756 S.W.2d at 752).
100. *Id.*

ture was a common occurrence and was not the type of event that would not be expected to occur in the absence of negligence.[101]

In deciding whether the evidence was sufficient to create a fact issue regarding a breach of duty, the court first held that expert testimony was required to establish the standard of care because a lay person would not have experience regarding the appropriate standards for aerial application of pesticides.[102] The court further concluded that the testimony of the plaintiffs' expert was insufficient to create a fact issue. In particular, the court rejected the expert's opinions that the defendants should have notified the plaintiffs prior to spraying and that the defendants should have allowed for a 300-foot buffer zone when spraying because the expert could not point to any particular regulations or information promulgated by a public agency to show that these were applicable standards of care in Texas. The court also found that, although an applicable standard of care required that pesticide application be avoided when wind speeds were above ten miles per hour, there was no evidence of a breach of that standard.[103] The plaintiffs attempted to establish that the defendants breached that standard through records showing that average wind velocity exceeded ten miles per hour in three neighboring areas on that day. The court, however, concluded that evidence of wind speed in the other areas did not tend to show that wind speed exceeded ten miles per hour at the application site.[104]

3. *Causation*

By far the most significant and highly publicized development in the area of mass torts in Texas in this Survey period was the application by Texas courts of a more demanding standard for proving causation in toxic tort cases than that traditionally applied. The leading case on this subject, and surely a landmark case in the history of toxic tort litigation in Texas, was *Borg-Warner Corp. v. Flores*.[105] In that case, the plaintiff claimed that he had developed asbestosis as a result of his exposure to asbestos-containing brake pads during his career as a brake mechanic from 1966 through 2001. The plaintiff presented evidence that he used brake products from several manufacturers, and offered specific proof that he used brake pads manufactured by Borg-Warner from 1972 through 1975. The plaintiff testified that he used Borg-Warner brake pads "on five to seven of the roughly twenty brake jobs" he did each week during this period.[106] Flores' job required him to grind the brake pads so they would not

101. *Id.*
102. *Id.* at 168-69 (citing Hager v. Romines, 913 S.W.2d 733, 735 (Tex. App.—Fort Worth 1995, no writ)).
103. *Id.*
104. *Id.* at 169-70.
105. 232 S.W.3d 765 (Tex. 2007). Baron & Budd (the employer of each of the co-authors of this article) represented the plaintiff, Mr. Flores, before the Texas Supreme Court but not in the trial court.
106. *Id.* at 766.

squeal; "[t]he grinding generated clouds of dust that Flores inhaled while working in a room that measured roughly eight by ten feet."[107] The Borg-Warner brake pads contained seven to twenty-eight percent asbestos by weight depending on the type of pad. The plaintiff presented expert testimony that he had developed asbestosis and that his work as a brake mechanic caused his disease. The jury found Borg-Warner liable, assessed its responsibility vis-à-vis the settling defendants at thirty-seven percent, and awarded the plaintiff a total of $114,000 in actual damages and $55,000 in punitive damages. The trial judge entered judgment on the verdict after appropriate offsets for settlements and denied Borg-Warner's post-trial motions. A unanimous court of appeals affirmed,[108] and the Texas Supreme Court granted Borg-Warner's petition for review.

In a unanimous opinion authored by Chief Justice Jefferson, the Texas Supreme Court reversed and rendered judgment for Borg-Warner, finding the evidence legally insufficient to support the jury's finding that the plaintiff's exposure to Borg-Warner products was a substantial cause of his asbestosis.[109] The opinion began by reciting a causation test for asbestos cases expressed in a twenty year-old federal case applying Maryland law, *Lohrmann v. Pittsburgh Corning Corp.*[110] Under the "frequency, regularity, and proximity" test announced in *Lohrmann*, the plaintiff must show "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."[111] The opinion notes that the amicus curiae supporting the defendant urged the court to adopt the "*Lohrmann* test," and finds the test "appropriate," but adds that the test is not demanding enough of plaintiffs; the terms frequency, regularity, and proximity "do not, in themselves, capture the emphasis our jurisprudence has placed on causation as an essential predicate to liability."[112] The opinion points out that the plaintiff "seemingly satisf[ied] *Lohrmann*'s frequency-regularity-proximity test" by presenting evidence that he "worked in a small room, grinding brake pads composed partially of embedded asbestos fibers, five to seven times per week over a four-year period. . . ."[113] But the supreme court nevertheless found the evidence legally insufficient to allow the jury to find causation, because the evidence "provides none of the quantitative information necessary to support causation under Texas law."[114]

The opinion suggests that to establish causation, the plaintiff in an asbestos case—and, by extension, any toxic tort case—must now provide both evidence of the dose of the toxin to which the plaintiff was exposed and evidence that the toxin, in that amount, was capable of producing

107. *Id.*
108. *See* Borg-Warner Corp. v. Flores, 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004), *rev'd*, 232 S.W.3d 765 (2007).
109. *Borg-Warner*, 232 S.W.3d at 765, 773-74.
110. 782 F.2d 1156 (4th Cir. 1986).
111. *Borg-Warner*, 232 S.W.3d at 769 (quoting *Lohrmann*, 782 F.2d at 1162-63).
112. *Id.* at 770.
113. *Id.* at 772.
114. *Id.*

injury. In *Borg-Warner*, the plaintiff unquestionably showed that he was exposed to asbestos from the defendant's product, but introduced "nothing about how much asbestos Flores might have inhaled."[115] "[A]bsent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis. Nor did Flores introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products."[116] The supreme court purported to "recognize the proof difficulties accompanying asbestos claims,"[117] but insisted that to show "substantial-factor causation" it was incumbent upon the plaintiff to show "the approximate quantum of fibers to which [he] was exposed."[118]

In *Georgia-Pacific Corp. v. Stephens*,[119] the First District Houston Court of Appeals applied the *Borg-Warner* decision to the case of a mesothelioma victim. The plaintiff testified that he used the defendant's product "quite a bit on jobs" in the 1960s and 1970s and that he swept up after other workers applied and sanded the defendant's product, which he saw "on a substantial number of jobs."[120] But as in *Borg-Warner*, the experts did not provide a "quantitative estimate" of the plaintiff's exposure, and the epidemiological studies on which the plaintiff's experts relied did not establish "the minimum exposure level (or dosage) of joint compound with a statistically increased risk of developing" mesothelioma.[121] Although the studies showed that workers are exposed to asbestos when working around mixing, sanding, or sweeping of joint compound products, and that joint compound exposure causes mesothelioma, the studies did not establish how much exposure to joint compound dust was needed to cause a statistically significant rise in the disease. In a footnote, however, the court suggested that a plaintiff might be able to meet its test if he proves up the scientific evidence "that links mesothelioma with 'low levels of asbestos exposure.'"[122]

Subsequent to the Texas Supreme Court's ruling in *Borg-Warner Corp. v. Flores*, but before the decision in *Georgia-Pacific Corp. v. Stephens*, Judge Mark Davidson, the Texas district judge overseeing the Texas multidistrict asbestos litigation, issued a letter ruling on the defendants' summary judgment motions to address the application of the *Borg-Warner* opinion.[123] Like the *Stephens* court, Judge Davidson first determined that the *Borg-Warner* analysis applied to mesothelioma cases as well as

115. *Id.* at 771-72.
116. *Id.*
117. *Id.* at 772.
118. *Id.* at 774.
119. 239 S.W.3d 304 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
120. *Id.* at 313.
121. *Id.* at 321.
122. *Id.* at 321 n.12.
123. *See* Letter Ruling, *In re* Asbestos, No. 2004-3,964 (11th Dist. Ct., Harris County, Tex., July 18, 2007), *available at* http://www.justex.net/JustexDocuments/1/Judges%20Orders/Post%20Borg%20Warner%20MFSJ.pdf [hereinafter "Davidson Ruling"].

asbestosis cases, but he recognized that a lower level of exposure could be a substantial cause of mesothelioma.[124] While acknowledging that scientists believe that every single exposure to asbestos is a potential cause of mesothelioma, Judge Davidson said that not every exposure could be considered a substantial cause.[125] The court then contrasted the evidence in two specific cases.[126] In *Pena*, the decedent had not been deposed. His sons' testimony, while it described his work with joint compound and identified the defendant's product as one of the products used, did not provide information from which one could approximate dose, such as the total amount or percentage of the defendant's product used. Judge Davidson found this evidence legally insufficient to prove causation.[127] In *Shake*, the injured plaintiff was alive and able to provide testimony about the amount of each defendant's product used. He also provided expert testimony estimating the exposure levels during various activities. The court found that this evidence met the causation standard set forth in *Borg-Warner*.[128]

The Texas courts' demand for more specific proof of causation was not confined to asbestos cases. In *Abraham v. Union Pacific Railroad Co.*,[129] some 300 current and former employees sued Union Pacific under the Federal Employers Liability Act ("FELA"), alleging that their various diseases—including cancer and respiratory and skin conditions—were caused by their workplace exposure to creosote used to treat railroad ties. The trial court granted summary judgment for Union Pacific on all claims, holding that the plaintiffs failed to produce legally sufficient evidence that their workplace exposure caused their illnesses. On appeal, the Fourteenth District Houston Court of Appeals first held that the "featherweight" standard of causation in FELA cases does not relax the standard of reliability that expert scientific testimony must meet to establish that a toxic exposure caused an injury.[130] The court then reviewed the plaintiffs' expert's methodology in determining causation and found it unreliable.[131] The expert had attempted to quantify the plaintiffs' exposure to creosote by extrapolating from a study of workers applying creosote products to wood poles and railroad ties and assigning an exposure level estimate based on length of employment to each plaintiff. But while the exposures described in the study were measured by job category—and indicated high exposure levels and increased cancer risk for "handlers"—the summary judgment evidence did not reveal the plaintiffs' job categories and provided no basis to conclude that their exposures would

124. *Id.* at 2.
125. *Id.* at 3.
126. *See* Pena v. Bondex, No. 2006-51,043 (11th Dist. Ct., Harris County, Tex. July 18, 2007); Shake v. Quigley, No. 2004-21,092 (11th Dist. Ct., Harris County, Tex. July 18, 2007).
127. Davidson Ruling, *supra* note 123, at 4.
128. *Id.* at 4-5.
129. 233 S.W.3d 13 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), *cert. denied*, 128 S. Ct. 1900 (2008).
130. *Id.* at 19-20.
131. *Id.* at 23-24.

have been the same or greater than the exposures found in the study.[132] The court thus upheld the trial court's blanket exclusion of the expert's testimony that the plaintiffs' exposure to creosote caused their injuries.[133]

While Texas courts were unwilling to defer to jury findings of causation in toxic tort cases in which the proof was arguably sketchy, the Dallas Court of Appeals readily affirmed a jury finding that the plaintiffs' exposure to toxic fumes *did not* cause them to develop reactive airway dysfunction symptoms in *Barfield v. SST Truck Co.*[134] On appeal, the plaintiffs contended that the evidence of the defendant's negligence, the causal relationship between the fumes generated by the defendant's negligence, and damages was conclusive. The court rejected this ambitious argument, noting that "almost every fact alleged by one party was disputed by the other" in the six-week trial,[135] including the days per week that the oven generating the fumes was used, the concentration of the toxins in the air, and the effect of the fumes on the plaintiffs.[136]

Plaintiffs in toxic tort cases found a more receptive audience in federal courts during the survey period, both on questions of admissibility and sufficiency of causation evidence. In *O'Neill v. Seariver Maritime, Inc.*,[137] a per curiam opinion, the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment for the plaintiffs, finding sufficient evidence that the plaintiff seaman's exposure to hydrogen sulfide vapor caused his neurological injuries and asthma symptoms and finding that the court did not err by admitting the testimony of the plaintiff's expert. The plaintiff, who sampled tanks of crude oil onboard a ship, reported seeing a plume of vapor in the same area where hydrogen sulfide vapors were measured at 200 parts per million ("ppm") two days later. An expert testified that visible vapor in that spot would have been more than 200 ppm, and the plaintiff and other crew members suffered symptoms consistent with high level hydrogen sulfide exposure. The court concluded that, under the more lenient causation standards of the Jones Act, the trial court did not commit clear error in finding that exposure to hydrogen sulfide at greater than 200 ppm caused the plaintiff's injuries.[138] The court also ruled that the plaintiff's expert's reliance on the symptoms that followed the plaintiff's exposure to hydrogen sulfide in forming his causation opinion did not make his opinion unreliable.[139] The expert provided a scientific explanation for connecting the exposure

132. *Id.* at 21-23.

133. *Id.* at 24. In contrast, a federal court presiding over similar claims involving exposure to creosote refused to order blanket exclusion of the testimony of different experts supporting the plaintiffs' theory of causation, concluding that the reliability of the testimony could better be addressed on a case-by-case basis. *See* Avance v. Kerr-McGee Chem., L.L.C., No. 5:04CV209, 2006 WL 3912472, at *15 (E.D. Tex. Dec. 4, 2006).

134. 220 S.W.3d 206 (Tex. App.—Dallas 2007, no pet.).

135. *Id.* at 208-09.

136. *Id.* at 209-10.

137. 246 F. App'x 278 (5th Cir. 2007) (per curiam).

138. *Id.* at 280.

139. *Id.* at 281.

and the symptoms that followed. The court held that the expert adequately excluded possible alternative causes from the plaintiff's childhood to make his testimony admissible, finding any weaknesses in his analysis should have been dealt with in cross examination.[140]

In *Burton v. Wyeth-Ayerst Laboratories Division of American Home Products Corp.*,[141] the United States District Court for the Northern District of Texas found that the plaintiff's evidence that her ingestion of diet drugs caused her to develop pulmonary arterial hypertension (PAH) and progressive heart valve regurgitation was reliable, admissible, and sufficient to withstand summary judgment. The defendant claimed that the plaintiff's condition—PAH with exercise—was a different disease than the more catastrophic PAH at rest, and that the expert opinion that diet drugs caused the plaintiff's "exercise PAH" was unsupported by the scientific literature, which reported an increase only in "resting PAH" in users of diet drugs. After examining the literature and the affidavits filed by the parties, the court refused to recognize "exercise PAH" and "resting PAH" as different diseases, noting that "[m]edical science appears not to have made this distinction, and neither will this court."[142] The court added that even though one of the two epidemiological studies relied on by the plaintiff to show a causal connection between her diet drug use and her PAH only reported an increase in "resting PAH," she could rely on the other study, which did not expressly identify the sub-type of PAH observed.[143] The court thus allowed the plaintiff to proceed to a jury determination of her claims of a causal relationship between her use of the defendant's product and her injuries.[144]

4. *Punitive Damages*

Courts and commentators have struggled for decades to establish reasonable ground rules for the recovery of punitive damages in mass tort litigation, but questions continue to abound.[145] Is each person injured by a mass tort entitled to claim and recover punitive damages? What is the measure of damages available to each plaintiff injured by a mass tort, and to what extent may the award be influenced by the effect of the defendant's tortious conduct on other individuals? Does the Constitution impose any limitation on the aggregate amount of punitive damages awarded to plaintiffs based on the same course of tortious conduct by the

140. *Id.*
141. 513 F. Supp. 2d 719 (N.D. Tex. 2007) (mem. op.).
142. *Id.* at 724.
143. *Id.* at 732-33.
144. *Id.* at 733.
145. *See, e.g.*, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 432 (2003) ("The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades."); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. L. REV. 1613, 1615 (2005) (observing that "[t]he multiple punitive damages problem was first identified in the 1960s by Judge Friendly" in his landmark opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967)).

defendant, and, if so, how is the constitutional limit calculated?[146]

The United States Supreme Court provided a qualified answer to one of these questions in *Philip Morris USA v. Williams*.[147] In that case, the plaintiff alleged that her deceased husband, Jesse Williams, developed fatal lung cancer from smoking cigarettes made and sold by Philip Morris, and further alleged that Philip Morris knowingly deceived him through advertising and other representations into believing it was safe to smoke. In argument, the plaintiff's attorney urged the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been" in considering the appropriate amount of punitive damages to award.[148] The jury awarded compensatory damages of just over $800,000, and punitive damages of $79.5 million. After the case made trips up, down, and back up the appellate ladder, the punitive damages award arrived intact at the Supreme Court for consideration of whether it was constitutionally excessive.

In a five-to-four decision authored by Justice Breyer, the Court vacated the punitive damages award, holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[149] The Court noted that it was unfair to allow a jury to base punishment of a defendant on wrongs allegedly committed against nonparties because the defendant "has no opportunity to defend [itself] against the charge."[150] The Court also observed that allowing a jury to punish the defendant "for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."[151] But the Court hastened to add that although a jury cannot constitutionally "punish a defendant directly on account of harms it is alleged to have visited on nonparties,"[152] a plaintiff *may* admit evidence showing harm to others to demonstrate the reprehensibility of the defendant's conduct. Such evidence, the Court said, "can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . ."[153] Justices Stevens, Thomas, Ginsberg, and Scalia dissented. In her dissent, Justice Ginsberg called the majority ruling "inexplicable" and noted the confusion likely to be engendered by a rule allowing a jury to consider evi-

146. Although the United States Supreme Court has never addressed these questions, the Texas Supreme Court has stated that the federal due process clause limits the total amount of punitive damages that a defendant that has committed a mass tort must actually pay. *See* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 48-51 (Tex. 1998). Neither that court nor any other has explained how the limit is quantified.

147. 127 S. Ct. 1057 (2007).

148. *Id.* at 1061.

149. *Id.* at 1063.

150. *Id.*

151. *Id.*

152. *Id.* at 1064.

153. *Id.*

dence of harm to others in assessing the reprehensibility of the defendant's conduct but forbidding a jury from punishing the defendant for inflicting that harm.[154]

In a less historic but more useful decision to Texas litigators, the El Paso Court of Appeals held in *Gilcrease v. Garlock, Inc.*,[155] that an award of punitive damages is recoverable even if the entire compensatory award is offset by settlements with other parties. The court observed that "[u]nder the one satisfaction rule, the non-settling defendant may only claim a credit based on the damages for which all tortfeasors are jointly liable,"[156] and noted that tortfeasors are not jointly liable for punitive damages assessed against a single defendant. The court reasoned that because "[t]he jury assessed exemplary damages against Garlock alone," the jury "[was] not entitled to offset its personal liability for exemplary damages by the amount of common damages paid by the settling defendants."[157] The court added that the plaintiffs were not prevented from enforcing the punitive damages award by the rule that recovery of actual damages is a prerequisite to the receipt of exemplary damages.[158] The court pointed out that the Texas Civil Practice and Remedies Code "speaks in terms of the *award* of actual damages by the jury rather than their *recovery*,"[159] and noted that the cap on exemplary damages similarly bases the limits on the actual damages "*found by the jury*,"[160] not those collectible by the plaintiff. Thus, had venue not been improperly laid, the plaintiffs probably would have been entitled to collect the punitive damages assessed against Garlock by the jury.[161]

5. *Defenses*

a. Learned Intermediary

In *Ackermann v. Wyeth Pharmaceuticals*,[162] a federal district court, adopting a magistrate's recommendation, applied the learned intermediary doctrine to bar a claim in which the plaintiff alleged that an inadequate warning on an antidepressant provided by a doctor for her husband resulted in her husband's suicide. Shortly before his suicide, Martin Ackerman had briefly taken Effexor, an antidepressant manufactured by the defendant and given to him by Dr. Sonn. Mr. Ackerman's widow alleged that the warning on the drug package insert was inadequate and should have warned "that for a small subset of patients, suicidal ideation is a risk

154. *Id.* at 1068-69 (Ginsberg, J., dissenting).
155. 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet.).
156. *Id.* at 457.
157. *Id.*
158. *Id.* at 457-59.
159. *Id.* at 458 (emphasis in original) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a) (Vernon Supp. 2006)).
160. *Id.* (emphasis in original) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b)(1)(B) (Vernon Supp. 2006)).
161. *Id.* at 460.
162. 471 F. Supp. 2d 739 (E.D. Tex. 2006).

of taking Effexor."[163] But Dr. Sonn testified that even had there been a warning as advocated by the plaintiff, he would still have prescribed the drug as he did and would not have told Mr. Ackermann of such warnings because he did not want to suggest to a depressed patient that suicide was an option. The court noted that "[u]nder Texas law, a plaintiff who complains 'that a prescription drug warning is inadequate must also show that the alleged inadequacy caused her doctor to prescribe the drug for her.'"[164] Noting that "this [was] not a case where the learned intermediary fails to pass necessary information to the patient because the manufacturer has understated the degree of risk," the district court ruled that the defendant was "entitled to Summary Judgment on the learned intermediary doctrine."[165]

b. Federal Preemption

The doctrine of federal preemption is most often invoked by defendants in personal injury cases who argue that a scheme of federal regulations is inconsistent with, and therefore overrides, state liability standards. In *In re Global Santa Fe Corp.*,[166] the Fourteenth District Houston Court of Appeals turned this typical scenario on its head, ruling that the Jones Act,[167] a federal statute providing a remedy for maritime injuries, preempted the application of a Texas law requiring the plaintiff to meet strict impairment criteria in silicosis cases. The plaintiff in *Global Santa Fe* filed a Jones Act case against the defendant in state court alleging that the defendant had failed to provide him with a safe and seaworthy vessel on which to work, resulting in his injurious exposure to silica. The defendant, invoking recently enacted chapter 90 of the Civil Practice and Remedies Code, effected a transfer of the case to the MDL pretrial court presiding over the silica cases.[168] In addition to authorizing transfer of silica cases to the MDL court, chapter 90 requires plaintiffs alleging silica injuries to file a report demonstrating a specified level of impairment before their cases may proceed.[169] The plaintiff objected to the transfer, arguing that chapter 90 is preempted by the Jones Act, which does not require the plaintiff to make a threshold showing of impairment. The MDL pretrial court agreed with the plaintiff and remanded the case to the court in which the case was originally filed. The defendant sought mandamus requiring the MDL pretrial court to retain the case. The Fourteenth District Court of Appeals denied the request, holding that in requiring proof of impairment chapter 90 "thwarts federal remedies" pro-

163. *Id.* at 746.
164. *Id.* at 747 (quoting Portersfield v. Etticon, Inc., 183 F.3d 464, 468 (5th Cir. 1999)).
165. *Id.* at 748.
166. No. 14-06-00625-CV, 2006 WL 3716495, at *1, 5 (Tex. App.—Houston [14th Dist.] Dec. 19, 2006, orig. proceeding, [mand. pending]).
167. 46 U.S.C. § 30104 (2006).
168. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.010(b) (Vernon Supp. 2008).
169. *See Global Santa Fe*, 2006 WL 3716495, at *4 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 cmt. (Vernon Supp. 2008)).

vided in the Jones Act, and is therefore preempted in Jones Act cases.[170] The court added that chapter 90's requirement that the plaintiff demonstrate that his silica exposure is the "most probable cause" of his impairment is inconsistent with the "featherweight" causation standard applied in Jones Act cases.[171] The defendant filed a petition for mandamus in the Texas Supreme Court, which heard oral argument on January 16, 2008.[172]

C. Conclusion

Despite the developments appearing to discourage the filing of toxic tort and mass tort cases in Texas, at least one commentator is unwilling to proclaim the death of such litigation. Professor Deborah Hensler, who has studied mass tort litigation for years, notes that mass tort litigation is "the product of a complex set of socio-legal factors" including "advances in medical technology, regulatory failure, mass culture, the economics of civil litigation, . . . [and] the rise of the Internet."[173] Given the continuing strength of these phenomena," she finds "it difficult to believe that mass toxic tort litigation has collapsed."[174] As the political environment evolves and the composition of the state judiciary slowly changes accordingly, toxic and mass tort litigation may well regain its prominence in the Texas legal landscape. For now, though, in the words of Professor Hensler, "[t]he fat lady has not sung her last aria—but at the moment she is singing a different tune."[175]

170. *Id.* at *5.
171. *Id.*
172. Submission Schedule, Texas Supreme Court (last visited Jan. 16, 2008), http://www.supreme.courts.state.tx.us/oralarguments/pdf/011608.pdf.
173. Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Torts*, 26 Rev. Litig. 883, 888 (2007).
174. *Id.*
175. *Id.* at 890.