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Toxic Torts and Mass Torts

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DURING the Survey period, the courts in Texas continued to address the challenging substantive and procedural issues posed by toxic tort and mass tort litigation. Although the courts, for the most part, broke no new ground, they continued to follow trends—such as the cabining of the duty owed by manufacturers, premises owners, and contractors to consumers and workers, strict scrutiny of scientific proof in toxic tort cases, and restriction of the use of the class action device in mass tort cases—observed in previous Surveys of this area of the law. Judicial developments, however, were largely overshadowed by the Texas Legislature's consideration and enactment of the comprehensive package of tort reform legislation known as House Bill 4.

I. LEGISLATION: HOUSE BILL 4

In enacting House Bill 4, the legislature adopted numerous controversial changes to both the substantive law and the procedural rules that typically govern toxic and mass tort cases. Some of the provisions contained in the bill, such as the class action statutes, the statutes creating procedures for multidistrict administration of multiple related cases, and the statute limiting a successor corporation's liability for asbestos-related injuries under certain circumstances, expressly and directly address toxic or mass tort litigation. Other provisions, like the amendments concerning proportionate liability, retailer liability, and punitive damages, will generally be applicable in personal injury litigation, but they will also have a significant impact on the administration of toxic and mass tort cases. The following summary is not a comprehensive description of House Bill 4, but is intended as a guide to the provisions that will most directly affect toxic and mass tort litigation in this state.

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A. Class Actions

The legislature significantly impacted class action practice by directing the Texas Supreme Court to adopt rules limiting the attorney's fees available to plaintiff's counsel in class action cases and by expanding access to supreme court review of class certification orders. New Sections 26.001 through 26.003 of the Texas Civil Practice & Remedies Code direct the supreme court to adopt rules requiring trial courts to calculate class counsel fees using the "lodestar method," which bases the fee primarily on the hours actually worked by counsel rather than on the benefit provided to the class by the litigation. The statute allows the supreme court to give the trial court discretion to increase or decrease the fee award by no more than four times based on factors specified by the supreme court. The statute also requires the supreme court to provide in its rules that if any portion of the benefits recovered for the class come in the form of coupons or other non-cash compensation, the attorney's fees must be awarded in cash and non-cash amounts in the same proportion as the recovery for the class.[1]

Under current law, the Texas Supreme Court may review an interlocutory class certification order only if the order conflicts with a decision of a court of appeals or of the supreme court.[2] House Bill 4 amends the Texas Government Code to confer jurisdiction on the Texas Supreme Court to review interlocutory orders certifying or refusing to certify a class.[3] The amended statute also provides that all other proceedings in a class action on interlocutory appeal are stayed pending disposition of the appeal.[4]

B. Offer of Settlement

House Bill 4 amends Section 42 of the Texas Civil Practice & Remedies Code to require the Texas Supreme Court to promulgate rules authorizing trial courts to shift litigation costs, including attorney's fees, to parties who reject reasonable settlement offers and who obtain a less favorable result at trial. The cost-shifting mechanism can be triggered only by the defendant; once triggered, it applies to either side of the litigation. The statute specifies that if the plaintiff refuses a qualifying offer and obtains an award of less than eighty percent of the offer, the defendant shall recover litigation costs from the plaintiff. Conversely, if the defendant refuses a qualifying offer from the plaintiff and the plaintiff recovers more than 120 percent of the offer, the plaintiff shall recover litigation costs from the defendant. A prevailing party may collect only those litigation costs incurred after rejection of the settlement offer, and the amount recoverable is capped at fifty percent of the economic damages and one

1. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 26, § 1.01, secs. 26.001-26.003, Tex. Civ. Prac. & Rem. Code.

2. *See, e.g.*, Schein v. Stromboe, 102 S.W.3d 675, 687 (Tex. 2002).

3. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 22, § 1.02, sec. 22.225(d), Tex. Govt. Code.

4. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 51, § 1.03, sec. 51.014(b), Tex. Civ. Prac. & Rem. Code.

hundred percent of the noneconomic and punitive damages awarded in the judgment. The timing of settlement offers and the operation of the offer of settlement procedure in multiparty cases is to be specified in the rules adopted by the supreme court.[5]

The statute and rule establishing the offer of settlement procedure did not become effective during the Survey period, so the effect of the provisions on toxic and mass tort litigation is uncertain. In general, the offer of settlement provisions seem designed to raise the stakes in litigation, to force parties to evaluate settlement offers more realistically, to punish parties willing to "roll the dice," and to encourage settlement over trial. Whether the new provision will promote these objectives in the already high-stakes world of toxic and mass tort litigation, and whether the reciprocal nature of the penalties imposed by the provision will discourage any party from even invoking the process, remains to be seen.

C. Multidistrict Litigation

House Bill 4 authorizes the transfer of civil actions involving one or more common questions of fact to a single district court for consolidated or coordinated pretrial proceedings. The Bill directs the creation of a judicial panel on multidistrict litigation, consisting of five court of appeals justices or administrative judges designated by the chief justice of the supreme court, which will decide by majority vote whether particular cases should be transferred. The panel may order a transfer if it determines that a transfer will promote (1) the convenience of parties and witnesses, and (2) the just and efficient conduct of the actions. The district judge to whom the actions are assigned may consider motions for summary judgment or other dispositive motions, but may not conduct a trial on the merits. The legislation directs the supreme court to adopt rules for the administration of cases transferred under the multidistrict litigation statute.[6]

The new Texas statute, authorizing statewide transfer and coordination of multiple actions, resembles the federal statute authorizing multidistrict litigation proceedings enacted in 1968.[7] The primary purpose of both statutes is to streamline the management of multiple cases with common issues—such as mass tort litigation—in the early stages of the litigation. Centralizing the litigation in a single court in the pretrial stage can achieve efficiencies such as eliminating duplicative discovery, providing uniform disposition of common legal issues, and promoting coordinated preparation of the litigation for trial. Aggregating mature litigation in a single court can be counterproductive, encourage the relitigation of set-

5. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 42, § 2.01, secs. 42.001-42.005, Tex. Civ. Prac. & Rem. Code.

6. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 74, § 3.02, secs. 74.161-74.164., Tex. Govt. Code.

7. 28 U.S.C. § 1407b (2000).

tled issues, and delay resolution of individual cases.[8] The manner in which the new Texas panel and Texas transferee courts implement the multidistrict litigation provisions will have a major impact on mass tort litigation in Texas in the coming years.

D. Venue and Forum Non Conveniens

House Bill 4 broadens the circumstances under which a party can pursue interlocutory appeal of a venue, joinder, or intervention order in a case involving multiple plaintiffs. Under current law, parties may pursue interlocutory appeal of joinder and intervention orders, but not of orders in which a person seeking joinder or intervention has independently established proper venue.[9] The amended provision allows interlocutory appeal of venue orders as well as joinder and intervention orders in multiplaintiff cases.[10]

The legislation also amends the language of the forum non conveniens statute to eliminate the distinction between plaintiffs who are aliens and those who are residents of the United States. This allows the trial court to "consider" factors relevant to the forum non conveniens inquiry rather than to reach a result based on "the preponderance of the evidence."[11] It is unlikely that these stylistic changes will have a significant practical effect on toxic and mass tort litigation in this state.

E. Proportionate Responsibility

House Bill 4 alters the law governing apportionment of damages in all tort cases involving multiple tortfeasors, but it will have a particularly dramatic effect in toxic tort cases, which invariably involve more than one culpable actor. The legislature made one change specific to toxic tort litigation. Under existing law, a defendant is jointly and severally liable for the damages recoverable by the plaintiff only if the fact finder assesses the defendant's percentage of responsibility at greater than fifty percent, or greater than fifteen percent if the claimant's injury results from a toxic tort.[12] House Bill 4 removes the "toxic tort exception" from the rule limiting joint and several liability, thus limiting the defendant's liability in most toxic tort cases to its percentage of responsibility for the injuries.

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8. *See, e.g.*, Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 719 (1991) ("Generally, pretrial consolidation will not conserve judicial resources nor serve the interests of the litigants if the cases are nearing trial in the transferor forum, or if discovery is well along."); Manual for Complex Litigation (Third) § 33.21, 311 n.1020 (1995) (Centralizing mature litigation, even if only for pretrial purposes, may "have the effect of delaying disposition and of limiting the judicial resources available for managing mass tort litigation.").

9. Am. Home Prods. Corp. v. Clark, 38 S.W.3d 92, 96 (Tex. 2000).

10. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 15, § 3.03, sec. 15.003, Tex. Civ. Prac. & Rem. Code.

11. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 71, § 3.04, sec. 71.051(b), Tex. Civ. Prac. & Rem. Code.

12. Act of Sept. 1, 1995, 74th Leg., ch. 136, 1995 Tex. Civ. Prac. & Rem. Code § 33.013(c), *repealed by* Tex. H.B. 4, 2003 78th Leg., R.S., ch. 4, § 4.10(5).

Under current law, a defendant may reduce its percentage of responsibility by obtaining findings of the percentage of responsibility of responsible third parties who were properly joined in the case.[13] Current law also provides that certain parties that the plaintiff could not sue in tort—specifically, employers covered by worker's compensation insurance, bankrupt entities, and parties not subject to the personal jurisdiction of the court—cannot be joined as responsible third parties.[14] House Bill 4 eliminates these restrictions on identifying responsible third parties and makes it easier for a defendant to obtain findings by providing that the defendant need only designate, and not join, the culpable entity as a responsible third party.[15] The ability of a defendant to attribute responsibility to bankrupt entities and to employers immune from suit is especially significant in toxic tort cases, which often involve latent injuries caused by toxic exposures at the workplace.

Because the new rules for apportioning liability effectively limit the defendant's liability to the defendant's percentage of responsibility for the plaintiff's damages, House Bill 4 eliminates the dollar-for-dollar settlement credit available to defendants under current law.[16] With the changes in the law of apportioning liability made by House Bill 4, Texas continues its conversion from a "joint and several" to a "proportionate responsibility" state.

F. Product Liability

House Bill 4 makes several changes to Texas substantive products liability law that may affect practitioners with toxic tort or mass tort cases. The legislation adds a statute of repose to Texas products liability law, requiring that, in general, a plaintiff who seeks damages for personal injuries or wrongful death caused by a defective product commence an action within fifteen years of the date of sale of the product.[17] The statute further provides, however, that it will not apply in cases based on a latent disease that was first reasonably discoverable more than fifteen years after the date of sale, if the plaintiff was exposed to the product within fifteen years of the sale. The "latent disease" exception to the statute of repose will limit the statute's application in most toxic tort cases.

Other changes in substantive products liability law made by House Bill 4 include limitations on the liability of retailers who sold but did not man-

13. Act of Sept. 1, 1995, 74th Leg., ch. 136, 1995 Tex. Civ. Prac. & Rem. Code § 33.004, *amended by* Tex. H.B. 4, 2003, 78th Leg., R.S., ch. 4, § 4.04 (applicable to cases filed after July 1, 2003).

14. Act of Sept. 1, 1995, 74th Leg., ch. 136, 1995 Tex. Civ. Prac. & Rem. Code § 33.011(6), *amended by* Tex. H.B. 4, 2003, 78th Leg., R.S., ch. 4, § 4.05 (applicable to cases filed after July 1, 2003).

15. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 33, § 4.04, sec. 33.004, Tex. Civ. Prac. & Rem. Code (applicable to cases filed after July 1, 2003).

16. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 33, § 4.10(6), sec. 33.014, Tex. Civ. Prac. & Rem. Code.

17. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 16, § 5.01, sec. 16.012, Tex. Civ. Prac. & Rem. Code.

ufacture a defective product,[18] a rebuttable presumption that manufacturers and sellers of pharmaceutical products marketed with government-approved warnings are not liable for injuries caused by the products,[19] and a rebuttable presumption that manufacturers and sellers are not liable for injuries caused by products that comply with mandatory federal safety statutes or regulations.[20] Because of the exceptions in these statutes, and because the presumptions can be rebutted by evidence typically offered in products cases, the practical effect of these changes on toxic tort cases is unlikely to be significant.

G. Damages

In one of the few provisions of House Bill 4 that appears favorable to plaintiffs, the legislation restores the concept of "gross negligence" as a basis for awarding punitive damages.[21] On the other hand, House Bill 4 makes obtaining a punitive award more difficult by requiring that awards of punitive damages, unlike awards of compensatory damages, be based on a unanimous jury verdict.[22] The legislation also limits recovery of medical expenses to those expenses actually incurred by the plaintiff and requires the fact finder to consider the effect of federal taxes in awarding damages for loss of income.[23] Although these changes are not specific to toxic tort litigation, they will affect the recoveries in many toxic tort cases.

H. Successor Liability for Asbestos-Related Litigation

An unusually specific provision in House Bill 4 caps the liability of corporations for asbestos-related torts committed by a predecessor corporation at the amount of the assets owned by the predecessor at the time of the acquisition.[24] The limitation of liability applies only if the acquisition occurred prior to May 13, 1968, and does not affect the successor corporation's liability for its own tortious acts. Because the provision appears narrowly tailored to protect companies who acquired a predecessor before the dangers of asbestos were widely publicized among commercial investors, the provision is expected to have only limited application.

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18. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 82, § 5.02, sec. 82.003, Tex. Civ. Prac. & Rem. Code.

19. Tex.H.B. 4, 2003 78th Leg., R.S., ch. 82, § 5.02, sec. 82.007, Tex. Civ. Prac. & Rem. Code.

20. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 82, § 5.02, sec. 82.008, Tex. Civ. Prac. & Rem. Code.

21. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 41, § 13.04, sec. 41.003, Tex. Civ. Prac. & Rem. Code. The Texas Legislature had eliminated gross negligence as a basis for awarding punitive damages in its 1995 version of Section 41.003.

22. *Id.*

23. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 26, § 41.0105, sec. 41.0105, Tex. Civ. Prac. & Rem. Code.; Tex. H.B. 4, 2003 78th Leg., R.S., ch. 18, § 13.09, sec. 18.091, Tex. Civ. Prac. & Rem. Code.

24. Tex. H.B. 4, 2003 78th Leg., R.S., ch. 149, § 17.01, secs. 149.001-149.006, Tex. Civ. Prac. & Rem. Code.

II. TEXAS CASE LAW: SUBSTANTIVE ISSUES

A. Duties and Defenses

1. *Products Liability: The "Sophisticated Employer" and "Bulk Supplier" Defenses*

While awaiting the Texas Supreme Court's decision in *Humble Sand & Gravel, Inc. v. Gomez*,[25] the Texas intermediate appellate courts had several opportunities to decide how the duty of a product supplier to a user or a bystander is affected by the presence of an intermediary that controls the use of the product. In *U.S. Silica Co. v. Tompkins*, the Beaumont Court of Appeals affirmed a judgment for the plaintiff, finding that the defendant failed to establish that the decedent's employer was a "sophisticated user" with actual knowledge of the dangers of silica exposure. U.S. Silica did not place warnings on its silica products in the 1960s and 1970s, when the decedent used its products; however, the silica the decedent used in the 1980s did bear a warning, and the decedent continued to use the products with the same type of respiratory equipment. The court held this evidence insufficient to overturn the jury's verdict because U.S. Silica did not establish that the 1980s warning was adequate and noticeable or that it informed the decedent that his current safety precautions were insufficient. The court also held that the "sophisticated user" or "intermediary" defense would not excuse U.S. Silica of its duty to warn product users because the evidence did not show the decedent's employers knew of the risk and any instruction on the issue was unnecessary surplusage because factual determinations relevant to the defense were encompassed in the broad-form causation instructions.[26]

In contrast, the Fourteenth District Court of Appeals in Houston affirmed summary judgment in favor of benzene suppliers based on the "bulk supplier" defense in *Wood v. Phillips Petroleum Co.* Various petroleum industry manufacturers offered evidence that the plaintiff's employer, Monsanto, had extensive information about the hazards of benzene exposure and the methods used to minimize that exposure. Because the manufacturers were bulk suppliers with "no package of [their] own on which to place a label," the manufacturers' duty to warn was satisfied by proof that the plaintiff's employer understood the risks.[27] Although it noted that "[t]he question in any case is whether a bulk supplier has a reasonable assurance that its warning will reach those endangered by the use of its product," the court did not address whether the manufacturers were reasonable in relying on Monsanto to pass on the necessary warnings, relying solely on evidence of Monsanto's knowledge rather

25. Humble Sand & Gravel, Inc. v. Gomez, 48 S.W.3d 487 (Tex. App.—Texarkana 2001, pet. granted). The Supreme Court of Texas granted petition for review on May 30, 2002 and heard arguments on October 30, 2002.

26. U.S. Silica Co. v. Tompkins, 92 S.W.3d 605, 609 (Tex. App.—Beaumont 2002, no pet.).

27. Wood v. Phillips Petroleum Co., 119 S.W.3d 870, 874-75 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).

than evidence of its safety or warning policies and the manufacturers' awareness of those policies.[28]

2. *Premises Liability*

In *Dyall v. Simpson Pasadena Paper Co.*, the Fourteenth District Court of Appeals in Houston affirmed a summary judgment for a premises owner who did not exercise control over the work of an injured independent contractor. When Dyall, an independent contractor, arrived at the Simpson paper mill to repair a leaking pipeline, he was not informed that the pipe carried chlorine dioxide and was led to believe that the leaking liquid was not dangerous. Simpson did not identify the leaking substance, did not provide any safety warnings, and did not give Dyall safety data sheets. A Simpson employee informed Dyall that he would not need an air pack. After working on the leaking pipe flange, Dyall began coughing and choking on the fumes, became nauseous and vomited, and developed severe respiratory problems. Under Chapter 95 of the Texas Civil Practice and Remedies Code, a premises owner is not liable for injuries arising from the failure to provide a safe workplace unless the premises owner exercised or retained some control over the manner in which the work was performed and had actual knowledge of the danger, but failed to warn. Plaintiffs conceded that Simpson did not control the manner in which Dyall performed the repairs but contended that Simpson exercised control over safety sufficient to satisfy Chapter 95 when a Simpson employee told Dyall he did not need an air pack and instead directed him to use an escape respirator in a certain area of the plant. The court of appeals found these allegations insufficient to demonstrate a right of control, pointing to the protections available to Dyall that he ultimately chose not to use. The court also noted that Dyall was told that the pipe was not empty, that he could see liquid dripping from the flange, and that the leak was within twenty-five feet of a sign warning of the presence of chlorine dioxide and recommending the use of goggles, a face shield, and a respirator. The court decided that Chapter 95 applied to the plaintiffs' claims and that summary judgment was properly granted for Simpson.[29]

3. *The "Known Danger" Defense*

In *In re Voluntary Purchasing Groups, Inc. Litigation*, a federal magistrate found that the defendant, an arsenic manufacturer, had no duty to warn community members of the dangers of arsenic because the danger was commonly known, the scope of a duty to warn all potentially affected communities would be too great, and the arsenic had been transformed through processing into a liquid waste that was no longer the defendant's

28. *Id.* at 874. *But see Humble Sand & Gravel, Inc.*, 48 S.W.3d at 496 ("Proof that the intermediary knew that the product was dangerous does not, in and of itself, absolve the supplier of a duty to warn ultimate users.").

29. Dyall v. Simpson Pasadena Paper Co., No. 14-01-00432-CV, 2003 WL 21664163 (Tex. App.—Houston [14th Dist] July 17, 2003, no pet.).

product. ASARCO shipped arsenic by railcar to a pesticide plant in Commerce, Texas, where unlined waste disposal pits were found to violate the Texas Water Quality Control Act. The liquid waste was moved to unlined pits near Ridgeway, Texas, where arsenic was later found in the water supply. The court found that the connection between any product defect and the personal injuries and property damage alleged by the Ridgeway residents was too attenuated to support liability. The court held that the dangers of arsenic exposure "were within the realm of 'common knowledge'" and that requiring a manufacturer transporting chemicals over long distances to warn every community receiving those chemicals, and perhaps every community along the transportation route, would be too difficult for the courts to supervise.[30] The plaintiffs also could not recover because they were exposed to liquid waste in which "ASARCO's arsenic underwent fundamental changes to its identity," rather than to the product as ASARCO sold it.[31]

4. Statute of Repose

In two cases released during the Survey period, the Tyler Court of Appeals interpreted the statute of repose to be applicable to engineers, builders, and designers of improvements to real property and manufacturing equipment. In *Brown & Root, Inc. v. Shelton,* the court held that the statute did not bar claims against a contractor based on asbestos exposure that occurred in part before the contractor's industrial machinery was annexed to real property. The court noted that although the asbestos-containing materials installed by Brown & Root constituted an improvement, at least some of the plaintiff's exposure occurred during the pre-installation and pre-construction phases, before those materials were sufficiently annexed to the property to be considered improvements.[32]

On the other hand, in *Cofer v. Ferro Corp.*, the court affirmed summary judgment based on the statute of repose in favor of a manufacturer, Ferro, who designed and constructed kilns in the early 1960s at the facility where the plaintiff was later employed. The court found that the kilns were improvements to real property and would be protected by the statute, observing that the plaintiff presented no evidence of any willful misconduct or fraudulent concealment that might prevent the operation of the statute of repose.[33]

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30. *In re* Voluntary Purchasing Groups, Inc. Litig., No. Civ. 3:94-CV-2477-H, Civ. 3:96-CV-1927-H, Civ. 3:96-CV-1929-H, Civ. 3:96-CV-2985-H, Civ. 3:96-CV-2993-H, Civ. 3:96-CV-3057-H, Civ. 3:96-CV-3094-H, Civ. 3:96-CV-3098-H, Civ. 3:97-CV-0055-H, 2003 WL 21499262, *report and recommendations adopted*, 2003 WL 21664856, at *7 (N.D. Tex. June 24, 2003).

31. *Id.* at *7-8.

32. Brown & Root, Inc. v. Shelton, No. 12-01-00259-CV, 2003 WL 21771917, at *4 (Tex. App.—Tyler 2003, no pet.) (not designated for publication).

33. Cofer v. Ferro Corp., No. 12-02-00151-CV, 2003 WL 21804821, at *4 (Tex. App.—Tyler 2003, no pet.) (not designated for publication).

B. Sufficiency and Admissibility of Expert Proof of Scientific Causation

Trial and appellate courts have continued to scrutinize expert opinion evidence in toxic tort cases to determine if such evidence has a valid scientific foundation. During the Survey period, appellate courts invariably affirmed trial court rulings excluding expert scientific testimony for lack of reliability. For example, in *Allison v. Fire Insurance Exchange*, the Austin Court of Appeals affirmed the exclusion of the plaintiff's expert testimony that exposure to toxic mold in his home caused the plaintiff to develop toxic encephalopathy; consequently, the court affirmed summary judgment for the insurer on the plaintiff's personal injury claims. The plaintiff's expert testified that it was premature to calculate a confidence interval or risk factor from the study results he relied upon, and he could not say whether the techniques used in the study were generally accepted; thus, the testimony was unreliable according to the standards set out in *Merrell Down Pharmaceuticals, Inc. v. Havner*.[34] The court also noted that *Havner* requires a doubling of the risk of injury to establish general causation, but the *Havner* court was unwilling to designate a relative risk of 2.0 a "bright-line boundary" or "litmus test" for proving causation.[35] In fact, while strength of association is relevant in determining general causation, the *Havner* court's reference to "doubling of the risk" is most directly relevant in the application of epidemiology to the requirement that a plaintiff prove specific causation, i.e., that it is "more likely than not" that a particular substance caused his illness.[36]

The First District Court of Appeals in Houston has affirmed trial court orders excluding expert testimony of causation in a variety of circumstances. In *Daniels v. Lyondell-Citgo Refining Co., Ltd.*, the court affirmed summary judgment against the family of a refinery worker who died from bronchial alveolar carcinoma allegedly caused by benzene exposure because it found no evidence of general causation. The plaintiffs' experts relied on three studies to support their conclusion that benzene causes bronchial alveolar carcinoma, but the court observed that follow-up studies to each of the three, which enlarged the sample size, (and in one case, the original study as well) failed to show a doubling of the risk. The court found that if the risk were not doubled, the results were statistically insignificant and did not support general causation. Again, the significance of "doubling of the risk" is more properly addressed to specific causation. This distinction, however, would not have affected the outcome of the court's analysis since, pursuant to its review of the articles, the court would have found no evidence of specific causation had it ad-

34. Allison v. Fire Ins. Exch., 98 S.W.3d 227 (Tex. App.—Austin 2002, pet. abated) (citing Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 717 (Tex. 1997), *cert denied* 118 S. Ct. 1799).

35. *Havner*, 953 S.W.2d at 718-19.

36. *Id.* at 717.

dressed that issue.[37]

In *Crofton v. Amoco Chemical Co.*, the First District Court of Appeals in Houston affirmed summary judgment against residents living in the vicinity of a hazardous waste superfund site because the plaintiffs' experts did not provide testimony that exposure to chemicals from the site caused any specific illness suffered by the plaintiffs. Dr. Arch Carson, a specialist in preventative medicine and occupational medicine, testified that based on his review of the medical records, the plaintiffs' illnesses "correspond well" to expected risks from chemicals found at the superfund site, but he failed to link any plaintiff's particular illness to specific chemical exposures from the site.[38] Plaintiffs' toxicologist, Dr. K.C. Donnelly, testified that the plaintiffs were exposed to "a mixture of chemicals released from the MOTCO site," which "included agents that are capable of irritation, as well as chemicals known to initiate . . . and promote . . . the carcinogenic process."[39] Dr. Donnelly, however, did not attribute any specific illness to such exposure. The plaintiffs' engineers calculated chemical concentrations, emission rates, and dispersion through the air and ground around the plaintiffs' residences, but they did not attempt to link any plaintiff's illness to chemical exposures from the site. The court concluded that the plaintiffs had produced no evidence of causation to support their claims for personal injury or medical monitoring. The court also found that the plaintiffs had not proposed specific protocol for medical monitoring or provided evidence that such monitoring was medically necessary.

In *Brookshire Bros., Inc. v. Smith*, the First District Court of Appeals in Houston held that a material safety data sheet (MSDS) could not provide the basis for an expert opinion of general causation in a chemical exposure case. The plaintiff was diagnosed with reactive airways dysfunction syndrome (RADS) after working with certain commercial cleaners in a grocery store bakery and bathroom over a two-day period. Dr. Gary Friedman testified, based on his review of the medical records, the plaintiff's account of his exposure, the warning labels on the commercial cleaners used by the plaintiff, and the MSDS for those products, that the plaintiff's RADS was caused by his exposure to toxins in those cleaners. The court held that Dr. Friedman's reliance on the warning labels and the MSDS was insufficient to provide his opinion with evidentiary value because those sources do not disclose "the scientific foundation used in formulating the conclusions contained in either the MSDS or the warning

37. Daniels v. Lyondell-Citgo Ref. Co., Ltd., 99 S.W.3d 722, 730 (Tex. App.—Houston [1st Dist.] 2003, no. pet.) ("Because the Daniels family failed to present summary judgment evidence sufficient to raise a fact question concerning general causation, we need not address their second point of error asserting that they offered sufficient proof of specific causation.").

38. Crofton v. Amoco Chem. Co., No. 01-01-00526-CV, 2003 WL 21297588, at *5 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (mem. op.).

39. *Id.*

labels."[40] Although Dr. Friedman mentioned two peer-reviewed articles, these articles were mentioned only in passing and did not provide the necessary support for Dr. Friedman's conclusions.

Across the hall, the Fourteenth District Court of Appeals in Houston has similarly upheld trial court decisions excluding expert opinion evidence of a causal relationship between the defendant's conduct and the plaintiff's injuries. In *Frias v. Atlantic Richfield Co.*, the court affirmed summary judgment against the family of a refinery worker who died of aplastic anemia allegedly caused by occupational exposure to benzene. As the First District Court of Appeals has tended to do, the Fourteenth District Court of Appeals also framed its discussion in terms of general causation "whether a substance is capable of causing a particular injury or condition in the general population."[41] While the court acknowledged that "it is undisputed that, at some level and length of exposure, benzene causes aplastic anemia," the court ruled that the plaintiff's evidence of general causation failed because it did not reliably establish the lower limit of dose and exposure time at which the substance could cause disease.[42] The court instead might have addressed this as a specific causation issue, that is, whether the plaintiff's dose, exposure, and onset of injury is similar enough to those observed in the relevant studies.[43] Addressing specific causation, the court found that the testimony quantifying the plaintiff's exposure that the plaintiff was "*consistently exposed* to benzene levels in the 10 to 20 ppm range . . . and that he had *regular exposures* above 100 ppm . . . [with *o*]*ccasional* peak exposures of hundreds of ppm and, in some cases, approaching 1000 ppm," was insufficiently precise to establish any particular level of exposure.[44]

In *Exxon Corp. v. Makofski*, the Fourteenth District Court of Appeals in Houston reversed judgment in favor of two minor plaintiffs alleging physical illness, including one case of acute lymphocytic leukemia (ALL), because the expert testimony amounted to no evidence that benzene exposure from contaminated well water caused any of plaintiff's past, present, or probable future illness. The court found that only one of the studies relied upon by plaintiffs' experts showed a statistically significant increase (at a ninety-five percent confidence level) in the incidence of ALL in benzene-exposed populations, and the results of even that study were suspect because of questionable diagnoses and its inconsistency with other studies of refinery workers. A government registry of disease inci-

40. Brookshire Bros., Inc. v. Smith, No. 01-02-00677-CV, 2003 WL 23123043, at *4 (Tex. App.—Houston [1st Dist.] Dec. 31, 2003, no pet. h.).

41. *Havner*, 953 S.W.2d at 714.

42. Frias v. Atl. Richfield Co., 104 S.W.3d 925, 928-29 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

43. *Havner*, 953 S.W. 2d at 720 ("A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.").

44. *Frias*, 104 S.W.3d at 930-31 (emphasis in original).

dence in the plaintiffs' community was not helpful because it denied any attempt to show causal relationships to benzene exposure, it admitted potential bias in disease reporting, and it grouped diseases by category so that the incidence of ALL was impossible to discern. Moreover, the testimony of plaintiffs' experts was flawed because they departed from the standards accepted outside the courtroom, applying lower confidence levels and broader disease grouping than would be accepted in epidemiological research and reanalyzing studies to find statistical significance where the study authors did not. One expert testified in contradiction to the opinion he offered in his published textbook. The court found no evidence that benzene exposure caused the plaintiffs' ALL. The court also found no evidence that benzene exposure caused the other plaintiff's anemia several years before because, having failed to test for iron deficiency when the anemia was diagnosed, the plaintiff was unable to exclude the most common source of anemia.[45]

In *Praytor v. Ford Motor Co.*, the Fourteenth District Court of Appeals in Houston affirmed the trial court's ruling that no competent evidence supported the plaintiff's claim that chemicals released when her air bag deployed caused her to develop asthma and sinusitis. The court noted that the trial court might have found the plaintiff's experts unqualified to testify on causation because the plaintiff's pulmonologist admitted that he was not an expert on asthma and its causes or on the toxicity of chemicals released by air bags, and the plaintiff's automotive safety consultant knew nothing about medical causation. The trial court also might have determined that the proposed causation testimony was fatally unreliable because the pulmonologist did not rule out other causes or demonstrate that "his theory has been tested, subject to peer review, or that his theory is generally accepted outside of the courtroom by the relevant scientific community."[46] The trial court did not abuse its discretion in ruling that the expert's opinion, based on the temporal relationship between the plaintiff's exposure and symptom onset, along with his personal observation of two similar cases, was unreliable and did not raise an issue of fact regarding causation.

Breaking the trend toward excluding expert testimony regarding causation, the Beaumont Court of Appeals found error in a trial court's exclusion of a CT scan report—only to hold that the error was harmless because the report was cumulative of other evidence. In *U.S. Silica Co. v. Tompkins*, a defense expert prepared a report that purported to evaluate a high resolution CT scan, but referred to an earlier date on which a regular CT scan was performed. The expert reported no evidence of intersti-

45. Exxon Corp. v. Makofski, 116 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2003, pet. filed). The court also affirmed the trial court's judgment against five adult plaintiffs whom the jury found suffered only mental anguish because, in the absence of current disease or evidence that disease is likely to develop in the future, Texas law does not allow recovery of mental anguish damages. *Id.* at 190-91.

46. Praytor v. Ford Motor Co., 97 S.W.3d 237, 244-45 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

tial fibrosis, but the high resolution CT scan was lost by the hospital and could not be reviewed by the plaintiff's expert. The plaintiff claimed that the report was too unreliable to be relevant, but the court held that the report was relevant to the decedent's disease progression and the "attendant circumstances went to the weight of the evidence rather than its admissibility."[47] The error was harmless, however, because pathologists for both parties found evidence of silicosis in the decedent's lungs, none of the testifying experts relied on the CT scan or report at issue, and the report "was subject to serious attack on its reliability that substantially affected its weight."[48]

The federal trial courts have been equally skeptical of scientific evidence of causation in toxic tort cases. In *Newton v. Roche Laboratories, Inc.*, a federal district court excluded the testimony of two plaintiffs' experts that Accutane causes schizophrenia because the medical literature did not support their opinions. The plaintiffs' sixteen-year-old daughter took Accutane for approximately one month when her parents noted psychological problems, which deteriorated until she was diagnosed with severe schizophrenia. The court rejected the general causation opinion offered by James O'Donnell because he was unqualified, having no medical or pharmacological degree, no experience in the causes of psychosis, and no non-litigation research concerning Accutane or its ingredients. The court also rejected his opinion because he relied on anecdotal case reports, isolated adverse event reports, and the journal of a nineteenth-century arctic explorer, but ignored hundreds of published, peer-reviewed scientific articles on retinoids, including Accutane, which found no connection between these substances and the development of schizophrenia. Dr. Lyle Rossiter, on the other hand, was qualified to act as an expert witness, but his testimony was undermined by his dependence on O'Donnell's opinion. Dr. Rossiter's reliance on the temporal connection between the teenager's Accutane use and her schizophrenia was not a reliable basis for inferring a causal link, and also the Physician's Desk Reference and insert warnings were no evidence of general causation because the standards for issuing those warnings do not coincide with legal proof of causation. Finally, the doctor did not adequately consider and eliminate other possible causes of the teenager's schizophrenia, such as childhood malnutrition, an elderly parent, and a strong family history of the disease.[49]

In *Burleson v. Glass*, a federal district court excluded the opinion of the plaintiff's expert that exposure to thoriated tungsten welding rods over a period of two years contributed to the plaintiff's throat and lung cancers. The court noted that plaintiff's expert, Dr. Arch Carson, a specialist in occupational medicine and toxicology, admitted that he had not calcu-

47. U.S. Silica Co. v. Tompkins, 92 S.W.3d 605, 612 (Tex. App.—Beaumont 2002, no pet.).

48. *Id.* at 613.

49. Newton v. Roche Labs., Inc., 243 F. Supp. 2d 672 (W.D. Tex. 2002).

lated the plaintiff's radiation dose from exposure to the welding rods, that there were no published studies linking thoriated tungsten welding rods to these cancers, and that a two-year latency period between exposure and manifestation of cancer was unusually short. Dr. Carson's radiation "hot spot" theory—that continual, low dose exposure to radiation caused by inhaled particles from the welding rods causes cancer—had been the subject of laboratory research and case reports, but it had not been the subject of epidemiological studies. In addition, the expert admitted that there was significant uncertainty about whether the plaintiff's exposure had caused his cancers.[50] On the other hand, the experts agreed that smoking had been linked to these cancers and that the plaintiff's forty-five year, two-pack-per-day smoking history showed a more predictable latency period to manifestation of the plaintiff's cancer. The court noted that the smoking evidence created a high rate of error for the expert's theory, but it appears that this flaw in the expert's opinion would be more accurately described as the failure to exclude other potential causes. The court excluded Dr. Carson's opinions as unreliable and, consequently, granted summary judgment to the defendant because the plaintiff could offer no evidence of causation.

C. Punitive Damages

In *Brown & Root, Inc. v. Moore*, the Texarkana Court of Appeals affirmed an award of punitive damages against a contractor (Brown & Root) whose work on the premises of the plaintiff's employer caused the plaintiff to be exposed to asbestos and develop mesothelioma. Brown & Root argued that the record contained "no evidence that Brown & Root, *the corporation*, acted with malice."[51] The court observed that the statutory definition of malice includes both an objective and a subjective component—the plaintiff must show that the defendant's conduct, viewed objectively, involves an extreme risk of harm and that the defendant has actual, subjective knowledge of the extreme risk. To support the objective prong of malice, the court noted evidence that "it was common knowledge as far back as 1930 that asbestos posed a serious health risk" and that the causal link between asbestos exposure and lung cancer was accepted in 1949 and the causal link to mesothelioma was accepted in 1960.[52] The court also noted Texas regulations passed in 1958 to regulate asbestos exposure and OSHA regulations passed in 1972. In finding sufficient evidence that Brown & Root was subjectively aware of the risk and proceeded with conscious indifference, the court rejected Brown & Root's contention that the evidence must establish an act by a vice principal, noting that the Texas Supreme Court has recognized authorizing or ratifying the gross negligence of an agent or grossly negligent hiring of an

50. Burleson v. Glass, 268 F. Supp. 2d 699, 706-07 (W.D. Tex. 2003).

51. Brown & Root, Inc. v. Moore, 92 S.W.3d 848, 851 (Tex. App.—Texarkana 2002, pet. denied) (emphasis in original).

52. *Id.* at 852.

unfit agent as equal bases to support punitive damages. Although Brown & Root knew that the regulations required it to monitor the air at its work sites and while it did monitor some work sites it did not perform air monitoring at Lone Star Steel (plaintiff's work site). Brown & Root did not begin air sampling for more than three years after the OSHA regulations required such monitoring. Although the evidence showed that Brown & Root was aware of the precautions to take from its work at Exxon premises where such protections were required, Brown & Root failed to implement similar protections, to monitor the air, or to warn workers at Lone Star Steel, possibly from concern for the "enormous" cost involved.[53] The court found the facts in this case very similar to the facts in *Mobil Oil Corp. v. Ellender* and held that because Brown & Root "proceeded with extreme caution and protected workers possibly coming into contact with asbestos" when it worked at the Exxon premises, but did not apply those safety policies when it worked at Lone Star Steel, the evidence was sufficient to show that Brown & Root acted with malice.[54]

In contrast, in *Quigley Co. v. Calderon*, the El Paso Court of Appeals affirmed an award of compensatory damages to a plaintiff suffering from asbestosis, but reversed the award of punitive damages because it found no evidence to support the malice finding. The plaintiff presented evidence that the plaintiff was exposed to Insulag manufactured by Quigley "almost daily during the 1950s and 1960s."[55] To show malice, the plaintiff relied on a 1959 report to Quigley that "the [Insulag] mixture of cement, asbestos, and brick dust presented an asbestosis exposure" and that the exposure in the plant was well above the prescribed threshold limit set by the American Conference of Governmental Industrial Hygienists.[56] The plaintiff also presented expert testimony that, by the late 1950s, there were well over one hundred articles in the medical literature that discussed the incidence of asbestos-related disease in individuals working with asbestos-containing products. But the court of appeals noted that a former Quigley employee testified that "it was not clear until the 1970s that asbestos was dangerous" or whether products containing a relatively low percentage of asbestos were dangerous.[57] The court found no evidence that (1) viewed objectively from Quigley's point of view in the 1950s and 1960s, the use of Quigley's product "involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others," and (2) during the 1950s and 1960s, Quigley "had actual subjective awareness of the risks . . . but still proceeded with conscious indifference."[58]

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53. *Id.* at 853-54.

54. *Id.* at 855 (discussing Mobil Oil Corp. v. Ellender, 968 S.W.2d 917 (Tex. 1998)).

55. Quigley Co. v. Calderon, No. 08-01-00346-CV, 2003 WL 77256, at *6 (Tex. App.—El Paso 2003, pet. denied) (mem. op.).

56. *Id.*

57. *Id.* at *7.

58. *Id.*

In *Zacharie v. U.S. Natural Resources, Inc.*, the San Antonio Court of Appeals ruled that the plaintiffs could pursue exemplary damages from the decedent's employer for the decedent's wrongful death notwithstanding the exclusive remedy provision of the Texas Worker's Compensation Act (TWCA). The court distinguished the Texas Supreme Court's holding in *Travelers Indemnity Co. of Illinois v. Fuller*[59] that the plaintiff cannot assert such a claim against the employer's insurer, noting that the TWCA expressly prohibits claims against a workers' compensation carrier, but expressly permits claims against an employer for exemplary damages for gross negligence that causes the decedent's death.[60]

III. TEXAS CASE LAW: PROCEDURAL ISSUES

A. Attorney Disqualification

In *In re TXU Holdings Co.*, the Waco Court of Appeals conditionally granted a writ of mandamus to direct the trial court to disqualify plaintiff's counsel based on the former employment of an attorney, Ms. Mortola-Strasser, who, before being admitted to the bar, worked as a legal assistant for defendant's counsel. The evidence showed that, while employed by defendant's counsel, Ms. Mortola-Strasser assisted in defending TXU in asbestos cases. After being licensed as an attorney, Ms. Mortola-Strasser was hired by a plaintiffs' firm that was also active in asbestos litigation. The plaintiffs' firm signed an agreement that it would not participate in "any claims or suits against TXU alleging asbestos exposure," and the firm honored that agreement during the term of Ms. Mortola-Strasser's employment.[61] Shortly after Ms. Mortola-Strasser left the firm, however, the plaintiffs' firm filed suit against TXU. Acknowledging the "conclusive presumption" that, as a non-lawyer on cases involving TXU, Ms. Mortola-Strasser had access to TXU confidences, the court considered whether it should apply the rebuttable presumption that a non-lawyer has shared the confidences of a former client or the irrebuttable presumption that an attorney has done so.[62] The court determined that because Ms. Mortola-Strasser was now an attorney and the concern about restricting the mobility of non-lawyers was not implicated, the better result would be to apply the irrebuttable presumption applicable to lawyers and disqualify the firm from representing plaintiffs against TXU.

B. Class Certification

Demonstrating the now-customary reluctance to certify class actions of claims involving personal injury, the Fourteenth District Court of Appeals in Houston, in *Stobaugh v. Norwegian Cruise Line Ltd.*, affirmed a trial court order denying class certification to cruise line passengers who

59. Travelers Indem. Co. of Ill. v. Fuller, 892 S.W.2d 848, 853 (Tex. 1995).

60. Zacharie v. U.S. Natural Res., Inc., 94 S.W.3d 748, 757-58 (Tex. App.—San Antonio 2002, no pet.).

61. *In re* TXU Holdings Co., 110 S.W.3d 62, 64 (Tex. App.—Waco 2002, no pet.).

62. *Id.* at 65-67.

suffered various injuries when their ship traveled through a hurricane at sea. The plaintiffs alleged claims based on breach of contract, breach of express and implied warranties, negligent misrepresentation, negligence, and violations of the Texas Deceptive Trade Practices Act and additionally sought damages for physical injury and emotional distress. Because the trial court did not indicate the basis for its denial of certification, the court of appeals reviewed the trial court's implied finding that the passengers failed to satisfy the predominance requirement of Texas Rule of Civil Procedure 42. In doing so, the court emphasized that the predominance requirement must be rigorously applied and that a class should not be certified unless it is determined that individual issues can be considered in a manageable, time-efficient, and fair manner. Applying that analysis, the court concluded that the passengers had not shown that common fact questions predominated as to any of the alleged claims.[63] For example, although the passengers alleged that all proposed class members took the same cruise under the same contract, the court found evidence in the record that contract formation was not the same for all passengers; thus, common fact questions did not predominate on issues of contract formation or reliance. With respect to damages, the court of appeals restated the general principle that class action treatment is rarely appropriate for resolving personal injury claims; the passengers suffered a variety of physical injuries and varying degrees of emotional distress and fear, but attempted to create predominance by proposing a "one size fits all" damages award, of which the court disapproved.[64] To the extent specific passengers took a "one size fits all" award and gave up substantial rights to individualized damages, the court found it unclear that a class action would be a superior method to resolve those passengers' claims. The court concluded that the trial court did not abuse its discretion in denying class certification.[65]

C. Intervention, Service, and Limitations

In *Baker v. Monsanto Co.*, the Texas Supreme Court ruled that, although intervenors are required to serve a defendant formally with citation and cannot rely on service by certified mail, the defendant waived the service defect by filing an answer and thereby making a general appearance. The original plaintiffs sued several defendants, including Monsanto, alleging personal injury and property damage caused by a Superfund site. Before the original plaintiffs served Monsanto with citation, the intervenors filed their petition and served it on Monsanto via certified mail. Monsanto refused service because it had not yet been served with citation, and the intervenors made no further attempt at service. The trial court granted Monsanto's motion for summary judgment

63. Stobaugh v. Norwegian Cruise Line Ltd., 105 S.W.3d 302 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
64. *Id.* at 309-10.
65. *Id.* at 312.

asserting limitations as an affirmative defense against the intervenors. As reported in the last Survey, the First District Court of Appeals in Houston affirmed summary judgment, holding that because Monsanto was not yet a party to the underlying suit when the intervenors attempted service, the intervenors were required to serve Monsanto personally rather than by certified mail. The appellate court specifically rejected the intervenors' argument that Monsanto waived any defect in service by filing an answer in the underlying lawsuit. In a per curiam opinion, the supreme court agreed that delivering the petition in intervention by certified mail was ineffective to bring Monsanto within the jurisdiction of the court, but the court ruled that Monsanto made a general appearance when it answered the plaintiffs' complaint, which relieved the intervenors of the responsibility for serving Monsanto with citation. Finding waiver, the supreme court held that summary judgment for Monsanto was erroneous, reversed the court of appeals' judgment, and remanded the case to the trial court.[66]

In *Zacharie v. U.S. Natural Resources, Inc.*, the San Antonio Court of Appeals held that a worker's occupational disease claim against her employer accrued when her doctor diagnosed her illness, but her children's causes of action for gross negligence accrued upon her death. The worker was diagnosed with "pneumoconiosis, probably silicosis," timely filed a personal injury suit against her employer, but did not serve the defendant with citation.[67] After the employee's death, her children amended the original petition to add wrongful death, survival, gross negligence, negligence per se claims, and additional alternative claims for other diseases. The trial court granted summary judgment for the defendants on limitations grounds. The court of appeals affirmed in part, holding that the worker's personal injury claims accrued on the date of her diagnosis because she knew that she had a lung disease and that it was likely work-related. Although her action was timely filed, summary judgment was proper because the decedent failed to serve the defendants during the limitations period and lacked due diligence as a matter of law; the citations sat unclaimed for months, and the attorneys did not attempt to actually serve the defendants or check the status of the citations. Although the children's amended claims alleged that the worker suffered from other diseases, they presented no evidence that these diseases were the result of separate disease processes, and these claims also accrued on the date of the worker's original diagnosis.[68] The court allowed the children to proceed with their claim for punitive damages based on the gross negligence of the worker's employer, however, holding that this was an independent claim accruing on her death.

66. Baker v. Monsanto Co., 111 S.W.3d 158 (Tex. 2003).

67. Zacharie v. U.S. Natural Res., Inc., 94 S.W.3d 748, 751 (Tex. App.—San Antonio 2002, no pet.).

68. *Id.* at 752.

In *Jones v. Alcoa, Inc.*, the Fifth Circuit affirmed dismissal based on limitations in a case brought against Alcoa by former African-American employees who alleged that Alcoa discriminated against them in violation of 42 U.S.C. § 1981 by assigning them to work in areas where employees were regularly exposed to large quantities of asbestos dust. The district court granted Alcoa's motion to dismiss the claims as time-barred. The Fifth Circuit agreed, observing that a § 1981 claim is governed by the most closely analogous limitation provision in state law; in this case, the plaintiffs' claims must have been brought within the limitations period for personal injury actions in Texas, which is within two years after the cause of action accrued. The plaintiffs' employment discrimination claims "accrued" when the plaintiffs knew or reasonably should have known that the challenged discriminatory act occurred. Although the plaintiffs argued that their knowledge of the discriminatory act could not have occurred until they began to experience symptoms of asbestos exposure, the Fifth Circuit disagreed, observing that the discriminatory act that caused plaintiffs' exposure was the assignment to areas where exposure was likely. Because the workers knew or should have known of that discriminatory act while at Alcoa from 1953 to 1970, their claims were barred by limitations. Finding the claims time-barred, the court did not resolve whether Alcoa's allegedly discriminatory assignment of plaintiffs to asbestos-laden work areas was actionable under § 1981.[69]

D. Personal Jurisdiction and Forum Non Conveniens

In *Hoffmann-La Roche, Inc. v. Kwasnik*, the El Paso Court of Appeals upheld the exercise of personal jurisdiction over a non-resident former employer for injuries to the plaintiff caused by workplace asbestos exposure outside the state of Texas.[70] The court first embraced legal sufficiency as the proper standard for reviewing a trial court's order denying a special appearance, citing the Texas Supreme Court's holding in *BMC Software Belgium, N.V. v. Marchand*.[71] Applying this standard, the court found more than a scintilla of evidence to support denial of Hoffmann-La Roche's special appearance. Although it was incorporated in New Jersey, Hoffmann-La Roche had conducted business in Texas since the 1950s and had continued to do business in Texas and maintain a registered agent for service of process in Texas. Additionally, Hoffmann-La Roche owned a plant in Texas and established a sales force in Texas that directly marketed its products to physicians. The court of appeals found the plaintiff's evidence sufficient to support the denial of Hoffman-LaRoche's special

69. Jones v. Alcoa, Inc., 339 F.3d 359, 361 (5th Cir. 2003).

70. Hoffmann-La Roche, Inc. v. Kwasnik, 109 S.W.3d 21 (Tex. App.—El Paso 2003, no pet.). Although the opinion does not expressly state that the plaintiff's exposure (and contact with Hoffmann-La Roche's tortuous conduct) occurred outside Texas, that fact may be assumed based on the plaintiff's reliance on general, rather than specific, causation. *Id.* at 25.

71. BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789 (Tex. 2001).

appearance.[72]

In *Koll Real Estate Group, Inc. v. Purseley*, the First District Court of Appeals in Houston considered whether a non-resident corporation's agreement to indemnify another for losses incurred in Texas is a sufficient basis for asserting personal jurisdiction over the non-resident corporation. The plaintiffs brought asbestos suits against Koll, alleging that as the successor-in-interest to the M.W. Kellogg Company, Koll was liable for injuries caused by Kellogg. Koll challenged personal jurisdiction in Texas, but the trial court denied Koll's special appearance, and Koll filed an interlocutory appeal. The appellate court distilled the corporate history to a few relevant facts: Kellogg was a subsidiary of Henley I, which sold Kellogg to Dresser and agreed to indemnify Dresser for liability arising from Kellogg's jobs in Texas, including the tort liability alleged by the plaintiffs; Henley I then transferred its rights and liabilities to Henley II, later known as Koll. The plaintiffs argued that Kellogg's contacts should be imputed to Koll because Koll's predecessor, Henley II, agreed to indemnify Dresser for Kellogg's liabilities, some of which occurred in Texas. The appellate court disagreed, finding no evidence that Koll assumed contractual liability to third parties for torts that occurred in Texas and noting that, at most, Koll inherited Henley II's responsibility to indemnify Dresser for any liability that Dresser suffered as a result of Kellogg's contacts. Noting that Texas courts have held that indemnification agreements alone are not minimum contacts, the court further explained that even if the indemnity agreement did constitute a sufficient minimum contact, jurisdiction would not be proper because the plaintiff's cause of action did not arise out of that contact. The court reversed and remanded with instructions to dismiss the claims against Koll for lack of personal jurisdiction.[73]

In *In re E.I. du Pont de Nemours & Co.*, the Texas Supreme Court refused to apply the "relation back" doctrine to allow asbestos claims filed by non-residents to escape mandatory dismissal under a Texas forum non conveniens statute. More than 8,000 plaintiffs in five related cases pending in trial courts in Orange and Jefferson counties had brought claims against various defendants for damages from exposure to asbestos, adding E.I. du Pont as a defendant on September 10, 1996. In 1997, the Texas Legislature enacted Section 71.052 of the Texas Civil Practice and Remedies Code, which provides for mandatory dismissal of asbestos-related personal injury or wrongful death claims commenced between August 1, 1995 and January 1, 1997, if those claims arose outside the state at a time when the plaintiff was not a resident of the state. The plaintiffs argued, and the trial courts held, that the claims against E.I. du Pont were not subject to dismissal under the statute because the cases (though not the claims against E.I. du Pont) were commenced prior to August 1, 1995.

72. *Hoffmann-La Roche, Inc.*, 109 S.W.3d at 25.

73. Koll Real Estate Group, Inc. v. Purseley, No. 01-02-01330-CV, 2003 WL 22382623 (Tex. App.—Houston [1st Dist.] Oct. 16, 2003, no pet.).

The supreme court held that to allow the claims against E.I. du Pont to "relate back" to the date of filing of the original case would contravene the language and defeat the intent of the statute. The supreme court also held that E.I. du Pont would have no adequate remedy by appeal, noting that in mass tort litigation a defendant like E.I. du Pont would have to endure several years of litigation against other claimants before the trial courts' decisions could be appealed. The supreme court thus conditionally granted E.I. du Pont's petition for mandamus.[74]

E. Venue and Joinder

In *Wyeth v. Hall*, the Beaumont Court of Appeals held that failing to rule within 120 days after the appeal of a ruling on joinder is perfected does not deprive the appellate court of jurisdiction under Section 15.003(c) of the Texas Civil Practice & Remedies Code. Hall, who alleged personal injuries caused by her ingestion of prescription diet drugs, filed a petition in intervention in a case pending in Jefferson County, Texas. The defendant drug manufacturer moved to transfer venue and objected to the proposed intervention. Hall argued that the language of Section 15.003(c), that the court of appeals shall "render its decision not later than the 120th day" after the appeal is perfected, deprived the court of jurisdiction once 120 days had passed.[75] The court found that this language was directory, not jurisdictional, and failing to rule within the prescribed period would not deprive the court of jurisdiction.[76] Hall could have properly intervened either by establishing venue independently or by satisfying the joinder requirements of Rule 15.003. Because Hall had not pled or offered evidence of any venue facts, the trial court's ruling was "necessarily" and "functionally" a ruling on joinder, despite the fact that the body of the court's order referred only to the venue motion.[77] The court held that Hall had not offered proof on each of the four joinder elements and, therefore, could not satisfy the requirements of Section 15.003.

In *Smith v. Adair*, the Texarkana Court of Appeals reversed a trial court order granting permissive joinder to a group of plaintiffs who could not independently establish venue in a county but tried to join an existing lawsuit filed there. Three groups of plaintiffs brought suit in Harrison County, alleging damages caused by exposure to toxic materials sold by product suppliers. The Group A plaintiffs established venue based on their residence in Harrison County. The Group B plaintiffs established venue by exposure to products supplied by Harrison County businesses. The Group C plaintiffs could not independently establish venue, but alleged that permissive joinder of their claims was proper because they were exposed to toxic materials sold by the Harrison County suppliers. A

74. *In re* E.I. du Pont de Nemours & Co., 92 S.W.3d 517 (Tex. 2002).
75. Wyeth v. Hall, 118 S.W.3d 487 (Tex. App.—Beaumont 2003, no pet. h.).
76. *Id.* at 489.
77. *Id.* at 490.

supplier argued on interlocutory appeal that the trial court erred in denying its motions to transfer venue as to Group C because the Group C plaintiffs did not meet the requirements for permissive joinder. The plaintiffs first argued that the appeal should be dismissed because it was not filed within twenty days after the order was signed, as required by Section 15.003 of the Texas Civil Practice and Remedies Code, which provides for interlocutory appeal of joinder questions. The court of appeals explained, however, that the twenty-day period for Smith to file his appeal began not when the order was signed, but when Smith received notice of the order. The court then considered whether the Group C plaintiffs met the permissive joinder requirements set out in Section 15.003, concluding that the "essential need" requirement would not be satisfied by the mere fact that the related suits of Group A and Group B plaintiffs were already proceeding in Harrison County.[78] Finding that the Group C plaintiffs' affidavits failed to show any "essential need" for their claims to be tried in Harrison County, the court of appeals reversed the order granting permissive joinder and remanded the case for trial.[79]

F. Discovery

The Texas Supreme Court demonstrated its willingness to police overbroad discovery of defendants in toxic tort litigation in *In re CSX Corp.* The plaintiff alleged that workplace exposure to benzene and other carcinogenic chemicals caused him to develop refractory anemia/myelodysplastic syndrome. Although the plaintiff was employed only by National Marine Services, he also sued his employer's parent corporation, American Commercial Barge Line, and three of its other subsidiaries. The plaintiff served interrogatories seeking information from each defendant regarding a thirty-year period. The first interrogatory asked for names and addresses for all persons who worked in the industrial hygiene or safety departments for the period of 1973 to present, the second sought names and addresses of all safety department workers employed by the defendants from 1970 to present, and the third asked for a list of all corporate physicians employed by the defendants from 1970 to present. The subsidiaries objected to the interrogatories as overbroad, but the trial court ordered them to respond, and the court of appeals denied mandamus relief. Observing that the plaintiff had never worked for any of the subsidiaries or for their parent company, the supreme court found that these requests could have been more narrowly tailored to obtain information relevant to the time period when the plaintiff was employed by National Marine Services. Because they were not reasonably limited as to time and subject matter, the supreme court found the three interrogatories overbroad and conditionally granted mandamus relief.[80]

78. Smith v. Adair, 96 S.W.3d 700, 707 (Tex. App.—Texarkana 2003, pet. denied).
79. *Id.* at 707-08.
80. *In re* CSX Corp., 124 S.W.3d 149, 151-52 (Tex. 2003) (per curiam).

In *In re Lincoln Electric Co.*, the Beaumont Court of Appeals conditionally granted mandamus relief to an asbestos defendant who argued that documents it was ordered to produce were privileged. The plaintiffs served Lincoln a subpoena duces tecum seeking documents relating to the manufacture, testing, expert assessment, and location of asbestos-containing welding rods. Lincoln filed a motion for protective order and objected to the subpoena as overly broad, vague, ambiguous, and not document-specific. After the trial court overruled Lincoln's objections and ordered Lincoln to produce the requested documents, Lincoln filed a supplemental response claiming that the information sought was privileged. The court ruled that Lincoln had waived its privileges, but the court of appeals disagreed. Emphasizing the "overall spirit of non-waiver apparent in the applicable discovery rules," the court concluded that the fact that Lincoln's first response consisted only of objections did not waive its later assertion of privilege and conditionally granted Lincoln's petition for writ of mandamus.[81]

G. Summary Judgment Procedure

In *Richard v. Reynolds Metal Co.*, the Corpus Christi Court of Appeals reversed summary judgment on wrongful death and survival claims brought by an asbestos worker's widow and daughter, identifying several procedural defects in Reynolds's two motions for summary judgment and remanding to the trial court. In its original motion for summary judgment, Reynolds claimed that asbestos did not cause the decedent's death, raised the affirmative defenses of limitations, and asserted that the plaintiffs' claims were barred by the Texas Workers' Compensation Act. Because Reynolds's motion did not address distinct claims for strict liability, premises liability, and intentional torts that were later added to plaintiffs' petition, the court of appeals sustained the plaintiff's point of error as to these new claims. The court also held that Reynolds's supplemental motion for summary judgment should be treated as a traditional motion even though the introduction referred to a "no-evidence" motion because Reynolds failed to comply with the requirements for a no-evidence motion. The court also found that Reynolds did not satisfy the traditional summary judgment standard, even criticizing the form of Reynolds motion as "rambling" and "shotgun" because it did not clearly delineate elements on which the plaintiffs had the burden of proof and because it addressed mixed issues including affirmative defenses and expert testimony. Finally, the court rejected Reynolds's argument that the plaintiffs' claims were barred by the decedent's release of an earlier claim against Reynolds, explaining that, even if there was a release in the record, the decedent's earlier claim was for sarcoidosis, not asbestosis, the basis of

81. *In re* Lincoln Elec. Co., 91 S.W.3d 432, 437 (Tex. App.—Beaumont 2002, orig. proceeding [mand. denied]).

the current suit.[82]

IV. UNITED STATES SUPREME COURT CASES

During the Survey period, the United States Supreme Court issued opinions in several toxic tort cases that will impact Texas practitioners. In *Norfolk & Western Railway Co. v. Ayers*, the Court ruled that railroad workers who had developed physical injuries from exposure to asbestos could recover damages under the Federal Employers' Liability Act (FELA) for mental anguish—including their fear of contracting an asbestos-related cancer—caused by the exposure.[83] The Court also rejected the defendant's contention that it was liable only for the portion of damages caused by its tortious conduct, holding that the FELA imposes joint and several liability on the defendant.[84] In *Dole Food Co. v. Patrickson*, the Court held that a tort suit against a foreign corporation may not be removed to federal court under the Foreign Sovereign Immunities Act (FSIA)[85] unless the corporation itself—not a corporate parent or related entity—is owned by a foreign government at the time the lawsuit is filed.[86] In *Syngenta Crop Protection, Inc. v. Henson*, the Court similarly limited federal jurisdiction, holding that a state court suit that is arguably precluded by a federal class action judgment may not be removed to federal court under the All Writs Act.[87] Finally, in *Dow Chemical Co. v. Stephenson*, an equally divided court affirmed the decision of the Second Circuit Court of Appeals that a 1984 class action settlement of injury claims relating to the use of Agent Orange during the Vietnam War did not preclude similar claims brought by class members after the settlement fund was exhausted, because the class members were inadequately represented in the 1984 proceedings.[88] The *Stephenson* decision calls into doubt the preclusive effect of class action settlements in mass tort cases.

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82. Richard v. Reynolds Metal Co., 108 S.W.3d 908, 911, 914 (Tex. App.—Corpus Christi 2003, no pet.).

83. 45 U.S.C. § 51 et seq.

84. Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 141 (2003).

85. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976).

86. Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003). *See also* Borja v. Dole Food Co., Inc., No. Civ. A.3:97-CV-308-L, 2003 WL 21529297 (N.D. Tex. June 30, 2003) (holding that removal was improper under *Patrickson*, 538 U.S. at 474).

87. Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 31 (2002) (interpreting 28 U.S.C. § 1651).

88. Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (citing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997)).