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Toxic Torts and Mass Torts

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TOXIC TORTS AND MASS TORTS

Brent M. Rosenthal*

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I. INTRODUCTION

IF asbestos litigation is the “mother” of all mass tort litigation,¹ as more than one commentator has suggested, then the state of Texas could fairly be described as the mother’s birthplace. It is widely acknowledged that asbestos litigation effectively began with the Fifth Circuit’s “seminal and wide-ranging opinion in *Borel v. Fibreboard Paper Products Corp.*,”² which affirmed a jury verdict in an asbestos case tried in a Beaumont, Texas federal court.³ In the decades following *Borel*, Texas trial and appellate courts arguably played the preeminent role, not only in shaping the substantive law applicable to cases involving injuries caused by asbestos and other industrial toxic substances, but also in developing and honing procedural tools for managing asbestos litigation and other types of mass torts. Initially, the Texas federal courts, led by the

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1. See, e.g., S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559, 564 (2012); Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1756 (2002).

2. See, e.g., Michael Green, *A Future for Asbestos Apportionment?*, 12 CONN. INS. L.J. 315, 318 (2006) (citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973)); David G. Owen, *Inherent Product Hazards*, 93 KY. L.J. 377, 411–12 (2005) (same).

3. *Borel*, 493 F.2d at 1081.

Fifth Circuit and Judge Robert Parker of the United States District Court for the Eastern District of Texas, took the lead in creating this law. These courts issued comprehensive and often controversial opinions on such issues as the availability of damages for risk and fear of future injury,⁴ recovery of punitive damages by successive litigants for the same course of wrongful conduct,⁵ the use of the doctrine of collateral estoppel⁶ and extrapolation techniques⁷ to decide purportedly common issues and streamline the litigation, and the availability of the class action device to produce a global resolution of mass tort claims.⁸

As asbestos litigation migrated to state court in the early 1990s, the Texas Supreme Court began to issue landmark opinions on both procedural and substantive issues. The issues decided by the supreme court included the criteria to be considered in consolidating cases for pretrial proceedings and trial,⁹ the availability of punitive damages to mass tort claimants,¹⁰ and the viability of successive suits for separate injuries caused by the same toxic exposure.¹¹

By the turn of the millennium, however, the climate for mass tort litigation in Texas was noticeably cooling. In 2003, the Texas Legislature enacted what is known to practitioners as "House Bill 4," a comprehensive series of amendments to the Texas Civil Practice and Remedies Code that greatly curtailed recoveries available in tort cases.¹² In 2005, the Texas Legislature added Chapter 90 to the Texas Civil Practice and Remedies Code to govern claims for asbestos and silica-related injuries. Among other reforms, Chapter 90 requires that claimants alleging non-malignant asbestos-related and silica-related injuries to produce documentation that they satisfy specific impairment criteria before their claims can proceed,¹³ and precludes the trial of more than one asbestos claim at a time.¹⁴ Because the overwhelming majority of asbestos claimants alleged non-malignant injuries and because most of these litigants could not satisfy

4. *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 466 (5th Cir. 1985); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-38 (5th Cir. 1985).

5. *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1032 (5th Cir. 1990).

6. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1360-61 (E.D. Tex. 1981), *rev'd in part*, 681 F.2d 334 (5th Cir. 1982).

7. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 663-64 (E.D. Tex. 1990), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998).

8. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986); *Ahearn v. Fiberboard Corp.*, 162 F.R.D. 505 (N.D. Tex. 1995), *aff'd sub nom. In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *and vacated and remanded*, 521 U.S. 1114 (1997), *and aff'd*, 134 F.3d 668 (5th Cir. 1998), *and vacated and rev'd sub nom. Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999).

9. *In re Ethyl Corp.*, 975 S.W.2d 606, 620 (Tex. 1998).

10. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 52-54 (Tex. 1998).

11. *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 653-54 (Tex. 2000).

12. *See generally* H.B. 4, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847 (codified as amended in scattered sections of TEX. CIV. PRAC. & REM. CODE ANN., TEX. GOV'T CODE ANN., TEX. EDUC. CODE ANN., TEX. FIN. CODE ANN., TEX. HEALTH & SAFETY CODE ANN., TEX. HUM. RES. CODE ANN., TEX. INS. CODE ANN., TEX. LAB. CODE ANN., TEX. PROB. CODE ANN., TEX. TRANSP. CODE ANN.).

13. *Id.* §§ 90.003-007.

14. *Id.* § 90.009.

Chapter 90's strict criteria for maintaining compensable claims, it is not an overstatement to suggest that Chapter 90 literally decimated the asbestos docket in Texas.¹⁵

At the same time the Texas Legislature was enacting these statutory tort reforms, the Texas Supreme Court and Texas appellate courts began to exhibit new and vigorous skepticism of the legal viability of many mass tort cases. In *Humble Sand & Gravel, Inc. v. Gomez*, the Texas Supreme Court reversed a jury verdict in favor of a worker who had contracted silicosis from using the defendant's flint products because the trial court failed to consider whether knowledge of the product's hazards by employers in general excused the defendant from the duty to warn.¹⁶ In *Alcoa, Inc. v. Behringer*, the Dallas Court of Appeals reversed a jury verdict in favor of a woman who contracted mesothelioma as a result of her exposure to asbestos on her ex-husband's work clothes, ruling that the defendant-employer owed no duty to a worker's spouse who encounters the work hazard away from the employer's premises.¹⁷ Most significantly, in *Borg-Warner Corp. v. Flores*, the Texas Supreme Court ruled that a toxic tort plaintiff must present "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed" to make a submittable case.¹⁸ The supreme court rejected the then-prevalent view that proof of "any exposure" to a toxic substance could be legally sufficient proof of causation.¹⁹ Recently criticized by the Nevada Supreme Court as "too stringent,"²⁰ the *Flores* test has been repeatedly invoked by Texas appellate courts in finding the plaintiffs' proof of causation to be legally insufficient.²¹

Finally, in recent years the Texas courts have shown increasing intolerance for conduct that plaintiffs' lawyers might characterize as legitimate strategic approaches to maximize the value of their clients's claims, but that defendants condemn as the assertion of meritless or even fraudulent claims. The most highly publicized example of this intolerance is Judge Janis Jack's opinion in *In re Silica Products Liability Litigation*, in which Judge Jack cited evidence that the plaintiffs' lawyers employed unseemly

15. See Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 523 (2009) (describing the "dramatic reduction in the number of filings by unimpaired claimants").

16. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 172–73, 195 (Tex. 2004).

17. *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 460–62 (Tex. App.—Dallas 2007, pet. denied).

18. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007).

19. See, e.g., Behrens, *supra* note 15, at 528–29 (describing the then-prevailing view).

20. *Holcomb v. G. Pac., LLC*, 289 P.3d 188, 195 (Nev. 2012) (noting that the *Flores* test "overburdens the claimant, who might not be able to sufficiently demonstrate not only the dosage quantity of exposure to a particular defendant's product but also the total asbestos dosage to which he was exposed").

21. See *Georgia-Pac. Corp. v. Bostic*, 320 S.W.3d 588, 602 (Tex. App.—Dallas 2010, pet. granted) (reversing jury verdict in plaintiff's favor in a mesothelioma case); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829, 830–31, 839 (Tex. App.—Fort Worth 2010, no pet.) (affirming summary judgment in favor of defendant in a mesothelioma case); *Georgia-Pac. Corp. v. Stephens*, 239 S.W.3d 304, 321 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (reversing jury verdict in mesothelioma case).

screening practices and filed suit based on improbable exposure scenarios and highly suspect medical reports.²² In addition, in a series of decisions beginning almost two decades ago, the Texas Supreme Court condemned what it perceived as efforts by plaintiffs' lawyers to inflate the value of marginal mass tort claims through evasive, obstructive, and unfair discovery practices.²³

Taken together, these developments—legislative curtailment of mass tort remedies, reevaluation by the courts of the common law standards and procedural ground rules governing mass tort cases, and judicial displeasure with alleged ethical breaches in the assertion of mass tort claims—have rendered Texas a chilly, and thus unlikely, forum for mass tort cases. The evidence for this proposition comes in various forms. A review of the activity of the Texas Judicial Panel on Multidistrict Litigation reveals that in the time since the last Survey on this topic (November 2010) the Panel has considered no requests for multidistrict consolidation of any claims that can be described as mass tort litigation.²⁴ The public press has noted that tort reform legislation, recent appellate court decisions, and the cost of litigation have caused the number of jury trials to decline dramatically.²⁵ It also reports that plaintiffs' lawyers in Texas, including lawyers that handle mass tort claims, have transitioned from handling personal injury cases to taking on contract disputes, intellectual property matters, and other types of business litigation.²⁶ Perhaps most relevant for the purposes of this article, the state and federal courts have issued fewer significant opinions in the areas of toxic torts and mass tort litigation than they did in the days before these litigation phenomena were recognized.²⁷ The mass tort cases anticipated in the prior Survey²⁸—the Toyota “unintended acceleration” cases and the litigation resulting from the Transocean oil rig explosion in the Gulf of Mexico—were primarily pursued in other jurisdictions.²⁹

Despite this mass tort and toxic tort “Ice Age” in Texas, the Texas courts have issued a few opinions of interest to mass tort and toxic tort practitioners since the last Survey on these topics. Additionally, the

22. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 625 (S.D. Tex. 2005).

23. See *In re Allied Chem. Corp.*, 227 S.W.3d 652, 655 (Tex. 2007); *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 208–12 (Tex. 2004); *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941–42 (Tex. 1998); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 768–71 (Tex. 1995).

24. See United States Judicial Panel on Multidistrict Litigation, *Multi Circuit Petition Report*, (2012), available at www.jpml.uscourts.gov.

25. Mark Curriden, *Civil Jury Trials Plummet in Texas*, THE DALLAS MORNING NEWS (Apr. 2, 2012, 9:41 PM), www.dallasnews.com/business/headlines/20120402-civil-jury-trials-plummet-in-texas.ece.

26. Janet Elliott, *Personal Injury Lawyers Turn to Representing Businesses*, THE DALLAS MORNING NEWS (Nov. 28, 2012, 9:00 PM), www.dallasnews.com/business/20121128-personal-injury-lawyers-turn-to-representing-businesses.ece.

27. See Behrens, *supra* note 15, at 504–05.

28. Brent Rosenthal, *Toxic Torts and Mass Torts*, 64 SMU L. REV. 583, 583 (2011).

29. See *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145 (C.D. Cal. 2010); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.* on April 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010).

United States Supreme Court issued several opinions that are worthy of review on topics such as preemption, class certification, and the prerequisites for pursuing a securities fraud claim based on a misstatement of potential mass tort liabilities.

II. TEXAS STATE COURT OPINIONS

A. THE LEARNED INTERMEDIARY DOCTRINE

During the Survey Period, the Texas Supreme Court's most significant decision in the toxic and mass tort litigation area solidified liability protection afforded by the learned intermediary doctrine for manufacturers of prescription drugs.³⁰ Under the learned intermediary doctrine, a prescription drug manufacturer satisfies its duty to warn of the risks of its product by providing adequate warnings to the prescribing physician; the manufacturer ordinarily has no duty to warn the consumer directly. As the 2010 Survey reported,³¹ in *Centocor, Inc. v. Hamilton*, the Corpus Christi Court of Appeals declined to apply the learned intermediary doctrine to protect a prescription drug manufacturer from liability for failure to warn because the jury found that the manufacturer engaged in deceptive advertising.³² Relying on an opinion of the New Jersey Supreme Court,³³ the court of appeals observed that the learned intermediary doctrine is largely based on "images of health care that no longer exist"³⁴ and held that the doctrine will not bar a failure-to-warn claim "when a drug manufacturer engages in direct-to-consumer advertising that fraudulently touts the drug's efficacy while failing to warn of the risks."³⁵ The Survey noted, however, that whether the Texas Supreme Court would "condone the abolition of the learned intermediary defense in this context remains to be seen."³⁶

In a decision that delighted the business community and disappointed, but did not surprise, pro-consumer critics of the Texas Supreme Court,³⁷ the supreme court reversed the decision of the court of appeals and rendered judgment in favor of Centocor based on the learned intermediary defense.³⁸ The supreme court did not reject the direct-to-consumer advertising exception outright, acknowledging that "some situations may require exceptions to the learned intermediary doctrine," but it held that

30. See *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 173 (Tex. 2012).

31. Rosenthal, *supra* note 28, at 590–91.

32. *Centocor, Inc. v. Hamilton*, 310 S.W.3d 476, 502–06 (Tex. App.—Corpus Christi 2010), *rev'd in part*, 372 S.W.3d 140 (Tex. 2012).

33. *Perez v. Wyeth Labs., Inc.*, 734 A.2d 1245 (N.J. 1999).

34. *Centocor*, 310 S.W.3d at 480.

35. *Id.* at 499.

36. Rosenthal, *supra* note 28, at 591.

37. Compare case detail for *Centocor, Inc. v. Hamilton* on the Washington Legal Foundation website with case detail in the article *Immunity for Big Pharma* on the Texas Watch website. *Case Detail Centocor, Inc. v. Hamilton*, WASHINGTON LEGAL FOUNDATION, www.wlf.org/litigating/case_detail.asp?id=682; *Immunity For Big Pharma*, TEXAS WATCH (June 18, 2012), www.texaswatch.org/2012/06/immunity-for-big-pharma/.

38. *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 173 (Tex. 2012).

“based on the facts of this case, no exception applies.”³⁹ Patricia Hamilton, the plaintiff in *Centocor*, was prescribed Centocor’s product, Remicade, to treat her Crohn’s disease. She received the drug intravenously at an infusion clinic. Neither the doctor at the clinic nor the nurse that administered the drug discussed with the plaintiff the risks of Remicade, but during the infusion process, they played a video (provided by Centocor) for her about Remicade. The video stated that “there are very little [sic] side effects that people need to watch for” and “did not mention [a] lupus-like syndrome”—the condition that the plaintiff developed—as a potential side effect of Remicade.⁴⁰

The supreme court reversed the jury’s finding of liability, reasoning that “the alleged harm was not caused by Centocor’s direct advertising to Patricia” because she “was already receiving her first infusion when the video started”⁴¹—even though Patricia received at least fourteen additional Remicade infusions after her first treatment.⁴² The supreme court added that the video was “not the type of misleading DTC [direct-to-consumer] advertising” that warranted consideration of an exception to the learned intermediary doctrine because the videos were merely available “to help patients feel more relaxed about the infusion process, by explaining some of the benefits and side effects of the treatment process.”⁴³ Acknowledging that “pharmaceutical companies have increased DTC advertising since courts first adopted the learned intermediary doctrine,” the supreme court concluded that “the fundamental rationale for the doctrine remains the same: prescription drugs require a doctor’s prescription and, therefore, doctors are best suited to communicate the risks and benefits of prescription medications for particular patients through their face-to-face interactions with patients.”⁴⁴

Despite this reasoning, the supreme court also relieved the doctor who administered the Remicade from a duty to warn.⁴⁵ The supreme court determined that since he did not prescribe the drug, the administering doctor “owed no additional duty to warn Patricia merely because he provided informational materials to her that he received from Centocor.”⁴⁶ According to the supreme court, to impose such a duty “could thwart the efforts of prescription drug manufacturers to provide valuable educational information about available treatments.”⁴⁷ The supreme court reached this conclusion despite the jury’s findings that Centocor was liable for fraud, misrepresentation, and negligent marketing in its sales of Remicade.⁴⁸

39. *Id.* at 162.

40. *Id.* at 147–48.

41. *Id.* at 162–63.

42. *Id.* at 148.

43. *Id.* at 163.

44. *Id.* at 164.

45. *Id.* at 167.

46. *Id.*

47. *Id.*

48. *Id.* at 151.

Finally, the supreme court rejected as a matter of law the jury's finding that Centocor was liable for misrepresenting the risks of Remicade to the prescribing physicians in the package inserts. To show the inadequacy of the warning, the plaintiff presented proof that although the package insert stated that three patients developed lupus-like symptoms after receiving Remicade in clinical studies, an internal Centocor e-mail referenced at least 174 patients in such studies that developed lupus-like symptoms. The supreme court dismissed the discrepancy as showing only "*de minimus* differences in risk" that were "legally insufficient to create a fact question for the jury."⁴⁹ The supreme court added that even if the package label was inadequate, the plaintiff did not prove that the inadequate label was a cause of her injury because she failed to show that an accurate label "would have changed Patricia's prescribing physician's decision to prescribe Remicade in light of her complicated medical history and serious ailments."⁵⁰ The supreme court's opinion in *Centocor* establishes huge hurdles for plaintiffs to overcome in order to recover damages caused by a prescription drug.

B. SCIENTIFIC CAUSATION

In its landmark opinion in *Merrell Dow Pharmaceuticals, Inc. v. Havner*,⁵¹ the Texas Supreme Court established criteria for evaluating the reliability, admissibility, and probative value of expert epidemiological evidence of a causal relationship between exposure to a toxic substance and a particular injury. In *Havner*—one of thousands of cases brought nationwide in which the plaintiffs alleged that birth defects in their children were caused by the drug Bendectin—the supreme court suggested that such evidence should be supported by more than one study showing at least a doubling of the risk of the injury in the exposed population.⁵² During the Survey period, the Texas Supreme Court used another mass tort case, involving the painkiller Vioxx, to emphasize that the criteria in the *Havner* opinion are bright-line standards for determining the reliability of expert evidence of causation based on epidemiology. In *Merck & Co. v. Garza*, the Texas Supreme Court reviewed the legal sufficiency of the evidence that the decedent's brief use of Vioxx caused his fatal heart attack.⁵³ The plaintiffs made two arguments: (1) that the expert's opinion of a causal relationship was properly based on epidemiological evidence indicating an elevated incidence of cardiovascular injury following the use of Vioxx, evidence that was based on clinical studies that allegedly were

49. *Id.* at 172.

50. *Id.*

51. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

52. *Id.* at 717 (stating that "there is a rational basis for relating the requirement that there be more than a 'doubling of the risk' to our no evidence standard of review and to the more likely than not burden of proof"); *id.* at 727 (stating that "if scientific methodology is followed, a single study would not be viewed as indicating that it is 'more probable than not' that an association exists").

53. *Merck & Co., Inc. v. Garza*, 347 S.W.3d 256, 259–60 (Tex. 2011).

more reliable than the unpublished observational studies offered in *Havner*; and (2) that “the totality of the evidence” was legally sufficient to support the jury’s finding of causation.⁵⁴ The supreme court emphatically rejected both arguments. Stressing that “*Havner*’s requirements necessarily apply to all epidemiological evidence,” including the clinical trials upon which the plaintiffs relied,⁵⁵ the supreme court found that the studies did not establish a doubling of the risk of heart disease in persons similar to the decedent, who had taken low doses of Vioxx for a brief period.⁵⁶ The supreme court then observed that “[t]he totality of the evidence cannot prove general causation if it does not meet the standards for scientific reliability established by *Havner*.”⁵⁷ Based on the legal insufficiency of the plaintiffs’ proof of causation, the supreme court rendered judgment for Merck.

In *Faust v. BSNF Railway Co.*, the Fort Worth Court of Appeals recognized that to prevail in a toxic tort case, the plaintiff must prove both “general causation” (that the toxic “substance is capable of causing a particular injury”) and “specific causation” (that the substance actually caused the individual’s injury).⁵⁸ The court of appeals affirmed the jury’s finding that a railroad operating a plant that manufactured railroad ties was not liable for damages related to a bystander’s stomach cancer.⁵⁹ The plaintiff presented evidence that the railroad negligently used and disposed of chemicals in the assembly of the ties; that the chemical waste was dispersed into the nearby environment; and that the plaintiff’s exposure to the chemicals caused her cancer. The trial court instructed the jury that to prove specific causation of her injury by the defendant’s conduct, the plaintiff “must exclude, with reasonable certainty, other plausible causes of [her] stomach cancer.”⁶⁰ In response to the jury question asking whether the negligence, if any, of the railroad was a proximate cause of the bystander’s cancer, the jury answered, “No,” and the trial court entered judgment on the verdict. On appeal, the plaintiff argued that the instruction regarding specific causation improperly shifted to the jury the trial court’s “gatekeeper function” of determining the reliability of scientific evidence of causation. The court of appeals rejected the argument, holding that the instruction was not an abuse of discretion and did not likely cause the rendition of an improper verdict.⁶¹ Although the court of appeals agreed “that it is the role of only the trial court to determine whether an expert’s testimony is reliable,” it disagreed with the contention “that the burden to exclude other plausible causes of injury relates

54. *Id.* at 262.

55. *Id.* at 264.

56. *Id.* at 267–68.

57. *Id.* at 268.

58. *Faust v. BSNF Ry. Co.*, 337 S.W.3d 325, 333 (Tex. App.—Fort Worth 2011, pet. denied).

59. *Id.* at 329.

60. *Id.*

61. *Id.* at 336.

solely to the trial court's rule 702 reliability inquiry."⁶² The court of appeals concluded that the specific causation instruction "assisted the jury by providing it with 'the standard it was required by law to apply in making its finding on a hotly-contested issue'—causation."⁶³

III. DEVELOPMENTS IN TEXAS AND FEDERAL MDL PROCEEDINGS

As was noted earlier, during the Survey period the Texas Judicial Panel on Multidistrict Litigation (the Texas MDL Panel or the Panel) was not presented with any requests to transfer and consolidate litigation fitting the technical definition of a mass tort.⁶⁴ It did issue, however, an opinion addressing the scope of MDL consolidation that is of interest to mass tort practitioners. In April and May of 2012, the Panel issued a series of orders transferring hundreds of cases brought by homeowners alleging that insurers undervalued and mishandled claims for property damage caused by Hurricanes Ike, Dolly, Hermine, and Alex.⁶⁵ One of the insurers, State Farm, sought transfer of the hurricane litigation as "tag-along cases"⁶⁶ to non-hurricane related suits alleging similar mismanagement of property insurance claims for roof shingle damage. The plaintiffs opposed consolidation of the non-hurricane cases to the Hurricane MDL. Coining the colorful phrase "MDL-scope creep," the plaintiffs argued that to be properly joined in an MDL consolidation, claims must be united by "one event."⁶⁷ The Panel rejected the plaintiffs' contention, noting that the Hurricane MDL already included claims for at least four separate storms. The Panel emphasized that it "should not be heard to say that any lawsuit involving shingle damages as a result of a wind event would automatically be considered related," but the Panel concluded that suits based on "the policies of State Farm regarding coverage for shingle damage arising from wind events during the period between 2008 and 2010" were sufficiently

62. *Id.* at 335.

63. *Id.* at 335–36 (quoting *Colum. Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855, 862 (Tex. 2009)).

64. See *Multidistrict Litigation Orders—2012*, SUP. CT. TEX., <http://www.supreme.courts.state.tx.us/mdl/mdlhome.asp> (last visited July 19, 2013).

65. Order of Multidistrict Litigation Panel, *In re Geovera Specialty Ins. Co. Hurricane Ike Litig.*, No. 12-0297 (Tex. M.D.L. Panel May 24, 2012); Order of Multidistrict Litigation Panel, *In re Nat'l Sec. Fire & Casualty Co. Hurricane Litig.*, No. 12-0271 (Tex. M.D.L. Panel May 22, 2012); Order of Multidistrict Litigation Panel, *In re Republic Lloyds Hurricanes Ike & Dolly Litig.*, No. 12-0262 (Tex. M.D.L. Panel May 22, 2012); Order of Multidistrict Litigation Panel, *In re S. Vanguard Ins. Co. Hurricanes Ike & Dolly Litig.*, No. 12-0261 (Tex. M.D.L. Panel May 22, 2012); *In re State Farm Lloyds Hurricane Ike Litig.*, M.O.L. No. 12-0156, 2012 WL 6013273, at *1 (Tex. M.D.L. Panel May 21, 2012); Order of Multidistrict Litigation Panel, *In re Cypress Tex. Lloyds Hurricane Ike Litig.*, No. 12-0230 (Tex. M.D.L. Panel Apr. 25, 2012); Order of Multidistrict Litigation Panel, *In re Nat'l Lloyds Ins. Co. Hurricane Litig.*, No. 12-0248 (Tex. M.D.L. Panel Apr. 25, 2012); Order of Multidistrict Litigation Panel, *In re State Farm Lloyds Hurricane Ike Litig.*, No. 12-0156 (Tex. M.D.L. Panel Apr. 25, 2012).

66. See TEX. R. JUD. ADMIN. 13.5(e) (2012).

67. *In re State Farm Lloyds Hurricane Ike Litig.*, 387 S.W.3d 130, 132 (Tex. M.D.L. Panel 2012).

related to be included in the Hurricane MDL.⁶⁸

As the Texas MDL Panel recognized in the Hurricane MDL litigation, only related cases are eligible for tag-along transfer to an existing MDL proceeding. In *In re Champion Industrial Sales, LLC*, the Corpus Christi Court of Appeals held that a case was not sufficiently related to an MDL proceeding to permit the MDL pretrial court to retain jurisdiction over the case.⁶⁹ This was true even though the plaintiff's original petition warranted transfer.⁷⁰ In *In re Champion*, the plaintiff alleged that her husband died as a result of exposure to toxic hard-metal substances, including silica, in the course of his employment, and she sued his employer and the suppliers of the materials to which he was exposed. After the case was transferred to the multidistrict proceeding supervising the silica litigation, the plaintiff filed an amended petition specifically denying that her husband's wrongful death was caused by silica. She then filed a motion to remand the case from the MDL pretrial court to the original trial court, attaching a medical report stating that her husband "did not have silicosis" but instead "had hard metal lung disease."⁷¹ Based on these filings, the MDL pretrial court concluded that the case was not related to the silica litigation—even though defendants' third-party claims against the silica manufacturers remained—and remanded the case to the court of origin.⁷² The defendants asked the court of appeals to issue a writ of mandamus requiring the MDL pretrial court to retain jurisdiction over the case.

The court of appeals declined to do so. The court of appeals first noted that a court sitting as an MDL pretrial court is not a court of general jurisdiction; it cannot exercise jurisdiction over a case that was not "properly transferred" pursuant to the statute.⁷³ The court of appeals cited the general rule that objections to subject matter jurisdiction "can be raised at any time" and, for cases transferred under the multidistrict litigation statute, declined to adopt the "time of filing rule," under which a court cannot be divested of jurisdiction by events that occur subsequent to filing.⁷⁴ The court of appeals concluded that the pretrial court had not abused its discretion in removing the case from the MDL silica docket and allowing the case to proceed in the court in which it was initially filed.⁷⁵

Meanwhile in the federal courts, the multidistrict proceeding concerning the metal-on-metal hip prosthesis manufactured by DePuy Orthopaedics, Inc. (a division of Johnson & Johnson) remains pending in the

68. *Id.* at 135.

69. *In re Champion Indus. Sales, LLC*, 398 S.W.3d 812, 816–17, 824 (Tex. App.—Corpus Christi 2012, no pet.).

70. *Id.*

71. *Id.* at 816.

72. *Id.* at 819.

73. *Id.* at 821–22.

74. *Id.* at 822–23.

75. *Id.* at 823–24.

Northern District of Texas before the Honorable Ed Kinkeade.⁷⁶ The court issued a pretrial order setting forth deadlines for completing discovery, filing pretrial motions, and establishing a protocol for selection of bellwether cases for trial.⁷⁷ The order requires the first bellwether case to be ready for trial by September 1, 2014.⁷⁸

IV. FIFTH CIRCUIT AND UNITED STATES SUPREME COURT OPINIONS

A. SCIENTIFIC CAUSATION

Plaintiffs who alleged injury caused by exposure to a known toxic substance, but who could not support their allegations with epidemiological studies demonstrating a clear causal link, fared no better in federal court than in Texas state court. In *Johnson v. Arkema, Inc.*, a worker claimed that his exposure to chemicals known as MBTC and HCI in a glass manufacturing plant caused him both acute respiratory injuries and severe, progressive pulmonary fibrosis.⁷⁹ The worker supported his allegations with the expert opinions of a pulmonary doctor and a toxicologist. Although the experts were not able to cite an epidemiological study specifically associating MBTC and HCI with a greater than two-fold increased risk of developing chronic pulmonary fibrosis, other cited data supported their conclusions. This data included: (1) proof that MBTC and HCI are part of a toxicological “class of chemicals” labeled as irritants that are known to cause pulmonary fibrosis; (2) animal studies, including a study of baboons, in which the animals developed pulmonary fibrosis after exposure to high concentrations of HCI; (3) evidence that material safety data sheets (MSDS) issued by the suppliers of MBTC contained warnings that HCI “can be severely corrosive to the respiratory system” and MBTC “CAUSES RESPIRATORY TRACT IRRITATION”; (4) evidence that the worker was exposed to concentrations of HCI in between two and ten times the permissible exposure levels set by the Occupational Safety and Health Administration (OSHA) and levels of MBTC between 100 and 500 times OSHA’s permissible exposure level set for that chemical; and (5) the temporal connection between the worker’s exposure to the chemicals, the development of his illness, and the absence of any other plausible cause of the disease.⁸⁰

Despite the abundance of circumstantial and common-sense factors implicating the worker’s occupational exposure to MBTC and HCI as the cause of his pulmonary fibrosis, the Fifth Circuit affirmed the district court’s exclusion of the worker’s expert opinions of causation as unrelia-

76. See *Judges-MDL Cases*, U.S. DIST. CT.—N. DIST. OF TEX., <http://www.txnd.us courts.gov/judges/MDL/mdl.html> (last visited July 19, 2013).

77. Case Management Order No. 8 [Schedule of Pretrial Matters], *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, M.D.L. No. 3:11-MD-2244-K (N.D. Tex. Aug. 14, 2012).

78. *Id.*

79. *Johnson v. Arkema, Inc.*, 685 F.3d 452, 457 (5th Cir. 2012).

80. *Id.* at 461–67.

ble.⁸¹ One by one, the court explained how each of the data upon which the experts relied did not support a proper conclusion of cause-and-effect. The court rejected the "class of chemicals" theory because the class included chemicals with "diverse chemical structures and toxicities of irritants."⁸² It dismissed the baboon study as unresponsive because the experts failed to show that there was a "correlation between the duration and length of the baboon exposure and Mr. Johnson's exposure."⁸³ It found the MSDS of no consequence because the experts "failed to come forth with any scientific data to support the MSDS's warning."⁸⁴ It discounted the significance of the OSHA limits because the experts did "not provide any scientific data or literature to explain how or why the various exposure limits and guidelines were" adopted for the respective chemicals.⁸⁵ The Fifth Circuit also found the temporal relationship between the exposure and the development of the condition, and the absence of other possible causes, were not suggestive because the suggestion of causation was "based on the presumption that MBTC and HCl [were] actually capable of causing restrictive lung disease and pulmonary fibrosis in the general population," and the experts did not present "any reliable or relevant scientific evidence to bolster this presumption."⁸⁶ Although the Fifth Circuit found that the worker's evidence supported his claim for acute respiratory injury, it concluded that the district court acted within its discretion in excluding the experts' opinions that the occupational exposures caused the worker's pulmonary fibrosis and in granting summary judgment for the defendant on that claim.⁸⁷

In a concurring opinion, Judge Reavley found the majority's rejection of the experts' opinions on the causal relationship between the exposure and the pulmonary fibrosis "simply incredible."⁸⁸ To Judge Reavley, the question of causation in this case involved fact questions to be decided by the trier of fact.⁸⁹ Judge Reavley suggested that the majority's insistence on "fully tested and peer reviewed studies" to support the expert opinions was unrealistic:

How would that study be designed and conducted, by obtaining a large population of people to breathe this chemical vapor or that vapor in this volume or that volume, then to have their lung function tested and maybe biopsied? Where would so many persons be found to be subjected to this?⁹⁰

81. *Id.* at 456-57.

82. *Id.* at 461-62.

83. *Id.* at 463.

84. *Id.* (reasoning for HCl); *id.* at 465-66 (reasoning for MBTC).

85. *Id.* at 464 (reasoning for HCl); *id.* at 466 (reasoning for MBTC).

86. *Id.* at 469.

87. *Id.* at 472.

88. *Id.* at 473 (Reavley, J., concurring).

89. *Id.* at 472 (Reavley, J., concurring).

90. *Id.* at 473 (Reavley, J., concurring).

Many toxic tort plaintiffs, unable to produce the kind of specific proof that both the state and federal courts in Texas now require, have asked the same rhetorical questions.

B. PREEMPTION

Tracking the United States Supreme Court's recent decisions on federal preemption of state law product liability claims against pharmaceutical manufacturers is a bit like watching a fast-paced tennis match. In 2008, the Court issued its decision in *Riegel v. Medtronic, Inc.*, holding that because the manufacturer received premarket approval for its cardiac catheter by the Food and Drug Administration (FDA) in compliance with the Medical Device Act, the plaintiff's claim based on breach of the manufacturer's state law duty was preempted.⁹¹ A year later, the Court held in *Wyeth v. Levine* that the manufacturer's compliance with federal regulations dictating the language of the warning on the manufacturer's prescription drug did not preempt the manufacturer's duty to provide an adequate warning under state law.⁹² The Court found that, unlike the manufacturer in *Riegel*, the manufacturer in *Wyeth* could have complied with both the federal regulations and state law because the regulations allowed Wyeth to change its label as long as it filed a supplemental application with the FDA.⁹³

Most recently, the Court held in *PLIVA, Inc. v. Mensing* that the use of an FDA-approved warning by manufacturers of a generic drug precluded liability for failure to warn under state law.⁹⁴ The Court, in an opinion by Justice Thomas, candidly recognized that finding preemption of claims for inadequate warning against generic drug makers but not against brand-name manufacturers "makes little sense" from the standpoint of the consumer.⁹⁵ However, the Court felt constrained to reach this result because under the federal statute "brand-name and generic drug manufacturers have different federal drug labeling duties": a brand-name manufacturer seeking FDA approval of a new drug "is responsible for the accuracy and adequacy of its label," while a manufacturer seeking generic drug approval is responsible only "for ensuring that its warning label is the same as the brand name's."⁹⁶ The Court rejected the plaintiff's argument that the manufacturers should not escape liability through federal preemption "because they did not even *try* to start the process that might ultimately have allowed them to use a safer label."⁹⁷ The Court found the argument "fair,"⁹⁸ but it declined to adopt an approach that would require "speculation about ways in which federal agency and third-party actions could

91. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

92. *Wyeth v. Levine*, 555 U.S. 555, 558–59, 581 (2009).

93. *Id.* at 568, 571.

94. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572, 2581 (2011).

95. *Id.* at 2581.

96. *Id.* at 2574.

97. *Id.* at 2579.

98. *Id.*

potentially reconcile federal duties with conflicting state duties.”⁹⁹ The Court acknowledged “the unfortunate hand that federal drug regulation has dealt” consumers of generic drugs but declined to distort the principles of federal preemption to force similar results “across a dissimilar statutory scheme.”¹⁰⁰

In a sharply worded dissent, Justice Sotomayor lamented that under the Court’s decision, “whether a consumer harmed by inadequate warnings can obtain relief turns solely on the happenstance of whether her pharmacist filled her prescription with a brand-name or generic drug.”¹⁰¹ Justice Sotomayor found unconvincing Justice Thomas’s conclusion that compliance with both the federal regulation and the state law duty was impossible, noting that “had the [m]anufacturers invoked the available mechanism for initiating label changes, they may well have been able to change their labels in sufficient time to warn respondents.”¹⁰² Quoting Justice Thomas himself, Justice Sotomayor bluntly stated her view that “[t]he Court gets one thing right: This outcome ‘makes little sense.’”¹⁰³

In *Bruesewitz v. Wyeth LLC*, the Court found preemption of state law from facts involving a claim for injuries caused by the side effects of vaccines.¹⁰⁴ The plaintiffs alleged that their daughter developed serious side effects after receiving a vaccine against diphtheria, tetanus, and pertussis.¹⁰⁵ They filed an administrative claim for compensation under the National Childhood Vaccine Injury Act of 1986 (NCVIA).¹⁰⁶ After their claim was denied, the plaintiffs filed a product liability claim against the vaccine manufacturer alleging that the vaccine was defectively designed.¹⁰⁷ But the NCVIA contains a provision that “[n]o vaccine manufacturer shall be liable in a civil action for damages . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.”¹⁰⁸ The district court and the Third Circuit both held that this provision preempted the plaintiffs’ claims, and the Supreme Court affirmed in a majority opinion by Justice Scalia.¹⁰⁹ Purporting to employ a strictly textual analysis, Justice Scalia rejected the argument advanced by the plaintiffs and the dissent that the language of the statute allows claims based on the theory that an alternative feasible design would have made the injury unavoidable.¹¹⁰ In dissent, Justice Sotomayor subjected the text to an equally meticulous analysis and reached the opposite re-

99. *Id.* at 2580.

100. *Id.* at 2581–82.

101. *Id.* at 2583 (Sotomayor, J., dissenting).

102. *Id.* at 2587 (Sotomayor, J., dissenting).

103. *Id.* at 2583 (Sotomayor, J., dissenting) (quoting *id.* at 2581).

104. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011).

105. *Id.* at 1072, 1074–75.

106. *See* 42 U.S.C. § 300aa–22(b)(1) (2006).

107. *Bruesewitz*, 131 S. Ct. at 1075.

108. 42 U.S.C. § 300aa–22(b)(1).

109. *Bruesewitz*, 131 S. Ct. at 1075, 1082.

110. *Id.* at 1075 (“The language of the provision thus suggests that the *design* of the vaccine is a given, not subject to question in the tort action.”) (emphasis in original).

sult.¹¹¹ Her interpretation of the NCVIA would have allowed a jury, applying state law, to determine whether the injuries caused by the vaccine could have been prevented “by a feasible alternative design that would have eliminated the adverse side effects without compromising the vaccine’s cost and utility.”¹¹² The majority’s finding of preemption, Justice Sotomayor concluded, “leaves a regulatory vacuum in which no one—neither the FDA nor any other federal agency, nor state and federal juries—ensures that vaccine manufacturers adequately take account of scientific and technological advancements.”¹¹³ One might add that the Court’s decision in *Bruesewitz* also closes the courthouse doors to what the majority acknowledged are thousands of potential claims for compensation for avoidable injuries resulting from defective vaccines.¹¹⁴

C. SECURITIES FRAUD BASED ON FAILING TO DISCLOSE TO INVESTORS THE SCOPE OF POTENTIAL MASS TORT LIABILITY

In the last Survey, we recognized the relatively modern phenomenon that a party charged with committing a mass tort may incur not only primary liability to the persons injured by the tortious conduct, but also secondary liability to persons whose financial positions have been harmed by the defendant’s false or misleading statements to the market about its potential mass tort liability.¹¹⁵ We reported that in *Archdiocese of Milwaukee Supporting Fund v. Halliburton Co.*, the Fifth Circuit ruled that an investor-plaintiff seeking damages for private securities fraud on behalf of a class must demonstrate “loss causation” (that is, that the misrepresentations or omissions actually caused the sales of stock at an inflated price) as a prerequisite for class certification.¹¹⁶ As noted in the Survey, the United States Supreme Court granted certiorari in *Archdiocese of Milwaukee* and has now reversed the Fifth Circuit’s decision. In *Erica P. John Fund, Inc. v. Halliburton Co.*, the Court reasoned that the “loss causation” requirement for certification imposed by the Fifth Circuit conflicts with the Supreme Court’s approval of the “fraud-on-the-market” theory, which recognizes a presumption that the investor-plaintiff relied on public misstatements if he purchased the stock at the price set by the market.¹¹⁷ The Supreme Court’s opinion in *Erica P. John Fund, Inc.* could make it easier for investors, whose shares in a company lost value after the company’s potential mass tort liability became public, to maintain a class action for securities fraud. But such suits are a time-consuming exercise. The suit against Halliburton, filed in 2002, has now entered

111. *Id.* at 1093–97 (Sotomayor, J., dissenting).

112. *Id.* at 1093 (Sotomayor, J., dissenting).

113. *Id.* at 1101 (Sotomayor, J., dissenting).

114. *Id.* at 1072–73 (noting the “massive increase in vaccine-related tort litigation” that prompted enactment of the NCVIA).

115. Rosenthal, *supra* note 28, at 595.

116. *Id.* at 595–96 (citing *Archdiocese of Milwaukee Supporting Fund v. Halliburton Co.*, 597 F.3d 330, 334 (5th Cir. 2010), *vacated and remanded sub nom.* *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011)).

117. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185–87 (2011).

its second decade. Following remand from the Supreme Court, the issue of the propriety of class certification is again before the Fifth Circuit on interlocutory appeal from the district court.¹¹⁸

V. CONCLUSION

In the past decade, Texas has gone from a haven to a hinterland for mass and toxic tort litigation. Isolated toxic tort cases continue to be brought in the Texas state and federal courts, and occasionally mass tort cases find their way to Texas as well. But this is more likely a function of geographical and procedural imperative than preference. Once viewed as “judicial hellholes,” courts in Texas are now viewed by the plaintiff’s bar as icy and unreceptive to all but the most conventional legal theories and factual scenarios. The relative dearth of significant activity in toxic tort and mass tort litigation since the last Survey reflects this development.

Common sense suggests that this climate change has not reduced the incidence of tortiously-caused toxic injuries or multi-victim cases in Texas any more than the passage of tort reform applicable to medical liability litigation has reduced the incidence of medical malpractice in the state. A thaw in the cold climate for toxic and mass tort litigation in Texas will likely occur only if and when the courts and the Texas legislature, through their opinions and enactments, once again provide victims of tortious conduct a realistic opportunity to recover compensation in the Texas courts.

118. Order Granting Parties’ Joint Motion for a Stay Pending Ruling on Defendants’ Appeal, *Archdioceses of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M (N.D. Tex. June 4, 2012).