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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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IN the areas of toxic tort and mass tort litigation, the 2009 to 2010 Survey period was notable not for landmark judicial decisions or landscape-changing legislation, but for the emergence of new mass torts of enormous potential scope and significance. In late 2009 and early 2010, the Toyota Motor Corporation recalled several of its models based on suspicions that defective design of the floor mats or the gas pedals in the vehicles created a risk of sudden, unintended acceleration.¹ The revelations prompted a deluge of suits in Texas state and federal courts and elsewhere by Toyota owners alleging economic harm from diminution of their vehicles' value attributable to the defects. In April 2010, an offshore oil rig leased by BP Exploration and Production Inc. (formerly known as British Petroleum) exploded in the Gulf of Mexico, resulting in the deaths of eleven rig workers and an unprecedented environmental catastrophe in the Gulf.² The plaintiffs who filed suit included commercial fisherman, hotel owners, recreational sportsmen, and even restaurant

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1. Angus MacKenzie & Scott Evans, *The Toyota Recall Crisis*, MOTOR TREND, Jan. 2010, available at http://www.motortrend.com/features/auto_news/2010/112_1001_toyota_recall_crisis/printer_friendly.html.

2. William M. Welch & Chris Joyner, *Memorial service honors 11 dead oil rig workers*, USA TODAY (May 25, 2010, 11:59 PM), http://www.usatoday.com/news/nation/2010-05-25-oil-spill-victims-memorial_N.htm#.

owners and travel agents in distant locations.³ Although BP promptly established a \$20 billion fund intended to compensate victims of the spill outside the tort system,⁴ the Gulf oil spill of 2010 will unquestionably spawn litigation that will present many novel legal issues and may take years to resolve.

During the Survey period, the Texas Supreme Court did not issue any opinions specifically addressing mass tort and toxic tort litigation. The Texas intermediate appellate courts continued to show skepticism toward claims of asbestos-related injury and demanded factual predicate for discovery in toxic tort cases. After a few eventful years and with enormously significant litigation on the horizon, the Survey period could fairly be described as the calm before the storm.

I. CASE MANAGEMENT AND PROCEDURAL ISSUES

A. MULTIDISTRICT LITIGATION ORDERS

On September 29, 2009, Toyota Motor Corporation and its related companies issued a safety advisory warning that floor mats on certain models of Toyota vehicles might entrap accelerator pedals, causing the vehicles to accelerate unintentionally.⁵ Soon after issuing the advisory, Toyota instituted a voluntary recall of affected Toyota vehicles. In January 2010, Toyota issued a second voluntary recall related to the accelerator pedals themselves.⁶ Not surprisingly, these disclosures sparked the filing of hundreds of suits against Toyota based on these possible defects in state and federal courts across the country.⁷ Most of the cases alleged economic loss as a result of the defect, but in several cases the plaintiffs alleged that one or both of these defects caused a catastrophic crash resulting in personal injury or wrongful death.⁸ The United States Judicial Panel on Multidistrict Litigation quickly consolidated the federal litigation in the United States District Court for the Central District of California.⁹ The federal MDL included claims of economic harm and left open the possibility of adding claims of personal injury or wrongful death.

In Texas, Toyota moved the state panel on multidistrict litigation to create an MDL docket of sudden acceleration cases.¹⁰ Plaintiffs in cases

3. See, e.g., Michael Kunzelman, *New Orleans Judge to Handle Most Gulf Oil Spill Lawsuits*, PRESS-REGISTER, Aug. 11, 2010, at A10 (listing examples of businesses operated by plaintiffs who filed hundreds of claims against BP after the oil spill).

4. Sheryl Gay Stolberg, *Administering the Fund, a Master Mediator*, N.Y. TIMES, June 17, 2010, at A18.

5. Mackenzie, *supra* note 1.

6. *Id.*

7. *Lawyers Selected in Toyota Case*, FORT WORTH STAR-TELEGRAM, May 15, 2010, at C.

8. *Id.*

9. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010).

10. *In re Toyota Unintended Acceleration Litig.*, No. 10-032 (Tex. Jud. Pan. Mult. Litig. July 12, 2010), available at <http://www.supreme.courts.state.tx.us/MDL/2010/0342/MDLOpinion-07122010.PDF>.

alleging economic harm joined the motion; two plaintiffs who had filed wrongful death cases opposed the motion, arguing that the cases were inappropriate for MDL treatment because they did not arise from the same catastrophic event and involved different vehicle models and claims of defect. The Texas panel granted the motion to transfer and consolidate the cases for pretrial proceedings, finding that the cases, despite their differences, presented numerous common questions of fact and that transfer would “serve the goals of convenience, efficiency, and justice.”¹¹ The court assigned the Toyota unintended acceleration docket to Judge Robert Schaffer of Harris County, Texas.¹²

The explosion of the Deepwater Horizon offshore oil rig leased by BP Exploration and Production Inc. in the Gulf of Mexico on April 20, 2010 cost eleven lives and resulted in the largest oil spill, measured by barrels of oil released, in the history of the petroleum industry.¹³ The full extent of the environmental damage will not be reliably ascertainable for years; the full extent of the litigation engendered by the spill will likely be unknown for a similar period.¹⁴ BP’s efforts to cap the deepwater well were only belatedly successful.¹⁵ The company was far more productive in its effort to cabin its potential liability for economic loss and environmental harm, taking the novel approach of setting aside a \$20 billion fund to be administered by iconic mass tort expert Kenneth Feinberg as a substitute for tort remedies.¹⁶

Of course (to paraphrase a well-worn sports cliché) one cannot stop mass tort litigation, one can only hope to contain it,¹⁷ and the Deepwater Horizon spill is no exception. Scores of cases, including class actions as well as individual claims, were filed in the federal courts in Louisiana, Mississippi, Alabama, Florida, South Carolina, and Texas.¹⁸ The plaintiffs in these cases alleged economic loss resulting from the spill. The United States Judicial Panel on Multidistrict Litigation promptly transferred and consolidated these cases in the United States District Court for the Eastern District of Louisiana before Judge Carl Barbier.¹⁹

Several cases involving at least thirty-two injured workers were filed in the Texas state courts. BP filed a motion with the Texas Panel on Mul-

11. *Id.* at *4.

12. *In re Toyota Unintended Acceleration Litig.*, No. 10-0342 (Tex. Jud. Pan. Mult. Litig., order of June 25, 2010), available at <http://www.supreme.courts.state.tx.us/MDL/2010/0342/AppointmentofPretrialjudge-06252010.PDF>.

13. Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind*, *Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14.

14. *See id.*

15. Clifford Krauss, *With Little Fanfare, Well is Plugged with Cement*, N.Y. TIMES, Aug. 6, 2010, at A13.

16. Sheryl Gay Stolberg, *Administering the Fund, a Master Mediator*, N.Y. TIMES, June 17, 2010, at A18.

17. *Memorable quotes for “SportsCenter”*, IMDb, (last visited April 9, 2011), <http://www.imdb.com/title/tt0136668/quotes> (attributing the phrase to Dan Patrick).

18. *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010).

19. *Id.*

tidistrict Litigation to consolidate these cases before a single pretrial judge.²⁰ The motion is pending as of this writing.

B. DISCOVERY

The success of a toxic tort claim almost invariably depends on the ability of the plaintiff to prove facts uniquely in the possession of the defendant or an uncooperative third party. The plaintiff must prove exposure to a particular toxic product, often supplied to the plaintiff's employer in bulk or unlabeled.²¹ The plaintiff's employer or the employer's supplier are much more likely to have this information than the plaintiff. More recently, the Texas courts have required the plaintiff to present some mathematical estimate of the amount (or "dose") of the toxin to which the plaintiff was exposed.²² Again, while the plaintiff's employer or its supplier may have measured or estimated the extent of the toxic exposure, it is unlikely that the plaintiff would possess this type of evidence. The plaintiff must also demonstrate the defendant's culpability. If the defendant is a premises owner or an employer, the plaintiff must show that the defendant knew of and failed to protect the plaintiff from the dangers posed by exposure to the toxic substance.²³ If the defendant is a product manufacturer, the plaintiff must prove that the defendant knew of the hazard but failed to warn of it²⁴ or could have designed the toxic product differently but failed to do so.²⁵ The very nature of the allegation—that the defendant knew of but concealed its awareness of the hazard to which the plaintiff was exposed—indicates that this evidence is likely to be found deep within the defendant's files, not in places to which the plaintiff has access.

Thus, plaintiffs in many toxic tort cases depend on open discovery to develop the evidence to substantiate the allegations necessary to impose liability. On the other hand, defendants in toxic tort cases typically condemn the plaintiff's efforts to search their files as overbroad and unduly burdensome "fishing expeditions" unlikely to uncover admissible evidence. For the past fifteen years, the Texas Supreme Court and the lower courts in Texas have been receptive to such defense arguments, narrowly defining the scope of permissible discovery in toxic tort cases.²⁶

20. Motion for Transfer for Consolidated or Coordinated Pretrial Proceedings, at *1; *In re Deepwater Horizon Incident Litig.*, No. 10-0376 (May 21, 2010), available at <http://www.supreme.courts.state.tx.us/MDL/2010/0376/MotionToTransfer.PDF>.

21. See, e.g., *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771 (Tex. 2007); see discussion *infra* Part II.B.

22. *Id.* at 773.

23. 4 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 42:8 (2010).

24. 1 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 2:16.1 (2010).

25. *Id.* at § 2:8.

26. See, e.g., *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (denying discovery in a benzene case because the requests "lack reasonable limitations as to time and subject matter"); *In re Am. Optical*, 988 S.W.2d 711, 713 (Tex. 1998) (finding an abuse of discretion in the trial court's order requiring the defendant in an asbestos case "to produce virtually all documents regarding its products for a fifty-year period"); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (in a case alleging that the defendant's employee died from

This trend continued during the Survey period, with a twist. In a trio of mandamus proceedings arising from the same wrongful death case, the Beaumont Court of Appeals predictably defined the scope of permissible discovery in a toxic tort case narrowly for the plaintiff, but added that the trial court had unduly restricted the defendant's discovery efforts. The three proceedings all bear the same style, *In re Univar USA Inc.*, and were each brought by the same defendant (Univar) in a case in which the plaintiffs claimed that their decedent's fatal leukemia was caused by his exposure to benzene supplied by the defendant to the decedent's employers. In *Univar I*, the court of appeals held that the trial court abused its discretion in shielding from discovery the plaintiffs' settlement agreements with other defendants in the case.²⁷ The trial court had accepted the plaintiffs' argument that the agreements were relevant only to establish Univar's settlement credit and ordered the plaintiffs to disclose to Univar only the identity of the settling parties and the aggregate amount of the settlements.²⁸ The court of appeals found that Univar was entitled to relevant portions of the settlement agreements themselves so it could verify the amounts of each settlement.²⁹ Additionally, the court pointed out that the settlement agreements could attempt to deprive Univar of a proper settlement credit by allocating all or a disproportionate part of the settlement amount to punitive damages; Univar should be permitted to discover and challenge any such allocation.³⁰ Finally, the court noted that the settlement agreements might furnish Univar with a basis for arguing that a particular witness is biased (for example, by providing the witness with an incentive to place blame on Univar by providing a reduction in the settlement amount owed for amounts assessed against or recovered from Univar).³¹ Because the settlement agreements might contain such revelations, the court of appeals held, the trial court abused its discretion in declining to order production.³²

While arguably allowing Univar's fishing expedition into the contents of written settlement agreements, the Beaumont Court of Appeals prohibited the plaintiffs from conducting their own expedition to discover evidence of Univar's knowledge of the hazards of its products and the identity of the suppliers of benzene to the decedent's employer.³³ The

cancer caused by exposure to asbestos and benzene, a request for production of all documents written by the defendant's corporate safety director was overbroad because it was not limited to "time, place, or subject matter"); *In re Sears, Roebuck & Co.*, 146 S.W.3d 328, 334 (Tex. App.—Beaumont 2004, no pet.) (discovery requests, in asbestos case, for all workers' compensation files and board of directors resolutions mentioning asbestos was overbroad because they were not tied "to the type of exposure, a reasonable time period, the relevant location, and the particular products or work involved").

27. 311 S.W.3d 175, 182 (Tex. App.—Beaumont, 2010, no pet.) ("Univar I").

28. *Id.* at 178–79.

29. *Id.* at 182.

30. *Id.* at 181.

31. *Id.* at 182.

32. *Id.* at 182–83.

33. *In re Univar USA Inc.*, 311 S.W.3d 183, 186 (Tex. App.—Beaumont 2010, no pet.) ("Univar II").

plaintiffs had produced extrinsic evidence that two of the decedent's employers may have purchased benzene from Univar from 1966 through 1968 and 1970 through 1971. The plaintiffs "largely" limited the scope of their discovery requests of Univar, including a corporate deposition and a subpoena duces tecum, to this time period.³⁴ But in *Univar II*, the court of appeals held that the trial court erred in failing to strictly limit the discovery to the times and locations suggested by the extrinsic evidence.³⁵ In *Univar III*, the court considered the trial court's order allowing the corporate deposition of Texas Solvents, a predecessor of Univar, to discover whether Texas Solvents sold benzene to the decedent's employer between 1970 and 1971.³⁶ To support their discovery request, the plaintiffs presented deposition testimony of a witness stating "I think" Texas Solvents supplied benzene to the decedent's employer, although the answer was only his "best guess."³⁷ Unimpressed, the court of appeals found that this evidence "fails to raise a reasonable possibility that benzene from Texas Solvent was present" at the decedent's employer during the relevant time period, and ruled that the trial court abused its discretion in allowing the deposition to include Texas Solvents.³⁸ Justice Gaultney dissented from the court's decision in *Univar III*, arguing that the court "should not be ruling on the sufficiency of the evidence" in considering the threshold issue of whether discovery should be permitted.³⁹

It is reasonable to anticipate that the Texas courts will continue to restrict plaintiffs' efforts to obtain broad discovery in toxic tort litigation. It will be interesting to see whether the scope of permissible discovery for defendants in the same litigation will continue to expand.

C. STATUTE OF LIMITATIONS

Because most toxic tort cases involve latent injuries which become apparent years after the toxic exposure, the viability of toxic tort litigation depends on the availability of a discovery rule under which the statute of limitations begins to run when the plaintiff learns of or should have discovered the injury and its cause. Although courts in Texas routinely applied the discovery rule in toxic tort cases for many years,⁴⁰ the Texas Supreme Court first expressly recognized the applicability of the rule in toxic tort cases in a pair of cases decided in 1998, *Childs v. Haussecker*⁴¹ and *Martinez v. Humble Sand & Gravel*.⁴² Under the rule announced in *Childs*, the statute of limitations in a latent occupational disease case does

34. *Id.*

35. *Id.*

36. 311 S.W.3d 186, 186 (Tex. App.—Beaumont 2010, no pet.) ("Univar III").

37. *Id.* at 188.

38. *Id.* at 188–89.

39. *Id.* at 189 (Gaultney, J., dissenting).

40. *See, e.g., Strickland v. Johns-Manville Int'l. Corp.*, 461 F. Supp. 215, 218 (S.D. Tex. 1978).

41. 974 S.W.2d 31, 31 (Tex. 1998).

42. 875 S.W.2d 311, 311 (Tex. 1994).

not begin to run until the plaintiff's symptoms "manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury" and the plaintiff knows or should know that the injury is "likely work-related."⁴³

Although it is rare for a court to hold as a matter of law that a latent injury and its cause should have been discovered before a formal diagnosis, the El Paso Court of Appeals did just that in *Rodriguez v. Crowell*.⁴⁴ The plaintiff in *Rodriguez* alleged that she developed an unpleasant and ultimately disabling bacterial infection, known as psitticosis, from her exposure to pigeon droppings at the office building where she worked.⁴⁵ She noticed symptoms of the disease about a year or two after beginning her employment at the building in 1995 and noticed that her symptoms lessened when she left the building, so she began seeking assignments out of town in 1997.⁴⁶ Over the years, she observed pigeons, dust, and debris all around the building, and was aware that co-workers were circulating e-mails about "air quality issues."⁴⁷ In 2002, she received an e-mail from the State describing procedures for filing a workers' compensation claim.⁴⁸ In July 2003, she was diagnosed with psitticosis by a local doctor and advised to terminate her employment at the office building.⁴⁹ In February 2005, she filed suit against the owners and operators of the building.⁵⁰ Although the plaintiff filed within two years after the first diagnosis of an injury related to her employment, the trial court granted summary judgment based on the statute of limitations.⁵¹

The El Paso Court of Appeals affirmed the summary judgment.⁵² Tracking the language of *Childs*, the court held the evidence established as a matter of law that more than two years before the plaintiff filed suit, her symptoms "manifested to a degree and for a duration that would put a reasonable person on notice that she had been injured and that . . . the injury was likely work-related."⁵³ The court acknowledged that the plaintiff was not diagnosed with a work-related injury until less than two years before she filed suit, but citing *Childs*, noted that "the law does not require a final diagnosis" to trigger the running of limitations.⁵⁴ The *Rodriguez* opinion reflects a new willingness of the Texas courts to find as a matter of law that a plaintiff had constructive knowledge of a toxic injury before diagnosis.

43. *Childs*, 974 S.W.2d at 40-41.

44. 319 S.W.3d 751, 757-58 (Tex. App.—El Paso 2009, pet. denied).

45. *Id.* at 753.

46. *Id.*

47. *Id.* at 754.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 758.

53. *Id.* at 757-58.

54. *Id.* at 758.

II. SUBSTANTIVE ISSUES

A. DUTY TO WARN: THE LEARNED INTERMEDIARY DEFENSE

In Texas, as in most states, the duty of drug manufacturers to warn of dangers associated with the use of their products has long been circumscribed by the learned intermediary doctrine.⁵⁵ Under that defensive theory, the drug manufacturer satisfies its duty to the ultimate consumer by providing an adequate warning to the prescribing physician, who is in a better position to understand the benefits and risks of a particular treatment and to receive and interpret information about possible adverse effects.⁵⁶ But in an age of universally accessible media, in which pharmaceutical companies brazenly advertise to the public prescription remedies for such sensitive conditions as “erectile dysfunction” (formerly known simply as “impotence”), “restless leg syndrome,” and depression, courts⁵⁷ and commentators⁵⁸ have increasingly questioned whether the rationale for the defense continues to apply.

In *Centocor, Inc. v. Hamilton*,⁵⁹ the Corpus Christi Court of Appeals called into doubt the continued vitality of the learned intermediary doctrine in many pharmaceutical failure to warn cases in Texas, suggesting that the defense “is based on images of health care that no longer exist.”⁶⁰ The plaintiff in *Centocor* sought treatment options for relief of her Crohn’s disease, and her doctor prescribed a new drug called Remicade, manufactured by Centocor, to be administered intravenously by another physician. When the plaintiff went to the physician’s clinic to receive her first dose of Remicade, the physician’s assistant played for her a videotape made by Centacor touting the benefits of the drug and identifying some possible risks. The videotape did not mention the risk that a person receiving Remicade would develop lupus-like symptoms; the package insert provided to the prescribing physician did identify such a risk, though the parties disputed whether the physician explained that risk to the patient. After receiving several doses of Remicade, the plaintiff developed severe lupus-like symptoms and stopped taking the drug. She sued Centocor, claiming that the company fraudulently induced her to take

55. See David G. Owen, *Dangers in Prescription Drugs: Filling a Private Law Gap in the Healthcare Debate*, 42 CONN. L. REV. 733, 761 (2010) (describing the learned intermediary doctrine as “an established fixture in American products liability law”).

56. *Wyeth-Ayerst Labs. Co. v. Medrano*, 28 S.W.3d 87, 91 (Tex. App.—Texarkana 2000, no pet.).

57. See *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 908–10 (W. Va. 2007); *Perez v. Wyeth Labs.*, 734 A.2d 1245, 1247 (N.J. 1999); *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1214–24 (D.N.M. 2008) (applying New Mexico law).

58. See, e.g., Lars Noah, *This Is Your Products Liability Restatement on Drugs*, 74 BROOK. L. REV. 839, 894 (2009) (noting that critics argue that the doctrine “fails to take into account changes in the delivery of health care services”); James Ottavio Castagnera & Richard Ryan Gerner, *The Gradual Enfeeblement of the Learned Intermediary Rule and the Argument in Favor of Abandoning It Entirely*, 36 TORT & INS. L.J. 119, 120 (2000) (observing that increasing consumer awareness and the evolving doctor-patient relationship has eroded the rationale for the doctrine).

59. 310 S.W.3d 476, 476 (Tex. App.—Corpus Christi 2010, no pet.).

60. *Id.* at 480.

Remicade through its promotional videotape which, as noted, omitted any reference to the risk of developing lupus-like symptoms. The jury found Centacor liable and awarded the plaintiff and her husband almost five million dollars in actual and punitive damages. Centacor appealed, arguing among other things that the learned intermediary doctrine barred the claim as a matter of law.

The Corpus Christi Court of Appeals affirmed the judgment against Centacor, rejecting the contention that the company satisfied its legal duty to the plaintiff by providing adequate warnings of possible side effects to the prescribing physician.⁶¹ The court noted that the learned intermediary doctrine rested on a series of assumptions about the relationship between doctors and patients that no longer prevail in modern society.⁶² When the doctrine was first developed, the court observed, “drug manufacturers did not advertise to the general public.”⁶³ The doctrine is based in large part on the beliefs that only a physician is qualified to weigh the risks and benefits of a prescription drug; that the physician is in the best or perhaps even the only position to receive and interpret a warning of a drug’s side effects; and that confidence in the doctor-patient relationship would be undermined by recognizing a patient’s independent ability to make medical decisions.⁶⁴ These assumptions, the court reasoned, are actually contradicted by the prevalence of direct-to-consumer marketing by drug manufacturers such as that employed by Centacor in this case.⁶⁵ Expressly following the reasoning of the New Jersey Supreme Court in a recent similar case,⁶⁶ the court of appeals ruled that the learned intermediary 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.”⁶⁷ Whether the Texas Supreme Court will condone the abolition of the learned intermediary defense in this context remains to be seen.

B. SCIENTIFIC CAUSATION IN TOXIC TORT CASES

Four years ago, in *Borg-Warner Corp. v. Flores*, the Texas Supreme Court provided specific guidance on the type of proof needed to support a finding of legal causation in an asbestosis case.⁶⁸ The plaintiff in such a case, the supreme court held, must do more than show isolated or even frequent exposures to the defendant’s asbestos-containing product; rather, the plaintiff must present “[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with

61. *Id.* at 481. The court modified the judgment to eliminate the jury’s award for future pain and mental anguish, which the court found unsupported by the evidence. *Id.* at 518–21.

62. *Id.* at 507–08.

63. *Id.* at 506.

64. *Id.*

65. *Id.* at 508.

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

67. *Centacor*, 310 S.W.3d at 499.

68. 232 S.W.3d 765, 773 (Tex. 2007).

evidence that the dose was a substantial factor in causing the asbestos-related disease.”⁶⁹ Two months later, in *Georgia-Pacific Corp. v. Stephens*, the Houston First District Court of Appeals applied this guidance in a mesothelioma case, reversing a jury verdict based on its conclusion that the plaintiff had failed to present any “quantitative evidence of exposure and any scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma.”⁷⁰

During this Survey period, the Texas appellate courts continued to hold plaintiffs in mesothelioma cases to the exacting standard of proving causation applied by the First District Court of Appeals in *Stephens*. In *Smith v. Kelly-Moore Paint Co.*,⁷¹ the Fort Worth Court of Appeals affirmed a summary judgment based on its conclusion that the plaintiff had not produced legally sufficient evidence that her deceased husband’s exposure to defendant Kelly-Moore’s asbestos-containing drywall products was a substantial cause of his fatal mesothelioma.⁷² The plaintiff had presented detailed evidence that her husband used Kelly-Moore drywall products on a frequent and regular basis and was in proximity to them as they emitted asbestos dust. She submitted proof that the products were tested and contained eight percent chrysotile asbestos and that the use of the products generated levels of chrysotile asbestos above the limit set by the federal agency charged with regulating toxic exposures. She also showed that chrysotile fibers were found in her husband’s lung tissue after his death. The court held that although the plaintiff’s evidence of the *amount* of her decedent’s asbestos exposure was sufficient,⁷³ the plaintiff failed to present evidence that the *type* of asbestos contained in Kelly-Moore’s products (chrysotile) was associated with an increased risk of developing mesothelioma.⁷⁴ The court thus held that the plaintiff “failed to adduce sufficient evidence that [the decedent] had been exposed to chrysotile asbestos in Kelly-Moore’s drywall joint compounds in a dose sufficient to have been a substantial factor in causing his mesothelioma.”⁷⁵

In *Georgia-Pacific Corp. v. Bostic*,⁷⁶ the Dallas Court of Appeals reversed a jury verdict in favor of the survivors of a man who developed mesothelioma at the age of forty after spending “his entire life” around drywall products, including an asbestos-containing joint compound made by Georgia-Pacific.⁷⁷ The decedent testified by deposition that his exposure began at the age of five while watching and helping his father perform drywall work and continued into his adulthood when he personally

69. *Id.*

70. 239 S.W.3d 304, 321 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

71. 307 S.W.3d 829, 829 (Tex. App.—Fort Worth 2010, no pet.).

72. *Id.* at 839.

73. *Id.* at 836.

74. *Id.* at 839.

75. *Id.* at 830.

76. 320 S.W.3d 588, 588 (Tex. App.—Dallas 2010, pet. filed). The law firm with whom the author was formerly employed was and is lead counsel for the plaintiff in this case.

77. *Id.* at 592.

worked on the same types of jobs. His father testified that he used Georgia-Pacific joint compound “ninety-eight percent of the time that he did drywall work.”⁷⁸ Examining the testimony in detail, however, the court of appeals found only three specific jobs on which the decedent and his father worked together with drywall.⁷⁹ The court found this to be “insufficient evidence of [the decedent’s] frequent and regular exposure to Georgia-Pacific’s asbestos-containing joint compound during the relevant time period.”⁸⁰ The court also found legally inadequate the plaintiff’s quantitative evidence that he was exposed to levels of asbestos from Georgia-Pacific’s products that placed him at risk of developing mesothelioma.⁸¹ The court acknowledged that the plaintiffs presented expert testimony from an industrial hygienist stating that tests of Georgia-Pacific products showed that they released hazardous amounts of asbestos fibers, but found that the tests did not establish the decedent’s level of exposure “because of the many variables in the circumstances of a given work activity and location of the activity.”⁸² The court thus held the evidence “insufficient to provide quantitative evidence of [the decedent’s] exposure to . . . Georgia-Pacific’s asbestos-containing joint compound or to establish [the decedent’s] exposure was in amounts sufficient to increase his risk of developing mesothelioma.”⁸³

The *Smith* and *Bostic* decisions indicate that the Texas courts have come a long way from the days in which evidence of “any exposure” to asbestos would support a finding of causation in a mesothelioma case.⁸⁴ In the current legal environment, even detailed proof of heavy exposure to asbestos is not enough to guarantee a victim of mesothelioma a jury determination of whether the exposure caused this “signature disease.”⁸⁵

Bucking the trend of requiring demonstrably reliable proof of causation as a prerequisite for proceeding to trial in a toxic tort case, the Beaumont Court of Appeals reversed a summary judgment in favor of a defendant in *Pink v. Goodyear Tire & Rubber Co.*⁸⁶ In *Pink*, the plaintiff alleged that her deceased husband’s fatal renal cancer was caused by his exposure to benzene while employed by Goodyear and that Goodyear was grossly negligent in allowing the exposure. Goodyear filed a no-evidence motion for summary judgment under Texas Rule of Civil Procedure 166a(i) challenging, among other components of the claim, the legal sufficiency of the plaintiff’s allegation that her husband’s cancer was

78. *Id.* at 593.

79. *Id.* at 593–94.

80. *Id.* at 599.

81. *Id.* at 601.

82. *Id.*

83. *Id.*

84. See *Celotex Corp. v. Tate*, 797 S.W.2d 197, 204 (Tex. App.—Corpus Christi 1990, writ dismissed) (if defendant “supplied any of the asbestos to which [the decedent] was exposed, then appellees have adequately met their burden of proof.”).

85. *Smith v. Kelly-Moore Paint Co.*, 307 S.W.3d 829, 834 (Tex. App.—Fort Worth 2010, no pet.) (describing mesothelioma as a “signature disease”).

86. 324 S.W.3d 290, 302 (Tex. App.—Beaumont 2010, pet. filed).

caused by his exposure to benzene at Goodyear. In response, the plaintiff initially produced deposition testimony that Goodyear workers such as her husband washed their hands in benzene in the late 1960s and early 1970s. Within seven days of the summary judgment hearing, the plaintiff produced an affidavit of her husband's treating physician attributing her husband's cancer to his exposure to benzene. The physician's affidavit, however, contained no reasoning supporting the conclusion but merely stated that the physician had reviewed the decedent's medical records, the deposition testimony of the decedent and three of his co-workers, and "scientific literature" in "rendering this opinion" of a causal relationship between the workplace exposure and the injury.⁸⁷ The defendant objected to the affidavit as untimely and unreliable. The trial court granted summary judgment and the plaintiff appealed.

A majority of the Beaumont Court of Appeals found that the plaintiff had produced sufficient evidence of causation to withstand summary judgment.⁸⁸ The majority first found that the trial court had implicitly overruled Goodyear's timeliness objection to the physician's affidavit by noting in its summary judgment order that it had considered "all of the evidence on file" in ruling on the motion.⁸⁹ The majority then rejected Goodyear's contention that the physician's affidavit was conclusory and thus legally insufficient evidence of a causal relation between the decedent's exposure to benzene and his fatal renal cancer.⁹⁰ The majority acknowledged that the physician's affidavit did not itself disclose the specific scientific literature that he consulted and did not describe the content of the literature, but found that this omission was not fatal.⁹¹ Instead, the "implicit assertion . . . that the scientific literature reviewed supports his opinion" rendered the affidavit not conclusory.⁹² Finally, the majority found it could not sustain the summary judgment on the basis that the affidavit was scientifically unreliable and therefore inadmissible because Goodyear had failed to obtain a ruling on those objections.⁹³ The majority noted that the admissibility of expert testimony and the propriety of summary judgment are governed by different standards of review—abuse of discretion and legal sufficiency (*de novo*) review, respectively—and reasoned that clarity and the nonmovant's right to a fair opportunity to be heard require that the admissibility and legal sufficiency objections be considered and decided separately.⁹⁴

Chief Justice McKeithen dissented from the reversal of summary judgment in favor of Goodyear, finding the affidavit of the decedent's treating physician "no evidence" that benzene caused his renal cancer.⁹⁵ The "ab-

87. *Id.* at 296.

88. *Id.* at 302.

89. *Id.* at 294.

90. *Id.* at 298.

91. *Id.* at 297.

92. *Id.*

93. *Id.* at 302.

94. *Id.* at 301.

95. *Id.* at 303 (McKeithen, C.J., dissenting).

sence of any explanation of how the records, testimony, and literature supported his opinion,” Chief Justice McKeithen reasoned, rendered the opinion of causation “mere *ipse dixit* of a credentialed witness” entitled to no weight.⁹⁶ Because the affidavit was conclusory and amounted to no evidence of causation, Chief Justice McKeithen argued that a hearing on the admissibility of the affidavit was not required.⁹⁷

Most likely, *Pink* does not reflect a new judicial tolerance for difficult claims that a toxic exposure caused a disease, but rather stands as an anomaly in the Texas legal landscape. Victims of mesothelioma and other diseases associated with toxic exposures can expect to continue to experience rough sledding in the Texas courts.

C. SECURITIES FRAUD BASED ON DEVELOPMENTS IN MASS TORT LITIGATION

This Survey primarily focuses on developments within toxic and mass tort litigation and typically does not address the indirect effects that particular mass tort cases have had on the legal community or the economy. It must be acknowledged though, that increasingly the emergence of potential mass tort liability engenders litigation not just by victims of the mass tort but by also those whose financial position was harmed by the litigation itself. Such claims have become almost routine in the pharmaceutical industry.⁹⁸ In *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, the Fifth Circuit considered the viability of a class action predicated in part on the claim that Halliburton fraudulently understated its involvement in the so-called “mother of all mass torts,”⁹⁹ asbestos litigation, to the detriment of investors who allegedly paid an inflated price for Halliburton stock.¹⁰⁰ Halliburton had merged with Dresser Industries in 1998; Dresser’s subsidiary, Harbison-Walker Refractories Company, bore potential liability for asbestos-related claims. In May 2001, Halliburton reported that it had reserved approximately \$30 million to cover its potential asbestos-related liability resulting from its acquisition of Dresser. Later in 2001, Halliburton publicly disclosed that it had substantially increased its reserve for asbestos liability, that it had incurred a jury verdict for \$21.3 million in an asbestos case, and that judgments against Dresser had been entered in other asbestos cases. The class plaintiffs alleged that these later disclosures caused Halliburton’s stock price to drop, that the price they had previously paid for Halliburton stock had been inflated by Halliburton’s misrepresentation of the scope of its potential

96. *Id.* at 304 (McKeithen, C.J., dissenting).

97. *Id.* at 303–04.

98. See, e.g., *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1784 (2010) (involving the anti-inflammatory drug Vioxx); *In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d 621 (S.D.N.Y. 2008) (involving anti-inflammatory drugs Celebrex and Bextra).

99. See Frances E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1756 (2002).

100. 597 F.3d 330, 334 (5th Cir. 2010), *cert. granted sub nom.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 856 (2011).

asbestos liability in May 2001, and that Halliburton was liable for the drop in its stock price.¹⁰¹

The Fifth Circuit affirmed the district court's denial of class certification.¹⁰² The court noted that the plaintiffs had to show that the company's misrepresentation or omission materially affected the price of the stock not only to prevail on the merits but also to demonstrate entitlement to class certification.¹⁰³ Moreover, it was not enough to show that the stock price declined after disclosure of negative news about the company; rather, the plaintiff must show that the loss "likely resulted from the specific correction of the fraud and not because of some independent reason."¹⁰⁴ The court held that the plaintiffs had failed to make such a showing.¹⁰⁵ Nothing in Halliburton's later disclosures, the court found, demonstrated that the company's announcement of its asbestos reserve in May 2001 was false, and "merely raising the asbestos reserves does not show that those prior reserve estimates were intentionally misleading."¹⁰⁶ Similarly, Halliburton's disclosure of verdicts and judgments against it and its subsidiary did not reveal that its previous representations regarding its potential liability in asbestos litigation were fraudulent.¹⁰⁷ Because the plaintiffs failed to prove "loss causation" on these disclosures and in other respects, the court held that the district court properly refused to certify the class.¹⁰⁸ Despite the plaintiffs' defeat in this case, investors whose shares lose value after the revelation of an alleged mass tort will undoubtedly continue to seek redress in the courts.

III. CONCLUSION

The previous discussion demonstrates that as far as toxic torts and mass torts are concerned, this Survey period was a relatively quiet one. No significant federal or state legislative initiatives were enacted or seriously considered, and the Texas courts followed established legal trails rather than blaze new ones. The emergence of the Toyota sudden acceleration cases and the British Petroleum oil spill cases, not to mention other disasters yet to occur, promises that in contrast, the next Survey period will almost certainly be an active one.

101. *Id.*

102. *Id.*

103. *Id.* at 335.

104. *Id.* at 336.

105. *Id.* at 344.

106. *Id.* at 340.

107. *Id.*

108. *Id.* at 344.