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Toxic Torts and Mass Torts

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TOXIC TORTS AND MASS TORTS

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FOLLOWING the Texas Supreme Court's 2007 decision in *Borg-Warner Corp. v. Flores*,[1] the Texas legal community saw relatively little activity in toxic tort and mass tort litigation. During the last Survey period, the Texas Legislature was out of session, Congress passed no legislation specifically affecting toxic tort or mass tort cases, the Texas Judicial Panel on Multidistrict Litigation considered no request to transfer any mass tort case to a single district in Texas,[2] and the pretrial judges in the asbestos and silica MDL cases entered no substantive orders on their dockets.[3] The rigorous standards for proving causation in toxic tort cases announced by the supreme court in *Borg-Warner*, coupled with tort reform legislation enacted by the Texas Legislature in 2003 and 2005, have unquestionably made Texas a less hospitable forum for toxic and mass tort cases. This alone may account for the relative dearth of activity.

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1. 232 S.W.3d 765 (Tex. 2007).

2. *See* The Supreme Court of Texas, Multidistrict Litigation Orders, http://www.supreme.courts.state.tx.us/MDL/mdl08.asp (last visited Aug. 30, 2009).

3. *See* Harris County District Courts, http://www.justex.net/Courts/Civil/CourtSection.aspx?crt=62&sid=244 (last visited Aug. 30, 2009) (asbestos cases); Harris County District Courts, http://www.justex.net/Courts/Civil/CourtSection.aspx?crt=23&sid=36 (last visited Aug. 30, 2009) (silica cases).

But the Texas appellate courts have continued to release decisions of interest to toxic and mass tort practitioners, and the United States Supreme Court has issued opinions on punitive damages and preemption that will directly affect mass tort litigation in Texas, with more opinions from the Supreme Court on the way. A review of these developments is helpful in understanding the challenges and the opportunities that face victims of corporate misconduct seeking redress in Texas.

I. PROCEDURAL ISSUES

A. CLASS CERTIFICATION

The Texas Supreme Court's aversion to the use of class actions to resolve mass torts has been well-chronicled. Beginning with its landmark opinion in *Southwestern Refining Co. v. Bernal*,[4] the supreme court has repeatedly ruled that mass tort and consumer tort cases lack the type of predominant common issues that permit virtual representation of absent class members.[5] In *DaimlerChrysler Corp. v. Inman*,[6] the Texas Supreme Court used a different approach to dismantle a putative nationwide class action, ruling that the named plaintiffs lacked standing to pursue their claims. The three named plaintiffs in *Inman* sought damages for economic loss caused by seat belts that, the plaintiffs alleged, unlatched too easily. The plaintiffs themselves had never experienced seat belt failure, but sought, for themselves and the class of over ten million owners and lessees of DaimlerChrysler vehicles, the cost of replacing seat belt buckles with ones that were harder to unlatch and any loss of use of the vehicles while the buckles were replaced. The trial court certified the class, but the Corpus Christi Court of Appeals reversed, holding that the claims were potentially viable but that the trial court had not sufficiently considered which states' laws should apply to the claims.

In a sweeping opinion by Justice Hecht, the Texas Supreme Court reversed and ordered the case dismissed, holding that because the named plaintiffs lacked standing to complain about the seat belts, the Texas courts lacked jurisdiction to decide the claims.[7] The supreme court noted that a plaintiff lacks standing not "simply because he cannot prevail on the merits of his claim" but "because his claim of injury is too slight for a court to afford redress."[8] Finding the possibility that the plaintiffs would sustain real injury to be "remote," the court denied that the risk of accidental seat belt release posed "any concrete threat of injury to the plaintiffs."[9] Responding to the charge of the four dissenters that the decision reflected not an accurate application of the constitutional doctrine of

4. 22 S.W.3d 425 (Tex. 2000).

5. *See, e.g.*, Stonebridge Life Ins. Co. v. Pitts, 236 S.W.3d 201, 203 (Tex. 2007); Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 681 (Tex. 2004); Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 688 (Tex. 2002).

6. 252 S.W.3d 299 (Tex. 2008).

7. *Id.* at 305.

8. *Id.*

9. *Id.* at 306.

standing, but rather a "visceral distaste for class actions,"[10] the supreme court stated, "We disagree. We simply think that the rights of ten million vehicle owners and lessees across the United States should not be adjudicated in an action brought by three plaintiffs who cannot show more than the merest possibility of injury to themselves."[11]

Aware of the trend against class certification of mass tort personal injury cases, lawyers have taken great pains to disavow claims for personal injury and to couch their claims against purveyors of allegedly defective products in terms of economic rather than physical harm. But this strategy has the unintended consequence of placing in doubt the availability of insurance to cover the claims. The Texas Supreme Court, at least momentarily, rescued mass tort plaintiffs from this minefield in *Zurich American Ins. Co. v. Nokia, Inc.*[12] In that case, individuals in several jurisdictions had filed class actions against Nokia, Samsung, and other sellers of cellular telephones, alleging that the use of the phones exposed them to excessive levels of radio frequency radiation and caused them to sustain "biological injury."[13] In all but one of the cases, the plaintiffs sought "maximum legal and equitable relief" including "the costs of purchasing headsets" for the cell phones.[14] In one case, styled *Naquin*, the plaintiffs initially made similar claims but then filed an amended complaint that expressly abandoned their product liability claims and sought recovery solely for economic loss under breach of contract theories.[15] Nokia tendered the defense of the cases to its insurer Zurich, which agreed to defend the claims but reserved the right to contest coverage. Zurich then sued Nokia in state court seeking a declaration that its commercial general liability insurance policy, which covered "all sums which [Nokia] shall become legally obligated to pay as damages because of . . . bodily injury," did not cover the claims asserted in the class actions.[16] The district court found for Zurich but the court of appeals reversed, and the Texas Supreme Court then granted review.

In an opinion by Chief Justice Jefferson, the supreme court found that the policy covered the bulk of the claims asserted in the class actions against Nokia and the other cell phone suppliers.[17] The court acknowledged that none of the complaints used the term "bodily injury," but concluded that the "biological injuries" alleged by the class action plaintiffs were "potentially" bodily injuries covered by the policies, "much like the subclinical injuries alleged by plaintiffs who have been exposed to asbestos."[18] The court also found that the complaints sought money damages as required by the policy. Although the class action plaintiffs alleged that

10. *Id.* at 317 (Jefferson, C.J., dissenting).
11. *Id.* at 307 (majority opinion).
12. 268 S.W.3d 487 (Tex. 2008).
13. *Id.* at 489.
14. *Id.* at 492-94.
15. *Id.* at 498-99.
16. *Id.* at 491.
17. *Id.* at 493.
18. *Id.*

headsets would prevent continued exposure to radiation, their complaints did "not disclaim damages in favor of headsets."[19] The court further rejected Zurich's argument that the damages alleged by the plaintiffs were "because of" bodily injury, finding that the complaints were based at least in part on physical harm.[20] But the supreme court agreed with Zurich that the insurance policy did not cover the claims asserted in *Naquin*, because the class action plaintiffs in that case expressly disclaimed recovery for individualized physical injuries and sought damages only for economic loss related to the allegedly defective product.[21]

Justice Hecht, joined by Justice Brister, issued a blistering dissent, pointing out that "[n]one of the class action pleadings claims any specific damages other than for headsets that Nokia did not supply with the phones," and that therefore "[t]his is not a claim for damages because of bodily injury."[22] Justice Hecht attributed the pleadings' "meticulous avoidance of any claims for personal injuries" to the plaintiffs' recognition that their proposed class actions could not be certified if class members claimed individualized bodily injuries.[23] By finding coverage for the claims in which the class action plaintiffs vaguely alleged harm and denying coverage where the plaintiffs were more forthcoming and disclaimed personal injury claims that would destroy the lawsuit, Judge Hecht wrote, the court had "reward[ed] cute and clever pleading that strains credulity."[24]

B. Venue and Forum Non Conveniens

In the wake of perceived venue abuses of the past two decades,[25] the Beaumont Court of Appeals has served notice that it will strictly and aggressively apply recently enacted venue provisions to ensure that cases are tried in the proper forum, even at the possible expense of judicial economy. The target of the court's attention was benzene litigation cases in which the plaintiff alleged the development of a blood-related cancer or disease resulting from exposure to products containing benzene and other carcinogens. In a series of three nearly identical opinions—*Crown Central LLC v. Anderson*,[26] *Union Carbide Corp. v. Loftin*,[27] and *Shell Oil Co. v. Baran*[28]—the Beaumont Court of Appeals held that because the plaintiffs failed to offer more than conclusory allegations, venue was not proper in Orange County, and each defendant who made a proper showing of venue in another county was entitled to transfer of the plain-

19. *Id.* at 494.
20. *Id.* at 495-96.
21. *Id.* at 499-500.
22. *Id.* at 502-03 (Hecht, J., dissenting).
23. *Id.* at 503.
24. *Id.* at 504.
25. *See generally* James Holmes, *House Bill 4's Impact on Multi-Plaintiff Joinder & Intervention and on Forum Non Conveniens*, 46 S. Tex. L. Rev. 775 (2005).
26. 239 S.W.3d 385 (Tex. App.—Beaumont 2007, pet. abated, reinstated).
27. 256 S.W.3d 869 (Tex. App.—Beaumont 2008, pet. dism'd).
28. 258 S.W.3d 719 (Tex. App.—Beaumont 2008, pet. abated).

tiffs' claims to that county, even if it meant that a plaintiff would have to pursue claims based on the same injury in several counties.[29] As for the defendants who did not prove a county of proper venue, the plaintiffs still could not maintain the suit in Orange County. Instead, the court remanded the cases to the district court to determine an appropriate county of suit for those defendants.[30] The Beaumont venue trilogy, if upheld, will increase the importance of making a strong showing of proper venue early in the litigation.

Since the Texas Supreme Court's 1990 decision in *Dow Chemical Co. v. Alfaro*,[31] Texas courts have provided a receptive forum for citizens of other countries who allege that they have been injured by toxic substances exported by American companies. Legislation and a recent Texas Supreme Court decision indicate, however, that this hospitality to such cases will not continue. In *In re Pirelli Tire, L.L.C.*, the Texas Supreme Court held that the trial court abused its discretion in declining to dismiss, under the doctrine of forum non conveniens, a wrongful death case brought by Mexican citizens against an American manufacturer based on an accident occurring in Mexico.[32] The plaintiffs sued Pirelli, the manufacturer of the tire that allegedly failed and caused the accident, in Cameron County, Texas, because the truck involved in the accident had been sold to its Mexican purchaser by a used truck dealer in Cameron County. The forum non conveniens statute applicable in *Pirelli* provided that the trial court "may" decline to exercise jurisdiction over a claim brought by a foreign plaintiff under the doctrine of forum non conveniens if the court "finds that in the interest of justice . . . a claim or action . . . would be more properly heard in a forum outside [the] state."[33] In a plurality opinion by Justice O'Neill, the supreme court observed that "though by its terms the forum-non-conveniens statute is permissive, the deference it affords trial courts is not without bounds."[34] The supreme court considered the burden on Texas citizens in maintaining the case in Texas, the inconvenience to the defendant, and the existence of an available forum in Mexico in concluding that the denial of Pirelli's motion to dismiss was an abuse of discretion.[35] The supreme court conditionally granted a writ of mandamus to require dismissal.[36]

Justice Johnson, joined by Chief Justice Jefferson, dissented, arguing the statute "permitted, but did not command, the trial court to refuse to

29. *Baran*, 258 S.W.3d at 722-24; *Loftin*, 256 S.W.2d at 873-75; *Anderson*, 239 S.W.3d at 387-90.

30. *Baran*, 258 S.W.3d at 723-24; *Loftin*, 256 S.W.2d at 875; *Anderson*, 239 S.W.3d at 390.

31. 786 S.W.2d 674 (Tex. 1990).

32. 247 S.W.3d 670, 673 (Tex. 2007).

33. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Vernon 2005). The current version of this statute eliminates the distinction between claims of citizens and those of noncitizens, and provides that a court *shall* dismiss a case if it finds that, in the interest of justice, the case would be more properly heard in another forum.

34. *Pirelli Tire*, 247 S.W.3d at 673.

35. *Id.* at 677-79.

36. *Id.* at 679.

exercise its jurisdiction . . . even if the case would more properly be heard in Mexico."[37] The dissent acknowledged that the current statute, by providing that Texas courts *shall* decline to hear cases more properly brought in other courts, might command dismissal in such circumstances, but noted that the statute applicable in *Pirelli* did not.[38] At the other end of the spectrum, Justice Willett, joined by Justice Wainwright, filed a concurring opinion contending the plurality should have reached its result without balancing the public and private interest factors relevant under the statute only to cases brought by legal residents.[39] In Justice Willett's view, "[t]he complete absence of a nontrivial Texas connection is sufficient in itself to mandate dismissal."[40] In any event, *Pirelli* demonstrates that foreign plaintiffs seeking to maintain toxic tort cases in Texas must prepare to satisfy not just the trial courts, but also the appellate courts and the Texas Supreme Court, that the litigation belongs in Texas and not some other forum.

C. Discovery and Case Management

The explosion at the BP Products oil refinery in Texas City, Texas, on March 25, 2005, generated hundreds of claims and yielded one opinion from the Texas Supreme Court during the Survey period. In *In re BP Products North America, Inc.*,[41] the Texas Supreme Court held that the trial court abused its discretion in declining to apply limits on discovery in an agreement between the parties made under Rule 11 of the Texas Rules of Civil Procedure. The plaintiffs' counsel sought to depose two senior BP executives: head of refining and marketing John Mazoni, and chief executive officer Sir John Browne. The parties agreed that Mazoni would appear for a four-hour deposition, and that Browne would not be deposed unless the Mazoni deposition revealed that Browne had "unique and superior knowledge"[42] of relevant facts, in which case Browne would be deposed for one hour by telephone. After the parties reached the agreement, Browne made public statements and gave interviews about the Texas City explosion. The plaintiffs argued that the Rule 11 agreement limiting the time and manner of the Browne deposition had been induced by misrepresentation and was unenforceable, and noticed Browne's deposition in Galveston, Texas. The trial court denied BP Products' motion for protection from the notice, making findings that the discovery agreement was induced by misrepresentation and that Browne's public comments "appear to be part of a continuing effort by

37. *Id.* at 688 (Johnson, J., dissenting).
38. *Id.* at 689.
39. *Id.* at 680-81 (Willet, J., concurring).
40. *Id.* at 682.
41. 244 S.W.3d 840 (Tex. 2008).
42. *See In re* Alcotel USA, Inc., 11 S.W.3d 173, 175-76 (Tex. 2000) (allowing "apex deposition"—a deposition of a senior corporate official—only if the official has "unique or superior personal knowledge" of relevant facts).

BP to taint the jury pool."[43] After the court of appeals denied BP Products' mandamus petition, BP Products sought relief from the Texas Supreme Court.

In an opinion by Justice David Gaultney,[44] the supreme court ruled that the trial court erred in declining to enforce the parties' discovery agreement. The supreme court noted that the record contained no "evidentiary support for the assertion that BP Products made a material, false representation that could have reasonably induced the plaintiffs to enter the discovery agreement."[45] The supreme court added that the court's refusal to enforce the agreement could not be upheld as a sanction for BP Products' alleged attempt to taint the jury pool, because the trial court neither gave notice that it was considering sanctions nor invoked its inherent power to sanction as a basis for its decision.[46] Concluding that "[t]he trial court abused its discretion in setting aside a valid discovery agreement without good cause," the supreme court conditionally granted mandamus compelling the trial court to enforce the parties' agreement confining plaintiffs to a one-hour telephonic deposition of Browne.[47]

In our last Survey, we reported on *In re Premcor Refining Group, Inc.*,[48] in which the plaintiffs alleged that emissions from the defendants' refining facility created a permanent nuisance for which defendants were liable.[49] The Beaumont Court of Appeals conditionally issued a writ of mandamus directing the trial court to dismiss the permanent nuisance claims because the plaintiffs did not own the properties in question at the time that the nuisance began and, thus, lacked standing to sue for permanent nuisance.[50] The case returns to our Survey this year, this time recouched as a suit for the plaintiffs' "physical discomfort."[51] The trial court entered a case management order staying all discovery until the plaintiffs produced affidavits showing the nature of each plaintiff's exposure to the emissions and the causal relationship between the emissions and the plaintiff's alleged harm. The plaintiffs did not comply with the order, but the trial court allowed the plaintiffs to conduct additional discovery and refused to dismiss the claims. Again, the defendants petitioned the Beaumont Court of Appeals for a writ of mandamus requiring dismissal, and again the court of appeals conditionally issued the writ. The court of appeals noted that the Texas Supreme Court has repeatedly held that a defendant in a toxic tort suit is entitled to timely disclosure of

43. *BP Prods.*, 244 S.W.3d at 845.

44. Justice Gaultney sat on the case pursuant to commission of Governor Rick Perry under section 22.005 of the Texas Government Code. *See id.* at 842 n.1.

45. *Id.* at 847.

46. *Id.*

47. *Id.* at 848-49.

48. 233 S.W.3d 904 (Tex. App.—Beaumont 2007, orig. proceeding).

49. Brent M. Rosenthal et al., *Toxic Torts and Mass Torts*, 61 SMU L. REV. 1155, 1161-62 (2008).

50. *Premcor*, 233 S.W.3d at 910.

51. *In re* Premcor Refining Group, Inc., 262 S.W.3d 475, 477 (Tex. App.—Beaumont 2008, orig. proceeding).

the evidence that links the plaintiff's damages with the defendant's conduct or product.[52] The court rejected the plaintiffs' bizarre contention that the toxic tort precedent did not apply because their claims were more accurately characterized as property damage claims than personal injury claims, noting that the claims, "regardless of the words plaintiffs choose to use in describing them, are personal injury claims."[53]

II. SUBSTANTIVE ISSUES

A. Scope of Duty

As we reported in last year's Survey,[54] the Houston Fourteenth District Court of Appeals issued its fourth and final opinion in *Exxon Mobil Corp. v. Altimore*,[55] reversing a jury verdict awarding exemplary damages to a worker whose wife died of cancer caused by her exposure to asbestos dust borne on her husband's work clothes. The plaintiff alleged that Exxon, his employer, was guilty of gross negligence by maintaining a dusty worksite and failing to warn of the danger to household members of workers wearing dusty work clothes home. The jury found Exxon liable for both compensatory and exemplary damages, but the compensatory award was entirely offset by settlements paid by other defendants, so only the award of exemplary damages was at issue on appeal. In its first three opinions, the court of appeals concluded that Exxon did not owe a legal duty to the worker's wife because the risk of harm posed by the use of asbestos to persons away from the employer's premises was not reasonably foreseeable.[56] In response to the plaintiff's fourth motion for rehearing, the court bypassed the thorny issue of duty, assuming, without deciding, that Exxon owed a duty to the wife and that its breach of duty proximately caused her fatal cancer.[57] Instead, the court vacated the award on the narrower ground that the plaintiff had not presented legally sufficient evidence to satisfy Texas' stringent standard for assessing exemplary damages. Specifically, the court found that the plaintiff had failed to make the case that Exxon had engaged in conduct which, from Exxon's standpoint, involved "an *extreme* degree of risk that family members of refinery employees will sustain serious injury or death."[58] The court noted that "Exxon's general knowledge of a risk to employees is no evidence that Exxon had knowledge of an extreme degree of risk to family members of employees," and added that the plaintiff presented no evidence that his wife "was exposed to an *extreme* risk given the dosage or

52. *Id.* at 480 (citing *In re* Allied Chem. Corp., 227 S.W.3d 652, 657-58 (Tex. 2007); Able Supply Co. v. Moye, 898 S.W.2d 766, 770 (Tex. 1995)).

53. *Id.* at 479.

54. Rosenthal et al., *supra* note 49, at 1166-67. Although the Fourteenth District's latest *Altimore* decision fell outside of last year's Survey period, we reported on the opinion because two of its previous opinions fell within the Survey period.

55. 256 S.W.3d 415 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

56. *See* Rosenthal et al., *supra* note 49, at 1166-67 n.88.

57. *Exxon*, 256 S.W.3d at 417.

58. *Id.* at 418.

amount of asbestos fiber on her husband's clothes."[59] Holding the plaintiff failed to establish the "objective risk" prong of the two-pronged test for gross negligence, the court disregarded the jury verdict and rendered judgment for Exxon.[60]

As the court of appeals pointed out in its opinion, in a case with a fact pattern similar to *Altimore*, the Dallas Court of Appeals ruled that the employer owed no duty to an employee's wife to protect her from the risk of harm posed by asbestos brought home on the employee's work clothes.[61] But with the withdrawal of the first three opinions in *Altimore*, the duty owed by an employer to the household members of its employees remains an unsettled question in Texas.

B. Preemption

In *Riegel v. Medtronic, Inc.*,[62] the United States Supreme Court gave new hope to those who believe that state standards for determining whether a product is defective—generally applied by juries of laypersons—should be superseded by federal regulatory standards applied by federal appointees and bureaucrats. In *Riegel*, the plaintiff was injured when a cardiac catheter manufactured by the defendant Medtronic ruptured in his coronary artery during heart surgery. The catheter received premarket approval by the Food and Drug Administration, meaning that the FDA had reviewed the design of the catheter and determined that the design provided a "reasonable assurance" of the device's "safety and effectiveness."[63] The federal Medical Device Act required that a device that had received premarket approval be marketed without significant deviations from the design specifications, and prohibited the imposition of any state requirements "different from, or in addition to, any requirement" imposed under the Act.[64] Writing for the Supreme Court, Justice Scalia concluded that the plaintiff's attempt to impose liability under New York common law was preempted by the Medical Device Act because the plaintiff's claims sought to impose design requirements that were "different from, or in addition to" the federal requirements.[65] Justice Ginsberg dissented, finding no congressional intent "to effect a radical curtailment of state common-law suits seeking compensation for injuries caused by defectively designed or labeled medical devices."[66] Having decided that claims based on allegedly defective medical devices are preempted by federal law, on November 3, 2008, the Court heard argument in *Wyeth v. Levine*,[67] in which the defendant argued that claims based on allegedly

59. *Id.* at 424-25.
60. *Id.* at 425.
61. *Id.* at 417 (citing Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 458 (Tex. App.—Dallas 2007, pet. denied)).
62. 128 S. Ct. 999 (2008).
63. *Id.* at 1004 (quoting 21 U.S.C. § 360e(d) (2006)).
64. *Id.* at 1003 (quoting 21 U.S.C. § 360k(a)(1) (2006)).
65. *Id.* at 1007-08.
66. *Id.* at 1013 (Ginsburg, J., dissenting).
67. Wyeth v. Levine, 129 S. Ct. 1187 (2009).

defective drugs—such as those that spawned the fen-phen and Vioxx mass tort litigation—are similarly preempted. The decision will have mortal consequences on the future of pharmaceutical products liability litigation and will be discussed during the next Survey period.

C. Indemnity in a Toxic/Mass Tort Case

In last year's Survey, we noted that the Texas Supreme Court heightened the burden of proving causation customarily demanded of plaintiffs in toxic tort cases by requiring plaintiffs to present "quantitative" evidence of exposure to the toxic substance in amounts sufficient to cause the injury.[68] During this year's Survey period, the supreme court similarly narrowed the scope of a manufacturer's liability for defective products in the context of statutory indemnity. In *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*,[69] a retailer sued by a woman who alleged that she had developed a severe allergy caused by her use of latex gloves sought indemnification of its defense costs from a manufacturer of latex gloves under section 81.002 of the Texas Civil Practice and Remedies Code. The manufacturer denied liability, arguing that it had satisfied its duty to the retailer under the statute by offering to defend the retailer against claims involving its specific product. The retailer responded that the offer was insufficient because the statute requires the manufacturer to assume the defense of all claims against the retailer, not just those involving the manufacturer's specific product. The Fifth Circuit certified the question to the Texas Supreme Court. In an opinion by Justice Green, the supreme court sided with the manufacturer, concluding that "it would be contrary to the Legislature's intent to require a defendant to indemnify a seller for claims regarding products the defendant never manufactured."[70] The supreme court believed it would be "absurd"[71] to require a manufacturer to be "placed in the awkward, if not impossible, position of defending someone else for injuries caused by products they did not make,"[72] and found the requirement that the limitation of a manufacturer's duty to indemnify a seller to claims involving the manufacturer's own products to be "inherent in the statute."[73] Justice O'Neill, joined by Justices Medina, Johnson, and Willett, dissented, arguing that the majority's interpretation of the statute "creates an exception to the indemnity obligation that does not exist in the text."[74] The dissent observed that the majority's holding requires a retailer enforcing its indemnity rights to accept a defense against only part of the claims asserted against it, and

68. Rosenthal et al., *supra* note 49, at 1169-71 (discussing Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007)).

69. 251 S.W.3d 481 (Tex. 2008).

70. *Id.* at 486.

71. *Id.* at 485.

72. *Id.* at 487.

73. *Id.* at 485.

74. *Id.* at 495 (O'Neill, J., dissenting).

found this contrary to the intent, as well as the language of the statute.[75] In a concurring opinion, Justice Brister attempted to bridge the gap between the majority and the dissenters, pointing out that, as a practical matter, most of the defense costs in toxic tort cases are not specific to the products of a single manufacturer; "[i]n most toxic tort cases, the costs incurred *solely* because of an added defendant are marginal, and it is those [costs] alone that [the manufacturer] would not have to pay."[76] Despite Justice Brister's optimism, the same day it handed down *Owens & Minor*, the supreme court reversed a judgment awarding defense costs to Owens & Minor from two latex glove manufacturers and remanded the case "for further proceedings consistent with this opinion," with no reference that the manufacturers had shown that the costs related to claims solely based on other products.[77]

D. Punitive Damages

In *Exxon Shipping Co. v. Baker*,[78] the United States Supreme Court reduced the punitive damages awarded to the victims of the infamous 1989 Exxon Valdez oil spill from $2.5 billion to just over $500 million, an amount equal to the compensatory damages awarded. The Court ordered this reduction not as a constitutional imperative, but as a matter of maritime common law "for which responsibility lies with [the] Court as a source of judge-made law in the absence of statute."[79] Writing for the Court, Justice Souter surveyed state laws capping punitive damages and empirical studies of jury behavior in devising a common law ceiling for punitive awards in maritime cases.[80] The Court concluded "that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases."[81] The decision reflects the increasing skepticism with which courts, including those in Texas, view awards of punitive damages.

E. Constitutional Validity of Legislation Limiting Successor Liability

In our 2007 Survey, we reported on *Robinson v. Crown Cork & Seal Co.*,[82] in which the Fourteenth District Court of Appeals in Houston rejected a constitutional challenge to the application of a statute limiting the successor liability of a frequent defendant in asbestos litigation, Crown Cork & Seal.[83] The Third District Court of Appeals in Austin

75. *Id.* at 498-99.
76. *Id.* at 491 (Brister, J., concurring).
77. Ansell Healthcare Prods., Inc. v. Owens & Minor, Inc., 251 S.W.3d 499, 500 (Tex. 2008).
78. 128 S. Ct. 2605 (2008).
79. *Id.* at 2627.
80. *Id.* at 2622-26.
81. *Id.* at 2633.
82. 251 S.W.3d 520 (Tex. App.—Houston [14th Dist.] 2006, pet. granted). The case was argued in the Texas Supreme Court on February 7, 2008, and remains pending.
83. Brent M. Rosenthal et al., *Toxic Torts and Mass Torts*, 60 SMU L. Rev. 1345, 1360-61 (2007).

reached a different result in *Satterfield v. Crown Cork & Seal Co., Inc.*[84] In *Satterfield*, as in *Robinson*, the plaintiff filed suit against Crown Cork & Seal and other defendants alleging that he contracted mesothelioma, a fatal and untreatable cancer of the lining of the lung, caused by his exposure to asbestos products made and sold by Crown Cork's predecessor. Days after the trial court granted summary judgment in the plaintiff's favor on the successor liability issue, the Texas Legislature passed a statute as part of House Bill 4 limiting the successor liability for asbestos-related harms of certain corporations to the gross assets of the company that originally incurred the liability,[85] and declared the statute applied even to pending cases.[86] The trial court dismissed the plaintiff's claim against Crown Cork based on the new statute.

In a majority opinion by Justice Patterson, the Austin Court of Appeals reversed, holding that the statute violated article I, section 16 of the Texas Constitution, which prohibits the enactment of retroactive laws.[87] The court of appeals acknowledged that to be protected by that provision, the plaintiff's rights must be "vested," but rejected Crown Cork's argument that rights become vested only when reduced to final judgment; it was enough that the claims were "accrued and pending" prior to the enactment of the statute.[88] The court of appeals also rejected Crown Cork's contention that the statute was a permissible exercise of the state's police power, noting that "[a]t the heart of the police power is its grounding in the public interest."[89] The court found that the primary purpose of the statute was to provide financial protection to "a particular private business or business segment,"[90] not to promote the "health, safety, morals, or general welfare *of the public*;"[91] thus, the statute could not be upheld as a valid exercise of police power. Justice Law dissented, arguing that the plaintiff did not have a vested right against Crown Cork at the time of the enactment of the statute, and the plaintiff's "statutory successor-liability remedy was not beyond the reach of subsequently enacted legislation."[92] Justice Law also that argued the plaintiff's rights were not abrogated because they remained enforceable against other defendants,[93] and that the limitation on Crown Cork's liability was a proper exercise of the state's police power.[94]

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84. 268 S.W.3d 190 (Tex. App.—Austin 2008, no pet.).

85. TEX. CIV. PRAC. & REM. CODE ANN. § 149.001-006 (Vernon 2003).

86. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.02(2), 2003 Tex. Gen. Laws 895 (codified at TEX. CIV. PRAC. & REM. CODE ANN § 149.001 (Vernon 2003) (historical note that designates effective date)).

87. *Satterfield*, 268 S.W.3d at 205-20.

88. *Id.* at 207.

89. *Id.* at 219.

90. *Id.*

91. *Id.* at 216.

92. *Id.* at 230 (Law, C.J., dissenting).

93. *Id.* at 232-36.

94. *Id.* at 236-39.

III. ETHICAL ISSUES

The "aggregate settlement rule" prohibits a lawyer representing two or more clients from agreeing to an aggregate, or group, settlement of the claims unless each client consents to the settlement of the claims in the aggregate with knowledge of "the extent of participation of each person in the settlement."[95] The rule is particularly important, and controversial, in the mass tort context. Proponents of the rule note that it protects individual clients from having the value of their own case compromised in the interest of benefiting the group (and the group's lawyer).[96] Those who favor relaxing or changing the rule argue that it impedes efficient resolution of mass tort claims and that the ideal of meaningful, individual consent and input into settlement terms is unrealistic.[97]

The First District Court of Appeals had an opportunity to explore the parameters of the rule in *Authorlee v. Tuboscope Vetco International, Inc.*[98] In that case, 176 workers sued Tuboscope, AMF, and other defendants, alleging that their occupational exposure to silica caused them to develop lung disease. Their lawyer and the lawyer for AMF went to mediation, after which the lawyers agreed that AMF's lawyer would recommend that his client and its insurance carrier settle the claims, so long as the total of the individual demands did not exceed $45 million and at least ninety-five percent of the plaintiffs agreed to settle. The lawyers signed a Rule 11 agreement[99] that memorialized their understanding but did not mention the $45 million cap. All but one or two of the plaintiffs signed forms sent to them by the lawyer authorizing the lawyer to settle for a particular amount and acknowledging that the claims were negotiated with similar claims but was not part of an aggregate settlement. The plaintiffs' lawyer then sent formal demand letters for each client to AMF's counsel, who accepted all but one demand. Before the settlements closed, the plaintiffs' lawyer asked that language representing that "[d]efendants have not made any aggregate settlement offer and this settlement is not part of any aggregate settlement" be included in the releases.[100] AMF's lawyer inserted the language verbatim into the releases. The trial court entered judgment on the settlements. Several plaintiffs later replaced their counsel and sought to reinstate their claims against AMF, contending that the settlement was void and unenforceable because it was the product of fraud and violated the prohibition against undisclosed group settlements. The trial court found that the settlement violated the aggregate settlement rule, but that the violation did not void

95. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(f), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (State Bar R. art. X, § 9).

96. *See, e.g.*, Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999).

97. *See, e.g.*, Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

98. 274 S.W.3d 111 (Tex. App.—Houston [1st Dist.] 2008, pet. abated).

99. *See* TEX. R. CIV. P. 11.

100. *Author Lee*, 274 S.W.3d at 117.

the judgment based on the settlement. The trial court also found that fraud by an opposing party in litigation is not actionable because it is unreasonable for a litigant to rely on an opposing party's representations.[101] The plaintiffs appealed.

A majority of the First District Court of Appeals in Houston agreed that AMF's settlement was enforceable. In an opinion by Justice Nuchia, the court held that AMF and its counsel did not commit actual fraud because the claimants did not actually rely on the statements inserted in the settlement agreements denying the existence of an aggregate settlement with AMF.[102] The court of appeals then held that "there can be no conspiracy to commit fraud in the litigation setting," essentially finding that counsel for a party owes no duty to the party's opponent.[103] Such a duty, the court reasoned, "would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice."[104] Finally, the court of appeals upheld the trial court's refusal to set aside the judgment based on the plaintiffs' contention that there had been an aggregate settlement, although, unlike the trial court, it found no aggregate settlement at all.[105] The court observed that the Rule 11 agreement "did not actually settle any case" and "did not bind the defendants to a lump sum to be paid to the plaintiffs' lawyers and divided among his [sic] clients."[106] Rather, the court concluded, the lawyers settled the cases based on the individual demands on behalf of each plaintiff sent by the plaintiffs' lawyer to AMF's counsel.[107]

In a lengthy dissenting opinion, Justice Keyes argued that the court of appeals should have set aside the settlement as the product of fraud and civil conspiracy and as unenforceable under the aggregate settlement rule.[108] She contended that the record "plainly shows that all claims were negotiated as part of a single global settlement" and that the individual settlement amounts were "apportioned according to a matrix agreed upon by counsel for both plaintiffs and defendants."[109] Although she understood the court's reluctance to set aside a settlement "for a large aggregate sum of money that may well be fairly apportioned among the claimants," she could not agree to turn "a blind eye" to violation of the aggregate settlement rule "out of an apparently equitable concern that a large aggregate settlement that benefited many people, both plaintiffs and defendants, not be disturbed."[110]

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101. *Id.* at 118.
102. *Id.* at 119.
103. *Id.* at 120.
104. *Id.* (quoting Bradt v. West, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
105. *Id.* at 120-21.
106. *Id.* at 121.
107. *Id.*
108. *Id.* at 121-33 (Keyes, J., dissenting).
109. *Id.* at 129.
110. *Id.* at 133.

IV. CONCLUSION

In last year's Survey, we cited one legal expert's unwillingness to proclaim the death of toxic and mass tort litigation.[111] If the activity in Texas during the past Survey period is any indication, this type of litigation in Texas is not yet finished—but it is clearly on life support.

111. Rosenthal et al., *supra* note 49, at 1178 (quoting Deborah H. Hensler, *Has the Fat Lady Sung? The Future of Mass Torts*, 26 REV. LITIG. 883, 888 (2007).