SMU | Dedman School of Law

SMU Law Review

Volume 55
Issue 3 *Annual Survey of Texas Law*

Article 24

January 2002

Toxic Torts and Mass Torts

Brent M. Rosenthal

TOXIC TORTS AND MASS TORTS

*Brent M. Rosenthal**

CASES involving personal injuries and property damage caused by chemicals or other toxic substances pose unique and challenging issues to the courts. Because toxic exposures generally act insidiously and over time, these types of cases often present issues relating to latency and causation. Moreover, chemical releases and toxic exposures frequently generate hundreds or even thousands of claims; the sheer number of claims presents its own unique challenge to the administration of justice. Since the mid-1990's, the Texas Supreme Court has expressly acknowledged and addressed the special problems confronted by Texas courts in toxic tort[1] and mass tort[2] litigation.

Although the Texas Legislature did not enact any laws specifically affecting toxic or mass tort cases during the Survey period, Texas state and federal courts have addressed a variety of substantive and case management issues in these types of cases. The courts have examined the scope of the duties owed to claimants by product suppliers and employers, decided whether multiple causes of action may accrue for successive latent injuries caused by the same toxic exposure, and considered the type of expert testimony required to prove causation in a toxic tort case. The courts have also continued the trend of limiting the availability of the class action device to resolve mass tort litigation, widened the scope of discovery available to defendants in mass tort cases, and recognized the practical importance of the choice between a state and a federal forum in toxic injury litigation. Because of the size and scope of these cases, one can expect them to continue to receive special judicial consideration for years to come.

I. SUBSTANTIVE AND EVIDENTIARY ISSUES

A. DUTY AND DEFENSES

In *Humble Sand & Gravel, Inc. v. Gomez*,[3] the Texarkana Court of

* Shareholder, Baron & Budd, P.C., Dallas, Texas, and Lecturer in Law on Mass Tort Litigation, Southern Methodist University School of Law. The author gratefully acknowledges the assistance of Carla Burke, Misty Farris, and Amy Shahan—all of whom are lawyers in the firm of Baron & Budd, P.C.—in preparing this survey.

1. *See, e.g.*, Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997) (recognizing the "difficult issues surrounding proof of causation in a toxic tort case").

2. *See, e.g.*, *In re Ethyl Corp.*, 975 S.W.2d 606, 609 (Tex. 1998) ("The mass tort litigation that has proliferated over the last two decades has caused departures from traditional ways in which cases have been filed, discovery has proceeded, and trials have been set.");CSR, Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (noting "problems inherent in many, if not all, mass tort cases").

3. 48 S.W.3d 487 (Tex. App.–Texarkana 2001, pet. filed).

Appeals considered whether the "sophisticated user defense" relieved a supplier of silica products of its duty to warn end users of the products' dangerous propensities. The court's rejection of the sophisticated user defense in *Gomez* gives plaintiffs in toxic tort cases new ammunition to defeat this defense, although Humble Sand's petition for review is pending before the Texas Supreme Court.[4]

Raymond Gomez developed subacute silicosis as a result of his exposure to silica products while working for Spincote.[5] He sued the supplier of the products, Humble Sand, for failing to warn of the dangers of the products and obtained a judgment for his damages.[6] On appeal, Humble Sand argued that it did not have a duty to warn Gomez of the dangers of exposure to silica products because Spincote was a sophisticated user.[7] The Texarkana Court of Appeals, in a majority opinion by Justice Ross, reiterated the general rule that a manufacturer or supplier has a nondelegable duty to warn ultimate users or consumers of the dangers of its product.[8] The court acknowledged that in exceptional cases, "a manufacturer or supplier may depend on an intermediary to communicate a warning to the ultimate user of a product."[9] However, the court noted, "[f]or the sophisticated user exception to apply, the intermediary must have knowledge or sophistication equal to that of the manufacturer or supplier, and the manufacturer must be able to reasonably rely on the intermediary to warn the ultimate consumer."[10] The court added that under the version of the defense that appears in the RESTATEMENT (SECOND) OF TORTS § 388 (1965), reliance on even a knowledgeable intermediary may be unreasonable if the magnitude of the risk is great and it would not be unduly burdensome to warn the user directly.[11] The court found that Humble Sand produced no evidence that it ascertained the knowledge possessed by Spincote and verified Spincote's safety procedures, or that Spincote held itself out as an expert on the subject of silicosis.[12] Because Humble Sand had failed to demonstrate that Spincote possessed full knowledge of the possible harm and necessary precautions involved in the use of Humble Sand's product, the court concluded, "Humble Sand has not met the threshold to assert the sophisticated user defense."[13] Chief Justice Cornelius dissented, arguing that the law did not obligate Humble Sand to show that it investigated the knowledge or actual practices of the intermediary to invoke the sophisticated user defense.[14]

---

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Gomez*, 48 S.W.3d at 494.
9. *Id.*
10. *Id.* at 495.
11. *Id.* at 497-98 (quoting extensively from RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965)).
12. *Id.* at 499.
13. *Gomez*, 48 S.W.3d at 501.
14. *Id.* at 510-11 (Cornelius, C.J., dissenting).

During the Survey period, the Fifth Circuit considered two cases involving injuries caused by the use of tobacco products. In both *Davis v. R.J. Reynolds Tobacco, Inc.*[15] and *Harris v. Philip Morris Inc.*,[16] the plaintiffs sought to impose liability on tobacco companies for their injuries under a theory of civil assault. The plaintiffs asserted this theory in an attempt to circumvent a provision in the Texas Product Liability Act that expressly bars a product liability action if the product is inherently unsafe and is a common consumer product intended for personal consumption, "such as . . . tobacco."[17] The plaintiffs argued that their claims were not product liability claims but were claims alleging an intentional tort. The Fifth Circuit found that the plaintiffs' civil assault claims, like the fraud, conspiracy, and deceptive trade practices claims that had been alleged and dismissed in a previous case,[18] were actually "product liability claims," because they were based on the defendants' wrongful conduct in failing to warn the plaintiffs of the dangers of the products.[19] Despite the plaintiffs' "legal labels and conclusory characterizations,"[20] the Fifth Circuit held in each case that the plaintiffs' civil assault claims were barred by the Texas Product Liability Act.[21]

B. Limitations and Accrual

In *Pustejovsky v. Rapid-American Corp.*,[22] the Texas Supreme Court considered whether more than one cause of action can accrue from the same toxic exposure. Henry Pustejovsky had been occupationally exposed to asbestos from 1954 through 1979, and in 1982 was diagnosed with asbestosis, a nonmalignant scarring of the lung.[23] He filed suit against Johns-Manville Corporation, one of the suppliers of asbestos products to his employer, and received a small settlement.[24] In 1994, Pustejovsky was diagnosed with mesothelioma, a fatal cancer of the lining of the lung, caused by his occupational exposure to asbestos.[25] He sued other suppliers of asbestos for damages caused by his mesothelioma.[26] The defendants in the second suit argued that his cause of action accrued in 1982 when he first discovered harm caused by exposure to asbestos and, therefore, that his mesothelioma claim was barred by the statute of limitations.[27] In response, Pustejovsky presented undisputed medical evidence that asbestosis and mesothelioma are separate injuries resulting

15. 231 F.3d 928 (5th Cir. 2000).
16. 232 F.3d 456 (5th Cir. 2000).
17. Tex. Civ. Prac. & Rem. Code § 82.004(2) (Vernon 1997).
18. *Harris*, 232 F.3d at 459 (citing Sanchez v. Liggett & Myers, Inc., 187 F.3d 486, 491 (5th Cir. 1999)).
19. *Id.* at 459; *Davis*, 231 F.3d at 930.
20. *Harris*, 232 F.3d at 459.
21. *Id.*; *Davis*, 231 F.3d at 930.
22. 35 S.W.3d 643 (Tex. 2000).
23. *Id.* at 644-45.
24. *Id.* at 645.
25. *Id.*
26. *Id.*
27. *Pustejovsky*, 35 S.W.3d at 645.

from separate disease processes.[28] The trial court granted summary judgment based on the statute of limitations,[29] and the San Antonio Court of Appeals affirmed holding that Pustejovsky had one cause of action based on his asbestos exposure which accrued in 1982 when he first discovered harm.[30]

The Texas Supreme Court reversed, holding that Pustejovsky's later claim for asbestos-related cancer did not accrue until the cancer was reasonably discoverable. In a unanimous opinion written by Justice Gonzales, the court recognized the general rule that only one cause of action accrues from a defendant's single breach of a legal duty.[31] The court found, though, that restricting a plaintiff who suffers successive latent injuries from a toxic occupational exposure to a single cause of action would be inefficient as well as unjust.[32] Application of the single action rule in this context would virtually compel workers—even those otherwise disinclined to sue—to assert claims at the earliest appearance of some harm and then attempt to recover for all possible future conditions, including those separate and dissimilar from the current injury.[33] Such "premature litigation of speculative claims" should be discouraged, the court said.[34] Defendants' interest in repose, the court added, was outweighed, not only by "the plaintiff's need of an opportunity to seek redress for the gravest injuries,"[35] but also by the efficiencies and other benefits of adjudicating claims of existing injury rather than anticipated, speculative future injury.[36]

The court did not want to craft a broad rule for application in litigation with which it was unfamiliar, so it expressly limited its holding in *Pustejovsky* to "asbestos-related diseases resulting from workplace exposure."[37] The court noted that asbestos litigation is a "mature tort" in which "the relevant medical science is advanced."[38] But the reasoning of *Pustejovsky* may have equal force in cases involving other types of toxic substances. Consequently, the applicability of the *Pustejovsky* rule in other factual contexts will have to be established on a case-by-case basis.

In *Nugent v. Pilgrim's Pride Corp.*,[39] the Texarkana Court of Appeals applied the discovery rule in a case involving cancer allegedly caused by the defendant's negligent dumping activities. Beginning in 1991, the

28. *Id.*
29. *Id.*
30. *Id.*; Pustejovsky v. Pittsburgh Corning Corp., 980 S.W.2d 828 (Tex. App.—San Antonio 1998), *rev'd sub nom.* Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643 (Tex. 2000).
31. *Pustejovsky*, 35 S.W.3d at 646-47.
32. *Id.* at 652-53.
33. *Id.* at 653.
34. *Id.* (citing Childs v. Haussecker, 974 S.W.2d 31, 38 (Tex. 1998)) (internal citation omitted).
35. *Id.*
36. *Pustejovsky*, 35 S.W.3d at 646-47.
37. *Id.*
38. *Id.* at 654.
39. 30 S.W.3d 562 (Tex. App.—Texarkana 2000, pet. denied).

plaintiffs learned that noxious and toxic chemicals and chicken waste dumped by Pilgrim's Pride on its property was raising the toxicity of the soil on their adjoining farm.[40] In 1994 one of the plaintiffs was diagnosed with skin cancer, and the other plaintiff was diagnosed with neurological injuries and an elevated risk of cancer.[41] The plaintiffs filed suit on August 30, 1994.[42] Pilgrim's Pride argued that the plaintiffs' personal injury claims were barred, because they were filed more than two years after the plaintiffs discovered that their farm had been contaminated.[43] The plaintiffs countered that the discovery rule applied to toll the limitations period until they knew or should have known that their injuries were caused by the defendants' wrongdoing.[44] The Texarkana Court of Appeals recognized that the discovery rule, enunciated by the Texas Supreme Court in *Childs v. Haussecker*,[45] normally applied to latent *occupational* diseases.[46] Although the plaintiffs did not have an occupational disease the court held that the discovery rule applied to the plaintiffs' claims, and therefore the statute of limitations did not begin to run until 1994 when they discovered they had diseases related to the defendant's wrongful conduct.[47]

C. Admissibility of Expert Testimony

Since the Texas Supreme Court mandated in *E.I. du Pont de Nemours & Co. v. Robinson*[48] and *Merrell Dow Pharmaceuticals, Inc. v. Havner*[49] that the trial court serve as a "gatekeeper" over the admissibility of expert testimony, Texas courts have struggled to define the "gatekeeper" role. The *Robinson/Havner* analysis of expert testimony concerning causation has become a significant hurdle for plaintiffs in toxic tort cases, especially in the area of new or emerging toxic torts.

In *Martinez v. City of San Antonio*,[50] the San Antonio Court of Appeals upheld summary judgment based on "no evidence" of causation after the trial court struck the testimony of two plaintiffs' experts. The plaintiffs alleged personal injuries and property damage from exposure to lead released into their neighborhood during construction of the Alamodome on the site of an old iron foundry. The plaintiffs offered testimony by Dr. Jack Matson to establish exposure levels attributable to releases from the construction site.[51] Dr. Matson used an accepted EPA test to calculate the amount of "fugitive dust" released during the con-

40. *Id.* at 565-566.
41. *Id.* at 571.
42. *Id.*
43. *Id.*
44. *Nugent*, 30 S.W.3d at 571.
45. 974 S.W.2d 31, 38 (Tex. 1998).
46. *Nugent*, 30 S.W.3d at 572.
47. *Id.* at 574.
48. 923 S.W.2d 549, 558 (Tex. 1995).
49. 953 S.W.2d 706, 712 (Tex. 1997)
50. 40 S.W.3d 587 (Tex. App.—San Antonio 2001, pet. denied).
51. *Id.* at 590.

struction activities.[52] Next, Dr. Matson calculated the level of lead in the "fugitive dust."[53] Although soil samples demonstrated the percentage of lead in the soil at the site, Dr. Matson concluded that these samples did not accurately reflect the lead levels in the lighter, airborne "fugitive dust" from the site.[54] He applied an "enrichment factor" of 3.3 to represent the percentage of lead in the "fugitive dust." In other words, he opined that the lead level in dust released from the site was 3.3 times higher than the level of lead found in soil samples at the construction site itself.[55] Moreover, Dr. Matson supported application of his "enrichment factor" by reference to a study of releases from a lead smelter in a New Mexico desert. But the trial court found that the New Mexico study showed inadequate similarities with the San Antonio site to be a reliable foundation for Dr. Matson's use of the "enrichment factor."[56] The trial court struck the affidavit of Dr. Matson and that of another expert, Dr. Colin J. Baynes, who relied on Dr. Matson's conclusions in rendering an opinion regarding the amount of lead emitted through the construction activities.[57] The court of appeals affirmed the exclusion of these affidavits, holding that the trial court did not abuse its discretion in finding the testimony unreliable.[58]

Even if the testimony of these experts had not been excluded, the court of appeals determined that summary judgment would still have been proper, because the plaintiffs' evidence constituted "no evidence" of causation.[59] The plaintiffs offered proof of elevated lead levels at the Alamodome site, and proof that the children had been exposed to lead and suffered injuries consistent with that exposure, but the plaintiffs could not prove that the Alamodome was the source of the lead.[60] Dr. Matson's testimony was offered to prove the source of the lead. However, his testimony was "no evidence" that the lead came from the Alamodome site because Dr. Matson "failed to rule out alternative sources of lead contamination."[61] Consequently, the *Martinez* plaintiffs failed to carry their summary judgment burden on causation, because they could not prove that the lead in their neighborhood came from the lead at the construction site.

In *Hess v. McLean Feedyard, Inc.*,[62] the Amarillo Court of Appeals considered similar issues in a property damage case. The plaintiffs alleged that runoff from the defendant's feedyard operations contaminated their surface and ground water. In opposing summary judgment, the

52. *Id.* at 593.
53. *Id.*
54. *Id.*
55. *Martinez*, 40 S.W.3d at 593.
56. *Id.*
57. *Id.* at 590.
58. *Id.* at 594.
59. *Id.* at 595.
60. *Martinez*, 40 S.W.3d at 595.
61. *Id.*
62. 59 S.W.3d 679 (Tex. App.—Amarillo 2000, pet. denied).

plaintiffs offered the affidavit of Dr. Baxley, which consisted of sixteen single-spaced pages in which he outlined his credentials, described his experience in similar cases, and discredited the reports of the Texas Natural Resources Conservation Commission on the alleged groundwater contamination.[63] The affidavit, however, did not include a recitation of the facts upon which Dr. Baxley based his causation opinions. Because the affidavit relied on assumptions that had not been proven as fact, the court of appeals held that the trial court did not abuse its discretion in striking the affidavit.[64]

Like the *Martinez* court, the *Hess* court found that, even if admitted, the affidavit provided "no evidence" of causation. The relevant portions of the affidavit were conclusory and thus failed to raise an issue of fact.[65] Moreover, like the expert in *Martinez,* Dr. Baxley failed to rule out alternative causes of the plaintiffs' damages.[66] Furthermore, the plaintiffs provided no evidence, through expert affidavits or otherwise, of the water quality prior to runoff from the feedyards. Without this evidence, the plaintiffs could not raise a fact issue on causation.[67]

But in *Jarrell v. Park Cities Carpet & Upholstery Cleaning, Inc.*,[68] the Dallas Court of Appeals limited the trial court's discretion in excluding expert testimony. The plaintiff in *Jarrell* became ill after she was exposed to two chemical products used to remove smoke odor from the carpets at the office where she worked.[69] Although no epidemiological studies of these products had been done, the plaintiff offered epidemiological studies of the chemical components of the products at issue.[70] The defendant asserted that only epidemiological studies of the specific products at issue—not studies of the components of the products—were admissible.[71] The trial court agreed with the defendant, excluded the plaintiff's evidence of causation, and granted a directed verdict for the defendant.[72] The Dallas Court of Appeals reversed, noting that "[a] manufacturer could make slight variations in chemical solutions, apply different trade names, and then assert there was no study of the variant solution. Such an application reduces the *Robinson/Havner* analysis to a matter of semantics, not science."[73]

63. *Id.* at 685-86.
64. *Id.* at 686-87.
65. *Id.* at 686.
66. *Id.* at 687.
67. *Hess*, 59 S.W.3d at 688.
68. 53 S.W.3d 901 (Tex. App.—Dallas 2001, pet. filed).
69. *Id.*
70. *Id.* at 902.
71. *Id.* at 903.
72. *Id.*
73. *Jarrell*, 53 S.W.3d at 903.

II. CASE MANAGEMENT ISSUES

A. CLASS ACTIONS

During the Survey period, Texas courts imposed additional requirements on parties seeking class certification and heeded the Texas Supreme Court's admonition in *Southwestern Refining Co. v. Bernal* that "the class action will rarely be an appropriate device for resolving" personal injury claims.[74] In *McAllen Medical Center, Inc. v. Cortez*,[75] the Texas Supreme Court again eschewed the "certify now, worry later" approach rejected in *Bernal*[76] and required the same rigorous pre-certification analysis described in *Bernal* of a "settlement-only class."[77] The plaintiff in *McAllen* brought a putative class action against Dr. Francisco Bracamontes and McAllen Medical Center ("MMC"), the hospital where he practiced, claiming that they had misrepresented the qualifications of the hospital's cardiac surgeons.[78] The plaintiff sought damages for economic loss, mental anguish, and intentional infliction of emotional distress.[79] After the plaintiff settled with the doctor, the trial court certified a settlement class consisting of every patient who had undergone cardiac surgery at the hospital during a five and a half year period.[80] The certification order preliminarily approved the settlement but delayed review of the certification criteria under Texas Rule of Civil Procedure 42.[81] The hospital tried to appeal the certification, but the Corpus Christi Court of Appeals dismissed the appeal, holding that the challenge to the certification and settlement was premature and that the hospital lacked standing to appeal the order.[82]

On review, the Texas Supreme Court cautioned that because a preliminary certification has an "immediate, significant, and perhaps irreparable" effect on the course of the proceedings, such an order cannot evade appellate review even if it is termed "preliminary," and the trial court will reconsider its ruling later at the fairness hearing.[83] Because the trial court had certified the class without first requiring proof that the proposed class met the certification requirements, the Texas Supreme Court held that the order was ripe for appeal.[84] The supreme court also rejected the appellate court's decision that, as a nonsettling defendant, the hospital had no standing to complain about the settlement class. In addition, the supreme court also held that "a nonsettling defendant has standing to contest certification of a settlement class if the nonsettling

74. 22 S.W.3d 425, 436 (Tex. 2000).
75. 66 S.W.3d 227 (Tex. 2001).
76. 22 S.W.3d at 435.
77. *McAllen*, 66 S.W.3d at 232.
78. *Id.* at 230.
79. *Id.*
80. *Id.* at 230-31.
81. *Id.* at 231.
82. *McAllen*, 66 S.W.3d at 231.
83. *Id.* at 234.
84. *Id.* at 233.

defendant can show that the certification adversely affects it."[85] The court noted that the proposed class notice itself adversely affected the hospital "by allowing class counsel to assert MMC's complicity to the broadly defined class and solicit claims against MMC, while at the same time denying MMC the opportunity to object because the order purportedly relates only to a settlement with Bracamontes."[86] Having resolved that the order was ripe for appeal and that the hospital had standing to challenge the order, the Texas Supreme Court remanded the case to the court of appeals for consideration of the merits of the appeal.[87]

Likewise, the Fort Worth Court of Appeals followed the Texas Supreme Court's conservative approach to class actions by reversing class certification in *Becton Dickinson & Co. v. Usrey*.[88] The proposed class in *Usrey* consisted of health care workers who had sustained needlesticks from used needles.[89] The plaintiffs asserted products liability claims against the suppliers of the needles, alleging that all conventional syringes and blood collection devices were defectively designed and that available alternative designs would have prevented needlesticks.[90] The trial court certified a class of workers seeking only economic damages for the reasonable costs of various tests the workers requested after their needlesticks.[91] The appellate court explained that suits involving allegedly defective medical devices may be the weakest candidates for certification under *Bernal*'s "rigorous analysis" of the predominance of common issues of law or fact over questions affecting only individual class members.[92] Because the evidence showed that the class members' needlestick injuries occurred in a variety of circumstances, the appellate court concluded that issues of causation and comparative responsibility would be distinct for each class member and reversed the trial court's certification.[93]

In *Texas Department of Transportation v. Barrier*,[94] the Houston Fourteenth District Court of Appeals reversed class certification in a property damage case, because the record did not show that common issues would predominate over individual issues, or that litigation of individual claims would create a risk of inconsistent results. The class action was brought against the Texas Department of Transportation and the Harris County Flood Control District by property owners alleging that the manner in which the defendants constructed a beltway and its drainage system caused more severe flooding to their properties than would otherwise

85. *Id.* at 235.
86. *Id.* at 236.
87. *McAllen*, 66 S.W.3d at 238.
88. 57 S.W.3d 488, 498 (Tex. App.—Fort Worth 2001, no pet. h.).
89. *Id.* at 489.
90. *Id.* at 490.
91. *Id.* at 490-491.
92. *Id.* at 494.
93. *Usrey*, 57 S.W.3d at 495.
94. 40 S.W.3d 153 (Tex. App.—Houston [14th Dist.] 2001, pet. filed).

have occurred during a flood.[95] The plaintiffs sought certification only of common issues regarding liability and planned to litigate separately the causation and damages issues peculiar to each plaintiff. Moreover, the trial court's order certified the class "as to liability issues only" without specifying which issues would be submitted to the jury in the class action phase and which would be decided in the individual phases.[96] The appellate court noted that since the elevated flood levels were claimed to have been caused by multiple defendants doing different things at different locations, a finding that the defendants were responsible for elevated flooding in one area would not establish whether any one defendant or all defendants were responsible for higher levels in another area.[97] Under these circumstances, the evidence did not demonstrate that issues common to the certified class would be the object of most of the efforts of the litigants, because each class member would have to prove which defendant caused the flooding on his particular property.[98] As a result, the appellate court reversed the certification and remanded to the trial court for proceedings consistent with the *Bernal* opinion, which was not available at the time the trial court granted certification.[99]

The trend against class certification of mass tort cases was reflected in federal as well as state courts during the Survey period. In *Neely v. Ethicon, Inc.*,[100] the plaintiffs sought certification in the United States District Court for the Eastern District of Texas of a class consisting of individuals injured by contaminated Vicryl surgical sutures implanted in their bodies during medical procedures.[101] In an attempt to satisfy the federal certification requirements, the plaintiffs sought class certification only for determination of common issues regarding liability and planned to litigate separately each class member's causation and damages.[102] Despite the proposed bifurcation of common and individual issues, the district court explained that under Federal Rule of Civil Procedure 23(b), common questions must predominate over any questions affecting only individual class members, even if the common and individual issues will be decided in different proceedings.[103] Further, because the proposed nationwide class involved class members from many states, the court explained that the variations in those jurisdictions' substantive law precluded a single determination of what appeared to be the common "breach of duty" issue.[104] The court concluded that "there are too many individual issues in Plaintiffs' proposed class that defeat predominance and superiority, even though there is a common nucleus of facts concern-

95. *Id.* at 155.
96. *Id.* at 157.
97. *Id.* at 159.
98. *Id.*
99. *Barrier*, 40 S.W.3d at 160.
100. No. 1:00-CV-00569, 2001 WL 1090204 (E.D. Tex. Aug. 15, 2001).
101. *Id.* at *1.
102. *Id.* at *4.
103. *Id.* at *5.
104. *Id.* at *7-8.

ing Defendants' conducts."[105] Thus, the court denied certification.

B. Discovery in Mass and Toxic Tort Cases

During and beyond the Survey period, the Texas courts continued to grapple with the issue of the extent to which a trial court presiding over a mass tort case can restrict discovery to the claims of a small group of plaintiffs selected for trial by the plaintiffs' counsel. In *In re Van Waters & Rogers*,[106] the Corpus Christi Court of Appeals held that the trial court could properly restrict discovery to the claims of plaintiffs set for trial, but the Texas Supreme Court held that the restrictions were impermissible. *Van Waters & Rogers* involved a case brought by over 400 workers who alleged that they had sustained various injuries as a result of exposure to a "toxic soup" created by the use of chemicals at the Parker-Hannifin Corporation processing plant in McAllen, Texas.[107] They sued more than 50 manufacturers, suppliers, and distributors of chemical products to the plant.[108] The defendants propounded the usual interrogatory seeking evidentiary support for the plaintiffs' allegation regarding causation of injury to all plaintiffs.[109] The plaintiffs uniformly responded that they did not recall.[110] The trial court then restricted discovery to a group of 20 plaintiffs selected for trial by plaintiffs' counsel.[111] The defendants sought mandamus relief from the trial court's order restricting discovery. In 1998, the Texas Supreme Court denied relief "without prejudice" to enable the trial court to reconsider its order in light of the Court's intervening decision in *In re Colonial Pipeline*,[112] in which the court held that a similar abatement of discovery was a clear abuse of discretion.[113] After the supreme court issued its order, the trial court changed the group of plaintiffs whose cases would be tried, but it declined to order the plaintiffs to provide a substantive answer to the causation interrogatory and refused to allow discovery regarding the claims of the plaintiffs whose claims were not set for trial.[114] On a petition for mandamus filed by the defendants, the Corpus Christi Court of Appeals ordered the trial court to require the plaintiffs to answer the causation interrogatory but declined to order the trial court to permit discovery regarding the non-trial plaintiffs.[115] The appellate court did "not believe the supreme court's decision in *Colonial Pipeline* intended to prohibit trial courts from selecting small groups of trial plaintiffs to serve as test cases while abating discov-

105. *Neely*, 2001 WL 1090294, at *15.
106. *In re Van Waters & Rogers, Inc.*, 31 S.W.3d 413 (Tex. App.—Corpus Christi 2000), *mandamus conditionally granted*, 62 S.W.3d 197, 2001 (Tex. 2001).
107. *Van Waters & Rogers, Inc.*, 62 S.W.3d at 198.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 199.
112. 968 S.W.2d 938, 943 (Tex. 1998).
113. *Van Waters & Rogers, Inc.*, 62 S.W.3d at 199.
114. *Id.* at 199-200.
115. *Id.* at 200.

ery as to the remaining plaintiffs in order to manage mass tort cases."[116]

However, the supreme court promptly granted mandamus to order the trial court to permit the requested discovery. The court acknowledged that "a trial court must be given latitude in managing discovery and preparing a case for trial, especially a case as complex as this," but noted that such latitude is not unlimited.[117] It observed that a "blanket abatement of discovery cannot be justified by the goal of an orderly trial process when not one plaintiff has yet gone to trial."[118] The supreme court added that the trial court's restriction on discovery prevented it from selecting an appropriate group of cases to try.[119] The supreme court also noted that its decisions in *In re Ethyl Corp.*[120] and *In re Bristol-Myers Squibb Co.*[121] established the factors to be considered in determining whether cases should be consolidated for trial. The trial court's refusal to permit discovery regarding the whole group of cases made it impossible to determine whether the factors permitting consolidation were satisfied.[122] Consequently, the Texas Supreme Court directed the trial court to permit discovery concerning all plaintiffs' claims without delay, and then determine how the claims will be tried in compliance with *Ethyl* and *Bristol-Myers*.[123]

In *In re Kellogg-Brown & Root, Inc.*,[124] the Tyler Court of Appeals granted mandamus to permit a defendant in an asbestos case to withdraw admissions of liability deemed for failure to respond. The plaintiff had sued Brown & Root, alleging that its negligent construction work exposed the decedent to asbestos dust, thus causing him to develop mesothelioma.[125] The plaintiff served discovery, including requests for admissions, on counsel for Brown & Root.[126] Brown & Root failed to respond within the time provided by the Texas Rules of Civil Procedure, and the requests were therefore deemed admitted by operation of law.[127] After the plaintiff's attorney brought the failure to the attention of Brown & Root's counsel, Brown & Root delivered responses to plaintiff's counsel four days later.[128] Brown & Root's attorney stated in an affidavit that the failure to respond to the requests for admission was the result of accident or mistake and was not intentional or the result of conscious indifference. As a result, Brown & Root moved to strike, withdraw, or amend the deemed admissions.[129] After the trial court denied Brown &

116. *Van Waters & Rogers, Inc.*, 31 S.W.3d at 418.
117. *Van Waters & Rogers, Inc.*, 62 S.W.3d at 200. .
118. *Id.*
119. *Id.* at 201.
120. 975 S.W.2d 606 (Tex. 1998).
121. 975 S.W.2d 601 (Tex. 1998).
122. *Van Waters & Rogers, Inc.*, 62 S.W.3d at 201.
123. *Id.*
124. 45 S.W.3d 772, 777 (Tex. App.—Tyler 2001, no pet.).
125. *Id.* at 773.
126. *Id.*
127. *Id.* at 774; TEX. R. CIV. P. 198.2(c)
128. *Brown & Root*, 45 S.W.3d at 774.
129. *Id.*

Root's motion, the defendant filed a petition for writ of mandamus.[130] The Tyler appellate court concluded that Brown & Root demonstrated good cause for withdrawal or amendment of its deemed admissions, because its failure to respond to the requests was unintentional and the plaintiff was not prejudiced by receiving the responses eight weeks before trial.[131] The court further noted that the trial court's refusal to allow Brown & Root to strike, withdraw, or amend the deemed admissions eliminated the defendant's ability to present any viable defense at trial and acted as a "death penalty sanction."[132] Because the presentation of the merits of the case would be served by allowing Brown & Root to present defenses, the appellate court ordered the trial court to allow the defendant to amend its deemed admissions.[133]

C. Removal to Federal Court and Its Consequences

Under principles of federalism long recognized by the United States Supreme Court, the ultimate outcome of a diversity case should be substantially the same whether the case proceeds in state court or federal court.[134] In many toxic tort and mass tort cases, however, the presence of the case in state court or federal court can, as a practical matter, determine the outcome of the litigation. For example, prior to 1993, state courts in Texas were forbidden by statute from dismissing cases under the doctrine of forum non conveniens;[135] however, federal courts were free to apply the federal rule allowing dismissal based on this doctrine.[136] In addition, cases involving non-malignant asbestos-related injury are legally viable in state courts,[137] but in federal courts, such cases are transferred to a pending MDL proceeding, where pursuant to procedures established

130. *Id.*

131. *Id.* at 776.

132. *Id.* at 777.

133. *Brown & Root*, 45 S.W.3d at 777.

134. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427-28 (1996) (citing *Guar. Trust* and *Hanna*); Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) (stating that "where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a [s]tate court"); Hanna v. Plumer, 380 U.S. 460, 468 (1965) (explaining that the *Guaranty Trust* principle must not be applied mechanically but instead must be guided by the "twin aims" of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938): "discouragement of forum-shopping and avoidance of inequitable administration of the laws").

135. *See* Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (1990) (construing Tex. Civ. Prac. & Rem. Code § 71.031 (Vernon 1986)).

136. *In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1159 (5th Cir.1987) (en banc) ("[A] federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum"), *vacated on other grounds sub nom.* Pan American World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989), *prior opinion reinstated in relevant part*, 883 F.2d 17 (5th Cir. 1989).

137. *See, e.g.*, Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712 (Tex. App.—Dallas 1997, no writ) (affirming verdicts for plaintiffs claiming non-malignant asbestos-related injuries).

by the presiding district judge, such cases are deferred indefinitely.[138] Consequently, in mass and toxic tort cases, issues concerning the propriety of removal to federal court and the availability of remand to state court frequently have overriding significance.

In *Delgado v. Shell Oil Co.*,[139] several thousand plaintiffs exposed to pesticides on foreign banana farms sued the United States companies that manufactured the pesticides.[140] The plaintiffs filed in Texas state court; the defendants removed the cases to federal court.[141] The Fifth Circuit characterized the parties' choices of state or federal court as a battle over whether forum non conveniens would be available to "send these suits back to their countries of origin."[142] To get into federal court, the defendants impleaded Dead Sea Bromine Company, Limited ("Dead Sea") as a third party defendant with a "foreign state" status.[143] Dead Sea removed the cases to federal court and waived its sovereign immunity.[144]

The plaintiffs first challenged the federal court's subject matter jurisdiction, claiming that Dead Sea was not a foreign state under 28 U.S.C. § 1603(a)[145] because a majority of its shares are not owned by a foreign state.[146] The Fifth Circuit rejected the plaintiffs' argument that this "indirect" ownership did not satisfy the statute, and therefore found that the federal district court did have subject matter jurisdiction over any case properly removed by Dead Sea.[147]

The plaintiffs also challenged the validity of the removals, because, at the time Dead Sea removed the cases, the state court had not granted leave for the defendants to serve their third-party petitions against Dead Sea, even though the state court later granted leave to serve the petitions.[148] The Fifth Circuit also rejected this argument, finding that the removals were neither premature nor invalid for lack of leave to serve because the law does not require service as a prerequisite to removal.[149] The court pointed to 28 U.S.C. § 1446(b),[150] which suggests that the removing defendant may receive notice by means other than service, and 28 U.S.C. § 1448,[151] which provides for service in the federal court after

138. *See* 11 No. 17 MEALEY'S LITIGATION REPORT: ASBESTOS 3 (1996) (quoting lawyers describing MDL as a "black hole" and arguing that the MDL judge "has effectively shut down the federal court system to plaintiffs who are not 'totally disabled' by asbestos exposure.").

139. 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

140. *Id.*

141. *Delgado*, 231 F.3d at 169.

142. *Id.* at 169. At the time the cases were filed, the doctrine of forum non conveniens was available in federal court but not in Texas state court.

143. *Id.*

144. *Id.*

145. 28 U.S.C. § 1603(a) (2002).

146. *Delgado*, 231 F.3d at 175. The state of Israel owns 75.3% of Israel Chemicals Limited, which owns 88.2% of Dead Sea Works, Ltd., which owns 100% of Dead Sea.

147. *Id.* at 175-76.

148. *Id.* at 176.

149. *Id.* at 177.

150. 28 U.S.C. § 1446(b) (2002).

151. 28 U.S.C. § 1448 (2002).

removal.[152]

The plaintiffs also challenged the joinder of Dead Sea as a fraudulent or collusive attempt to create federal jurisdiction.[153] The plaintiffs noted that the defendants had entered into formal agreements capping Dead Sea's ultimate liability, indicating that the joinder of Dead Sea was merely a ruse to allow removal to federal court.[154] The plaintiffs also pointed out that they had disclaimed any recovery from Dead Sea in their amended petitions, cutting off the defendant's right to contribution under Texas law and eliminating any practical reason—such as the need to protect the foreign defendant from provincial state courts—for exercising federal jurisdiction.[155] The Fifth Circuit was reluctant to expand the judicial doctrine of fraudulent joinder beyond the usual circumstances in which the plaintiff joins a third party in order to defeat diversity, especially when application of the doctrine might conflict with Congress's plan that foreign sovereigns have access to the federal courts.[156] However, the court did not decide whether the doctrine might apply since it concluded that, even if it did apply, the plaintiffs were unable to prove that Dead Sea was fraudulently joined.[157] The court held that the agreements between Dead Sea and the other defendants capping Dead Sea's liability were made too long after the removals to support the conclusion that the joinder was collusive.[158] Moreover, the court rejected the plaintiffs' contention that the defendants' third-party claims against Dead Sea could not be maintained due to the plaintiffs' disclaimer of liability, holding that Texas law did not apply to this issue.[159] Because the plaintiffs had not pled and proved their fraudulent joinder claim under any applicable law, the court held that the plaintiffs had not met their burden.[160] The Fifth Circuit's ruling effectively approved the removal of these cases. Consequently, the defendants were successful in their forum choice and parlayed that win into the sought-after forum non conveniens dismissal.

Conversely, in *Sbrusch v. Dow Chemical Co.*,[161] the plaintiff was able to regain her chosen state forum. The *Sbrusch* defendant removed on the basis of diversity.[162] The plaintiff argued that the case was not removable, because the decedent's work-related death from benzene exposure arose under Texas workmen's compensation laws. Pursuant to 28 U.S.C. § 1445(c),[163] "[a] civil action in any [s]tate court arising under the workmen's compensation laws of such [s]tate may not be removed to any dis-

152. *Delgado*, 231 F.3d at 177.
153. *Id.*
154. *Id.* at 179.
155. *Id.*
156. *Id.* at 178.
157. *Delgado*, 231 F.3d at 178-79.
158. *Id.* at 179.
159. *Id.* at 179-81.
160. *Id.* at 181.
161. 124 F. Supp. 2d 1090 (S.D. Tex. 2000).
162. *Id.* at 1091.
163. 28 U.S.C. § 1445(c) (2002).

trict court in the United States."[164] The plaintiff brought suit under Texas Labor Code section 408.001(b),[165] alleging that her husband's benzene-related death "was caused by an intentional act or omission of the employer or by the employer's gross negligence."[166] The Fifth Circuit concluded, based on its reading of *Wright v. Gifford-Hill & Co., Inc.*,[167] that the Texas Supreme Court would rule that section 408.001(b) "creates an independent cause of action for exemplary damages based on wrongful death."[168] Hence, the court held that the plaintiff's cause of action arose under Texas workmen's compensation law and was not removable.[169] As a result, the plaintiff was able to return to her chosen forum.

As the *Delgado* opinion makes clear, the courts are often fully aware of the parties' motives for seeking or avoiding a federal forum. Because forum choice can have such a powerful impact on the outcome of the case, it will continue to be a vigorously contested aspect of mass and toxic tort litigation.

164. *Sbrusch*, 124 F. Supp. 2d at 1091.
165. TEX. LAB. CODE ANN. § 408.002(b) (Vernon 2002).
166. *Sbrusch*, 124 F. Supp. 2d at 1091.
167. 725 S.W.2d 712, 713 (Tex. 1987).
168. *Sbrusch*, 124 F. Supp. 2d at 1092.
169. *Id.*

Tributes


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS

WILLIAM J. FLITTIE


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS