Toxic Torts and Mass Torts

Brent M. Rosenthal

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol63/iss2/28
THE past few years have been tough for lawyers in Texas specializing in toxic torts and mass torts. Legislative tort reform, judicial opinions requiring ever more precise statistical proof of causation in toxic tort cases, court decisions and statutes disfavoring the class action as a procedure for resolving claims of tortiously inflicted harms, and the global economic downturn have inhibited the creativity and enthusiasm that has long characterized both sides of the toxic and mass tort bar. As a gauge of new activity involving mass tort litigation in Texas, one need look no further than the docket of the Texas Judicial Panel on Multidistrict Litigation. In last year’s Survey, we reported that the panel considered no new request to transfer any mass tort cases to a pretrial court for centralized administration; during the current Survey period, the panel issued a decision in one case that approached, but did not meet, the commonly accepted definition of a mass tort.1 As another barometer of the vitality of toxic and mass tort litigation in Texas, the activity of the Texas Legislature in its 2009 regular session is revealing. For the first time in

---

1. See In re Tex. Windstorm Ins. Ass’n Hurricanes Rita & Humberto Litig., No. 08-0914, 2009 WL 888054, at *4 (Tex. J.P.M.L. Jan. 27, 2009) (transferring claims alleging that insurer had wrongfully adopted business practice of handling insurance claims that minimized payments to its insured for covered hurricane damage). The claims do not fall within the classic definition of a mass tort because they do not involve allegations of physical personal injury or property damage.
recent memory, the Texas Legislature did not enact, or even consider, any legislation intended to restrict the prosecution of toxic or mass tort cases in Texas.\(^2\) Perhaps most telling, for the second year in a row, no Texas jurisdiction made the list of the American Tort Reform Association's top six "Judicial Hellholes," although the Texas Gulf Coast and Rio Grande Valley remained on the organization's "Watch List."\(^3\)

Undaunted by this bleak environment for toxic and mass tort litigation, the appellate courts continued to churn out opinions of interest to Texas practitioners in these areas. The Texas Supreme Court issued opinions on the availability of forum non conveniens dismissal and the applicability of tort reform legislation to cases governed by federal common law, and the Texas courts of appeals issued significant opinions concerning management of mass tort litigation and liability of premises owners and employers for injuries caused by toxic exposures. Most notably, the United States Supreme Court issued three opinions directly affecting mass and toxic tort litigation in Texas. These developments confirm that the area of toxic and mass torts continues to deserve its own chapter in the Annual Survey of Texas Law.

I. CASE MANAGEMENT AND PROCEDURAL ISSUES

A. Bankruptcy

Beginning in the 1980s, corporations with significant mass tort liability turned to the bankruptcy courts to seek refuge from the burden of addressing individual tort claims.\(^4\) Although the disadvantages of seeking bankruptcy protection—the burden of conducting business under court supervision, the loss of confidence of both customers and creditors, and the risk of partial or total loss of shareholder equity, to name just three—are obvious, the potential for achieving a comprehensive resolution of mass tort liability through bankruptcy has proved too tempting to resist for some corporate defendants. On the other hand, the mass tort claimants, whose direct claims against the bankrupt defendant are invariably discounted in bankruptcy, often seek to make up the difference by asserting independent tort claims against other defendants that may be closely linked to the bankrupt defendant. Those defendants, in turn, often argue that the protective bankruptcy cloak shielding the initial defendant covers them too.

\(^2\) See Mary Alice Robbins, Winners and Losers of the 81st Session, Texas Lawyer, June 15, 2009 (noting that efforts of supporters of tort reform focused not on enacting new legislation but on "killing bills that . . . would have rolled back reforms"). One of those bills was Senate Bill 1123, which would have relaxed, in mesothelioma cases, the strict standards for proving causation announced by the supreme court in Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007). Id.


Such was the case in *Travelers Indemnity Co. v. Bailey*,\(^5\) decided by the United States Supreme Court this past term. In 1982, Johns-Manville Corporation (Manville) filed for protection under Chapter XI of the United States Bankruptcy Code in the hope of achieving a comprehensive resolution of the thousands of claims against it seeking damages for personal injury and wrongful death caused by exposure to its asbestos-containing products. Supporters of Manville’s strategy praised the filing as an innovative blueprint for resolving mass tort liabilities in an organized, equitable way;\(^6\) critics condemned the action as a cynical attempt to cabin liability and preserve the company’s equity at the expense of injured victims.\(^7\) In 1986, the bankruptcy court confirmed a reorganization plan that channeled present and future asbestos claims against Manville to a trust composed largely of stock in the reorganized company and proceeds from product liability insurance policies that covered the claims.\(^8\) In return for the insurers’ contributions to the trust, the bankruptcy court issued an order enjoining the assertion against the insurers of any “and all claims, demands, allegations, duties, liabilities and obligations” which were or could have been “based upon, arising out of or relating to any or all” of the insurance policies.\(^9\) The appellate court affirmed the bankruptcy court’s orders confirming the reorganization plan and enjoining the maintenance of claims against the insurers.\(^10\)

Years later, the continued press of asbestos claims forced the Manville bankruptcy trust to reduce its payments to claimants and caused other companies implicated in asbestos litigation to seek bankruptcy protection.\(^11\) When denied these sources of compensation, plaintiffs with asbestos claims asserted creative theories of liability against other companies. Among the new targets was Travelers Indemnity Company, an insurance company that contributed to the Manville trust. The plaintiffs alleged that Travelers and other insurers were liable for injuries caused by exposure to Manville asbestos products—separate and independent from their derivative liability under the insurance policies—for conspiring with Manville and other manufacturers to conceal from the public the hazards of asbestos exposure and for developing a fraudulent “state of the art” presentation to use in defense of their insureds at trial.\(^12\) Travelers, of course, argued that these “direct actions” against it violated the injunc-

---

9. Id.
10. Id. at 2200.
tion issued by the Manville bankruptcy court, and it sought an order from
that court "clarifying" that the 1986 order indeed enjoined the actions.13
Travelers agreed with three sets of direct action plaintiffs to pay more
than $400 million in settlement to all direct action plaintiffs if such an
order were entered. The bankruptcy court issued the requested "clarify-
ing order," finding that the direct actions against Travelers were "based
upon, arising out of or relating to" the insurance policies issued by Trav-
elers to Manville because "Travelers['] knowledge of the hazards of as-
bestos was derived from its nearly three decade insurance relationship
with Manville and the performance by Travelers of its obligations under
the Policies."14 But some direct action plaintiffs and one co-insurer of
Travelers appealed the clarification order. They argued that the bank-
ruptcy court had no jurisdiction to enjoin actions against Travelers for its
independent liability (i.e., for its liability that did not derive from
Manville's tortious acts). The United States Court of Appeals for the
Second Circuit agreed, holding that "a bankruptcy court only has jurisdic-
tion to enjoin third-party non-debtor claims that directly affect the res of
the bankruptcy estate."15

The Supreme Court reversed.16 In an opinion authored by Justice Sou-
ter, the Court first held that the terms of the 1986 order clearly enjoined
the claims.17 The Court observed that it would be "possible (but quite a
stretch) to suggest that a 'claim' only relates to Travelers' insurance cov-
verage if it seeks recovery based upon Travelers' specific contractual obli-
gation to Manville."18 The Court did note, though, that in also barring
"allegations" relating to the insurance policies, the injunction unambigu-
ously prohibited plaintiffs' actions.19 The Court next addressed the Sec-
ond Circuit's conclusion that the bankruptcy court lacked jurisdiction to
enjoin independent (as opposed to derivative) claims against Manville's
insurers. The Court declined to reach the merits of the holding, stating
that "once the 1986 Orders became final on direct review (whether or not
proper exercises of bankruptcy court jurisdiction and power), they be-
came res judicata to the parties and those in privity with them."20 The
Court emphasized that its holding did "not resolve whether a bankruptcy
court, in 1986 or today, could properly enjoin claims against nondebtor
insurers that are not derivative of the debtor's wrongdoing."21 Rather, it
held only that "[a]lmost a quarter-century after the 1986 Orders were
entered, the time to prune them is over."22

13. Id. at 2200, 2203.
14. Id.
15. Id. at 2202 (quoting In re Johns-Manville Corp., 517 F.3d 52, 66 (2d Cir. 2008)).
16. Id. at 2203.
17. Id.
18. Id.
19. Id.
20. Id. at 2205.
21. Id. at 2207.
22. Id. at 2206.
Justice Stevens, joined by Justice Ginsberg, dissented. He asserted that contrary to the majority's assumption, the 1986 injunction did not by its terms enjoin claims against insurers for their own misconduct; rather, the injunction was expanded to include such claims in the 2004 order purporting to clarify the injunction.23 If that were not the case, Justice Stevens suggested, "surely Travelers would not have paid $445 million" in settlement to the direct action plaintiffs merely "to obtain a redundant piece of paper."24 Thus, Justice Stevens argued, the attack on the bankruptcy court's jurisdiction to enjoin such claims was not an impermissible collateral attack on the 1986 order but a direct and timely challenge to the 2004 order.25 The independent actions against Travelers, Justice Stevens continued, had "no effect on the bankruptcy estate, and bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor."26 Thus, Justice Stevens concluded, the bankruptcy court improperly enjoined the independent actions against Travelers in its 2004 clarifying order.27

B. DISCOVERY AND TRIAL SETTINGS

In 1999, hundreds of plaintiffs sued more than thirty companies alleging that chemicals supplied by those companies to pesticide manufacturing facilities operated by the Hayes-Sammons Chemical Company in Mission, Texas, contributed to a "toxic soup" in the community that caused the plaintiffs and their family members to develop a wide variety of injuries.28 More than a decade later, however, none of the cases had yet to emerge from the pretrial stage. In 2007, in a development reported in the 2008 Survey,29 the Texas Supreme Court issued mandamus to vacate the trial court's order setting for trial five bellwether cases. This mandamus occurred before the plaintiffs in those cases, or in any other filed case, adequately answered discovery concerning their allegations that the defendants caused their injuries.30 After the supreme court's ruling, the plaintiffs gradually provided the defendants with causation information to support their claims, including estimates of the amounts of the defendant's toxins to which the plaintiffs were exposed, as required by the Texas Supreme Court's decision in Borg-Warner Corp. v. Flores.31 The trial court severed and set for imminent trial the claims of one plaintiff, Guadalupe Garza, who provided the most detailed responses to the

23. Id. at 2207-08 (Stevens, J., dissenting).
24. Id. at 2212 (Stevens, J., dissenting).
25. Id. at 2212-13 (Stevens, J., dissenting).
26. Id. at 2213 (Stevens, J., dissenting) (quoting Celotex Corp. v. Edwards, 514 U.S. 300, 309 n.6 (1995)).
27. Id.
defendants' discovery requests on causation. The defendants filed mandamus petitions challenging the trial setting of the Garza case, the sufficiency of the discovery responses both of Garza and of the non-trial plaintiffs, and the refusal of the trial court to rule on motions for summary judgment by a defendant that was not identified in Garza's discovery responses.

The Corpus Christi Court of Appeals granted the petitions in part and denied them in part in In re Allied Chemical Corp. The court of appeals held that the plaintiff, Garza, adequately informed the defendants both of the identity of the chemicals and companies that injured her and the approximate dose of the chemicals to which she was exposed. Because her responses to the defendants' discovery requests on causation were adequate, the court of appeals determined that the trial court did not abuse its discretion in severing her case and setting it for trial. The court of appeals rejected the defendants' argument that all plaintiffs were required to file adequate discovery responses before any plaintiff's case could go to trial, stating that it "cannot countenance" the suggestion that the Texas Supreme Court intended that trial should be delayed until all of the hundreds of plaintiffs identified their causation evidence. The court of appeals added, however, that the trial court failed to require the non-trial plaintiffs to disclose their product and exposure evidence within a reasonable time, noting that "plaintiffs are not absolved of the responsibility to timely provide adequate interrogatory responses merely because their ranks are numerous." The court of appeals also held that the trial court abused its discretion in failing to rule on the motion for summary judgment, and it ordered the trial court to do so. By allowing trial to proceed in the Garza case, however, the court of appeals took another metaphorical step in the thousand-mile journey of the Hayes-Sammons "toxic soup" litigation.

C. Location of the Forum

The 2007 Survey reported on an unpublished order by Judge Mark Davidson, the pretrial judge supervising the Texas multidistrict asbestos litigation, declining to dismiss a case involving mesothelioma (a fatal cancer caused by asbestos exposure) based on the doctrine of forum non conveniens. The order was notable because Judge Davidson acknowledged that the case had "absolutely no connection" with Texas, but added that

---

32. 287 S.W.3d at 120.
33. Id. at 127-28.
34. Id. at 128.
35. Id. at 128 n.10.
36. Id. at 130.
37. Id. at 131-32.
dismissal would not further “the interests of justice” because the case would have been removable to federal court in its more appropriate forum.39 Noting the reputation of the federal MDL for asbestos litigation as a “black hole” and the refusal of the moving defendants to agree not to remove the case to federal court it were refiled in its proper jurisdiction, Judge Davidson exercised his discretion to deny the motion to dismiss.40

The Texas Supreme Court considered this order during the current Survey period in In re General Electric Co.,41 and concluded that Judge Davidson abused his discretion in declining to dismiss the case.42 In an opinion by Justice Johnson, the supreme court noted that following the 2003 amendments, the forum non conveniens statute now provides that a trial court “shall” (not “may”) dismiss a case if it finds that “in the interest of justice” and “for the convenience of the parties” another forum would more properly hear a case. The amended statute also provided that a trial court “shall” (not “may”) consider certain factors in deciding a forum non conveniens motion.43 Responding to the plaintiff’s contention that this change in language should not change the result—aft er all, Judge Davidson found that it would not serve the interest of justice to dismiss the case—the supreme court insisted that by using the word “shall,” the legislature “essentially defined the terms ‘interest of justice’ and ‘convenience of the parties’ as they are used” in the statute.44 In rejecting the plaintiff’s argument (and Judge Davidson’s implication) that the federal courts do not provide an adequate forum for victims of terminal asbestos disease, the supreme court observed that complaints based on “comparative analysis of procedural processes and times to trial” are “disfavored” in a forum non conveniens analysis.45 Noting that the factors specified in the forum non conveniens statute all weighed in favor of dismissal, the supreme court held that Judge Davidson’s determination that “the interest of justice” permitted denial of the forum non conveniens motion “violated the forum non conveniens statute and was an abuse of [his] discretion,” and it conditionally granted mandamus to compel dismissal of the case.46

In recent years, the Fifth Circuit, like the Texas Supreme Court, has indicated that mandamus is available to correct a trial court’s erroneous denial of a motion to dismiss based on the doctrine of forum non conveniens.47 But what if the court that denied the forum non conveniens motion was not the district court from which the case was being appealed,

40. Id. at 2.
41. 271 S.W.3d 681 (Tex. 2008).
42. Id. at 684.
43. Id. at 686 (quoting TEX. CIV. PRAC. & REM. CODE § 71.051(b) (Vernon 2008)).
44. Id.
45. Id. at 688.
46. Id. at 685, 694.
47. In re Volkswagen of Am., Inc., 545 F.3d 304, 309 (5th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 1336 (2009) (granting mandamus to correct an erroneous denial of a motion to change venue); In re Pirelli Tire, L.L.C., 247 S.W.3d 670, 679 (Tex. 2007).
but rather a court in another circuit that was charged with supervising pretrial activity in that case and all similar litigation under the multidistrict litigation (MDL) statute? The Fifth Circuit confronted this situation in In re Ford Motor Co. The plaintiffs were Mexican citizens who were injured in Mexico when, they alleged, the Firestone tires on their Ford sport utility vehicle failed. They sued Ford and Firestone in state court in Texas, but their case was removed to federal court and then transferred to the court in the Southern District of Indiana presiding over the Ford/Firestone tire separation MDL litigation. This MDL court had previously dismissed another case brought by Mexican citizens against Ford and Firestone based on the doctrine of forum non conveniens, basing its ruling in part on its finding that an order of dismissal of a parallel case by a Mexican court, offered by the plaintiffs to show the unavailability of a Mexican forum for the case, was the product of manipulation and fraud. But when Ford and Firestone moved for dismissal of the case at issue based on forum non conveniens, the MDL court denied the motion, finding that Mexico did not provide the plaintiffs with an adequate alternative forum. The MDL court then returned the case to federal district court in Texas, where Ford and Firestone immediately moved the district court for reconsideration of the MDL court's denial of their forum non conveniens motion. The district court declined to disturb the MDL court's denial of the forum non conveniens motion, observing that pretrial orders of an MDL court should be reconsidered, "if at all, under only the most extraordinary circumstances," because to review such orders "would go a long way toward defeating the entire purposes of the MDL process." The district court held that this case presented no extraordinary circumstances and that reconsideration was therefore unwarranted.

On Ford and Firestone's petition for mandamus relief from the denial of the motion to reconsider, the Fifth Circuit acknowledged that courts and commentators were split on the degree of deference that should be accorded to an MDL court's pretrial rulings. The court noted that several courts have adopted "a bright-line rule that a transferor court cannot overrule a transferee court," while other courts "have advocated only substantial deference to the transferee court." The court found an appropriate standard for review in the "law of the case" doctrine, which provides that a court shall not revisit previously rendered orders absent a change in evidence, a change in controlling legal principles, or a showing that the order was "clearly erroneous" and would work "manifest injustice." Applying the "law of the case" standard, the Fifth Circuit ruled

48. 591 F.3d 406 (5th Cir. 2009), superseding 580 F.3d 308 (5th Cir. 2009).
49. In re Ford Motor Co., 591 F.3d at 409.
50. Id. at 410 (quoting the unreported district court order).
51. Id.
52. Id.
53. Id.
54. Id. at 411-12.
that the district court had clearly erred in refusing to reconsider the MDL court's forum non conveniens decision, and that this error imposed manifest injustice on Ford and Firestone.\textsuperscript{55} The court further held that the harm suffered by Ford and Firestone—facing trial in an inconvenient and inappropriate forum—could not be remedied by ordinary appeal.\textsuperscript{56} The court thus granted a writ of mandamus directing the district court to dismiss the case under the doctrine of forum non conveniens.\textsuperscript{57}

In a pair of decisions issued the same day, the Houston Fourteenth Court of Appeals reached different conclusions on whether the same defendant could be brought into a Texas court to defend against claims based on harm caused by exposure to silica. In the first decision, \textit{Pulmosan Safety Equipment Corp. v. Lamb},\textsuperscript{58} the court of appeals affirmed the trial court's ruling that it could exercise specific jurisdiction over a dissolved New York corporation that made and sold allegedly defective protective equipment that contributed to the plaintiff's silicosis.\textsuperscript{59} In the second decision, \textit{Moore v. Pulmosan Safety Equipment Corp.},\textsuperscript{60} the court of appeals affirmed an order by the same trial court that it could not exercise specific jurisdiction over the same defendant on a similar type of claim.\textsuperscript{61} The rather obvious explanation for the different results is that in \textit{Lamb}, the plaintiff lived, used the defendant Pulmosan's product, and developed the disease in Texas, while in \textit{Moore}, the plaintiff lived, encountered the Pulmosan product, and got sick in Louisiana. In \textit{Lamb}, the court of appeals held that the "operative facts of the litigation" occurred in Texas, while in \textit{Moore}, they did not.\textsuperscript{62} The \textit{Pulmosan} cases stand for propositions no more mysterious or complex than that different facts can yield different results and that seemingly easy cases make good law.

\section*{II. SUBSTANTIVE ISSUES}

\subsection*{A. Preemption}

The 2009 Survey reported that the United States Supreme Court's opinion in \textit{Riegel v. Medtronic, Inc.}\textsuperscript{63} "gave new hope" to those who want courts to broadly interpret federal statutes and regulations to preempt state common-law standards for imposing tort liability.\textsuperscript{64} In this Survey

\textsuperscript{55} Id. at 412.
\textsuperscript{56} Id. at 416.
\textsuperscript{57} Id. at 417.
\textsuperscript{58} 273 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
\textsuperscript{59} Id. at 833.
\textsuperscript{60} 278 S.W.3d 27 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
\textsuperscript{61} Id. at 30.
\textsuperscript{62} Lamb, 273 S.W.3d at 839; Moore, 278 S.W.3d at 38.
\textsuperscript{63} 552 U.S. 312 (2009).
\textsuperscript{64} Brent M. Rosenthal, \textit{Toxic Torts and Mass Torts}, 62 SMU L. REV. 1483, 1491 (2009). In \textit{Riegel}, the Court held that a product liability action against the manufacturer of a cardiac catheter was effectively precluded by the Medical Device Act because the catheter had received pre-market approval by the Food and Drug Administration. 552 U.S. at 322-23.
period, the Court’s opinion in Wyeth v. Levine\textsuperscript{65} demonstrates that the hope the Court giveth, the Court may taketh away. In Wyeth, plaintiff Diana Levine developed gangrene and was forced to have her right arm amputated due to an adverse reaction to the drug Phenergan, which a nurse administered to her intravenously to treat her nausea caused by a severe migraine headache. The label on Phenergan warned of the danger of gangrene and amputation following inter-arterial injection, but Levine argued that the labeling was defective because it failed to advise clinicians to use the “IV-drip” method of intravenous administration instead of the higher-risk “IV-push” method, which was the method that the nurse had used on Levine. In its defense, Wyeth argued that because the federal Food and Drug Administration (FDA) approved the exact language of the Phenergan label, a state-law claim predicated on the theory that Wyeth should have marketed Phenergan with a different, stronger warning, conflicted with—and therefore was preempted by—federal law. State courts, however, rejected Wyeth’s preemption defense, and a jury awarded damages to Levine under state product liability law.\textsuperscript{66} The United States Supreme Court then granted certiorari.\textsuperscript{67}

In a six-to-three decision, the Supreme Court affirmed the state-court judgment, holding that Wyeth’s compliance with federal regulations did not preempt Levine’s state-law claim.\textsuperscript{68} In a majority opinion by Justice Stevens, the Court first rejected Wyeth’s contention that the FDA regulations made it impossible to provide the type of warning that the state-court jury effectively required through its verdict.\textsuperscript{69} The Court noted that the federal regulations permitted Wyeth to strengthen its label based on new data or on new analysis of existing data, as long as it filed a supplemental application with the FDA. The Court concluded that it would not find that it was impossible for Wyeth to comply with both state and federal requirements “absent clear evidence that the FDA would not have approved a change to Phenergan’s label,”\textsuperscript{70} evidence that was not presented in this case. Next, the Court rejected Wyeth’s contention that imposing liability on Wyeth for failing to provide warnings stronger than those required by the FDA frustrated the purposes and objectives of federal drug-labeling regulation.\textsuperscript{71} The Court disputed Wyeth’s premise that Congress intended to entrust to a federal agency, rather than to civil juries, decisions on the adequacy of drug labels, observing that “all evidence of Congress’[s] purposes is to the contrary.”\textsuperscript{72} The Court gave no deference to a regulatory preamble issued by the FDA in 2006 stating that FDA approval of a drug warning “establishes both a ‘floor’ and a

\begin{itemize}
  \item \textsuperscript{65} 129 S. Ct. 1187 (2009).
  \item \textsuperscript{66} Id. at 1191.
  \item \textsuperscript{67} Wyeth v. Levine, 552 U.S. 1161 (2008).
  \item \textsuperscript{68} Wyeth, 129 S. Ct. at 1204.
  \item \textsuperscript{69} Id. at 1196-99.
  \item \textsuperscript{70} Id. at 1198.
  \item \textsuperscript{71} Id. at 1199-1204.
  \item \textsuperscript{72} Id. at 1199.
\end{itemize}
ceiling” on the strength of the warning. The Court noted that the FDA’s “new position” conflicted both with Congress’s refusal to expressly preempt tort suits based on inadequate drug labels and with the FDA’s traditional view that “state law offers an additional, and important, layer of consumer protection that complements FDA regulation.”

The four justices who did not join in Justice Stevens’s majority opinion presented sharply differing approaches to the process of determining whether federal law displaces state tort standards. Justice Thomas issued an opinion concurring in the judgment but expressing his opposition to the majority’s “implicit endorsement” of the concept that a state law or standard is preempted if a court finds that it conflicts with “broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.” Such reasoning, Justice Thomas explained, “facilitates freewheeling, extratextual, and broad evaluations of the ‘purposes and objectives’ embodied within federal law,” and “leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text.”

On the other side of the preemption spectrum, Justice Alito, joined by Chief Justice Roberts and Justice Scalia, dissented from the decision upholding Levine’s tort judgment, arguing that “[f]ederal law . . . does rely on the FDA to make safety determinations like the one it made here” and characterizing Levine’s tort suit against Wyeth as “a ‘frontal assault’ on the FDA’s regulatory regime for drug labeling.” After Wyeth v. Levine, the difficulty for practitioners in cases involving pre-emption is not finding a coherent approach to the doctrine, but in predicting which approach is likely to prevail.

While Wyeth v. Levine presented the issue of whether new, specific federal regulations preempt pre-existing, general state common-law standards of care, the Texas Supreme Court’s opinion in In re GlobalSanteFe Corp. considered the converse question: Do pre-existing, general rules of federal common law preempt new, specific state laws governing tort liability? The answer to that question, the supreme court concluded, depends on whether the new state laws are characterized as procedural or substantive. As reported in the 2006 Survey, the Texas Legislature in 2005 enacted new procedural and substantive requirements, now codified in Chapter 90 of the Texas Civil Practice and Remedies Code, for the prosecution of claims seeking damages for physical harm caused by exposure to asbestos and silica. These requirements include the obligation

73. Id. at 1200.
74. Id. at 1203.
75. Id. at 1202.
76. Id. at 1205 (Thomas, J., concurring).
77. Id. at 1217 (Thomas, J., concurring).
78. Id. at 1218 (Alito, J., dissenting).
79. 275 S.W.3d 477 (Tex. 2008).
80. Id. at 483.
to serve a detailed medical report confirming the existence of asbestos- or silica-related disease,\textsuperscript{82} the need to submit to transfer and consolidation of the case with its respective docket created under the Texas multidistrict litigation statute,\textsuperscript{83} and the demonstration of a specific, objectively ascertainable level of impairment as a result of the alleged condition.\textsuperscript{84} In \textit{GlobalSantaFe}, the supreme court considered whether these statutory requirements applied to a suit seeking compensation for silica-related disease sustained by a seaman from his work aboard ship, a suit which is governed by federal law but can be brought in either state or federal court.\textsuperscript{85} The MDL pretrial court held that the Jones Act, which governs claims for maritime injuries, preempts Chapter 90 in its entirety, and remanded the suit to the district court where it had been filed.\textsuperscript{86}

In a unanimous opinion by Justice Willett, the Texas Supreme Court granted mandamus to compel the return of the case to the silica MDL court, holding that the Jones Act preempts only the substantive, and not the procedural, portions of the legislation.\textsuperscript{87} The supreme court noted that the statute requiring timely, expert disclosure of the basis for alleging a silica-related injury does not conflict with any rule or policy of federal maritime law.\textsuperscript{88} Similarly, the portions of Chapter 90 directing “transfer of silica-related cases to an MDL court . . . do[ ] not work material prejudice to a characteristic feature of maritime law” and thus are not preempted.\textsuperscript{89} Because “[t]he Jones Act imposes no requirement for a minimum threshold of physical injury,” however, the Texas statute requiring that a plaintiff demonstrate a specific level of impairment from a silica-related disease “cannot be applied to Jones Act claims.”\textsuperscript{90} Under \textit{GlobalSantaFe}, plaintiffs seeking compensation for injuries sustained aboard a ship need not satisfy the medical criteria in Chapter 90 to recover damages.\textsuperscript{91}

B. CAUSATION

In \textit{City of San Antonio v. Pollock},\textsuperscript{92} the Texas Supreme Court’s new willingness to scrutinize scientific expert testimony for its legal sufficiency to support a causation finding was on display. The Pollocks alleged that their daughter Sarah’s leukemia was caused by her exposure \textit{in utero} to benzene emanating from an old landfill maintained by the City of San

\begin{footnotesize}
82. \textit{TEX. CIV. PRAC. \\& REM. CODE ANN.} § 90.004 (Vernon Supp. 2009).
83. \textit{TEX. CIV. PRAC. \\& REM. CODE ANN.} § 90.010(b) (Vernon Supp. 2009).
84. \textit{TEX. CIV. PRAC. \\& REM. CODE ANN.} § 90.004(b)(2) (Vernon Supp. 2009).
85. \textit{GlobalSantaFe}, 275 S.W.3d at 484-87.
86. \textit{Id.} at 482.
87. \textit{Id.} at 479, 485.
88. \textit{Id.} at 486-88.
89. \textit{Id.} at 489.
90. \textit{Id.}
91. See \textit{id.}
92. 284 S.W.3d 809 (Tex. 2009).
\end{footnotesize}
Antonio, and they sought damages from the City. One of the Pollocks’
experts, an engineer with experience in landfill management, testified
that in his opinion, benzene from the City’s landfill entered the Pollocks’
property “on a regular basis.”\(^9\) Although he could not estimate the con-
centration of benzene that actually entered the property, he testified
without objection that a sealed well on the landfill located near the Pol-
locks’ property contained benzene in concentrations of at least 160 parts
per billion during the time in question. From this he concluded that “the
Pollocks were exposed to gas levels like that in the sealed well.”\(^9\) Rely-
ing on the engineer’s testimony regarding exposure and on medical litera-
ture showing increased rates of cancer in workers occupationally exposed
to benzene, an oncologist testified that Sarah’s exposure to benzene
caused her leukemia. From all of the evidence, the jury found for the
Pollocks and awarded them sizable compensatory damages for Sarah’s
leukemia and for diminution in property value, and it also awarded exem-
plary damages.\(^9\) The court of appeals struck the punitive award but af-
irmed the compensatory component of the judgment.\(^9\)

In an opinion authored by Justice Hecht, the supreme court reversed
and rendered judgment for the City.\(^9\) The supreme court first acknowl-
edged that the City had not objected to the admission of the expert testi-
mony concerning causation, but held that this was not an obstacle to the
court’s consideration of the legal sufficiency of the causation evidence.\(^9\)
The supreme court distinguished between a challenge to expert testimony
as “unreliable”—such as a quarrel with the methodology of the expert—
which must be preserved by objection, and a challenge to expert opinion
as being “conclusory” or having “no basis,” which need not be pre-
served.\(^9\) Turning to the case before it, the supreme court noted there
was “no basis in the record” for the engineer’s assumption that the expo-
sure levels at the Pollock home were the same as those in the sealed well,
holding that the engineer’s testimony to that effect “is the kind of naked
conclusion that cannot support a judgment.”\(^9\) The supreme court also
found the oncologist’s testimony of causation conclusory and legally in-
sufficient to support a judgment.\(^9\) The supreme court noted that the
studies showing increased cancer rates in workers exposed to benzene all
involved exposures of far greater concentrations than those experienced
by the Pollocks. “Given this large gap between the exposure levels,” the
supreme court concluded that the studies “provide no basis for his opin-
ion that the Pollocks’ claimed benzene exposure caused Sarah’s

\(^9\) Id. at 814.
\(^9\) Id. at 818.
\(^9\) Id. at 815.
\(^9\) Id. at 815.
\(^9\) Id. at 811-12.
\(^9\) Id. at 816.
\(^9\) Id. at 817-18.
\(^9\) Id. at 819.
\(^9\) Id. at 820.
Justice Medina, joined by Justice O’Neill, dissented, arguing that the City waived its complaints about deficiencies in the expert testimony of causation by failing to object at trial. Justice Medina acknowledged the distinction between conclusory and unreliable expert testimony but concluded that the City’s objections to the Pollocks’ causation evidence was “nothing more than an unpreserved reliability challenge.” The City had not plausibly suggested that the expert evidence had no basis, but rather complained that “specific errors or omissions” in the expert’s analysis rendered the opinions “unreliable.” By characterizing the opinions of causation as “no evidence,” Justice Medina wrote, the majority erroneously and unfairly “assume[d] the role of gatekeeper ex post facto.” The result, Justice Medina added, “may encourage gamesmanship” at trial. “Why . . . make a reliability objection during trial and run the risk that the proffering party may fix the problem, when the expert’s opinion can be picked apart for analytical gaps on appeal?”

During the Survey period, the Texas appellate courts considered two appeals from jury verdicts holding the pharmaceutical manufacturer Merck liable for deaths allegedly caused by the once popular but now discredited anti-inflammatory prescription drug Vioxx. In Merck & Co., Inc. v. Garza, the San Antonio Court of Appeals upheld the jury’s finding that the decedent Garza’s heart attack and death were caused by his use of Vioxx, despite Merck’s contention that Garza’s expert inadequately ruled out Garza’s preexisting cardiovascular disease as the cause of his death. The court of appeals noted that Garza was seventy-one years old, overweight, had previously suffered a heart attack and undergone a quadruple bypass surgery long before taking Vioxx, had high blood pressure and high cholesterol, and smoked cigarettes until the time of his death. But in holding the evidence legally sufficient to support the jury finding of causation, the court of appeals also cited evidence that a stress test completed shortly before Garza’s death showed a “stable cardiac status,” that the “rare” simultaneous formation of two blood clots caused the heart attack, and that “the formation of clots is the type of problem caused by Vioxx.” Unfortunately for the plaintiff, Mrs.

102. Id.
103. Id. at 822 (Medina, J., dissenting).
104. Id. at 828 (Medina, J., dissenting).
105. Id. (Medina, J., dissenting).
106. Id. at 822 (Medina, J., dissenting).
107. Id. at 829 (Medina, J., dissenting).
109. 277 S.W.3d 430.
110. Id. at 437.
111. Id. at 436.
112. Id.
113. Id. at 437.
114. Id. at 436, 437.
Garza, the court of appeals held that jury misconduct tainted the verdict based on evidence that one of the jurors previously received several interest-free loans from Mrs. Garza herself.\textsuperscript{115} The court of appeals thus remanded the case for a new trial.\textsuperscript{116}

In contrast, in \textit{Merck \& Co., Inc. v. Ernst},\textsuperscript{117} the Houston Fourteenth Court of Appeals held the evidence legally insufficient to support the jury's finding that decedent Ernst's ingestion of Vioxx caused his sudden cardiac death.\textsuperscript{118} The court of appeals acknowledged evidence that Vioxx could cause a "thrombotic cardiovascular event" (heart attack due to a blood clot),\textsuperscript{119} but it noted that the autopsy conducted on Ernst found no evidence of a blood clot. The court of appeals dismissed theories that the clot could have dissolved or become dislodged as "mere speculation."\textsuperscript{120} and it discounted the plaintiff's exclusion of other risk factors for Ernst's fatal heart attack with the inscrutable observation that the "exclusion of risk factors . . . does not equate to the exclusion of causes."\textsuperscript{121} The court of appeals thus reversed the plaintiff's judgment and rendered judgment for Merck.\textsuperscript{122} Undoubtedly, the next Survey will have more to report on the Vioxx litigation in Texas.

C. Compensable Harm

The United States Supreme Court rarely engages in the relatively mundane tasks of defining the scope of common-law tort liability and designing procedures for ensuring that the proper scope of liability is not exceeded. Those functions typically fall to the state courts of last resort. But in cases involving injuries sustained on the high seas or while in the employ of an interstate railroad, Congress has effectively designated the Supreme Court as the ultimate authority on such matters.\textsuperscript{123} In \textit{CSX Transportation, Inc. v. Hensley},\textsuperscript{124} the Supreme Court exercised that authority in reversing a $5 million verdict awarded by a Tennessee state-court jury to a plaintiff who claimed that he developed asbestosis and other diseases while employed by a railroad.\textsuperscript{125} The plaintiff asked the jury, in calculating damages, to consider the plaintiff's fear of contracting

\begin{footnotesize}
\textsuperscript{115} \textit{Id.} at 440-42.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} 296 S.W.3d 81 (Tex. App.—Houston [14th Dist.] 2009, pet. filed).
\textsuperscript{118} \textit{Id.} at 99-100.
\textsuperscript{119} \textit{Id.} at 96 n.7.
\textsuperscript{120} \textit{Id.} at 97.
\textsuperscript{121} \textit{Id.} at 99.
\textsuperscript{122} \textit{Id.} at 100.
\textsuperscript{124} 129 S. Ct. 2139 (2009).
\textsuperscript{125} \textit{Id.} at 2140, 2142.
\end{footnotesize}
lung cancer in the future caused by his asbestos exposure. The trial court rejected the defendant’s request for an instruction that the plaintiff must demonstrate that the “fear is genuine and serious” to recover damages.\textsuperscript{126} In a per curiam opinion, the Supreme Court held that the trial court’s refusal to give such an instruction was reversible error.\textsuperscript{127} The Court relied on its 2003 opinion in \textit{Norfolk & Western Railway Co. v. Ayers},\textsuperscript{128} in which the Court held that a plaintiff who had asbestosis but not cancer could recover from his fear of cancer only if the plaintiff could “prove that his alleged fear is genuine and serious.”\textsuperscript{129} The Court pointed out that in allowing damages for “genuine and serious” fear of cancer, the \textit{Ayers} Court “struck a delicate balance between plaintiffs and defendants . . . against the backdrop of systemic difficulties posed by the elephantine mass of asbestos cases,”\textsuperscript{130} and noted that “[j]ury instructions stating the proper standard for fear-of-cancer damages were part of that balance.”\textsuperscript{131} In a dissenting opinion, Justice Stevens disputed the majority’s premise that by listing a “genuine-and-serious” jury instruction as a possible verdict-control device, the \textit{Ayers} Court indicated “that a court’s decision not to give the instruction would be treated as \textit{per se} reversible error.”\textsuperscript{132} He further noted that it is “hard to believe the jury would have awarded any damages for Hensley’s fear of cancer if it did not believe that fear to be genuine and serious.”\textsuperscript{133}

\section*{D. Liability of Premises Owners and Employers}

As manufacturers of asbestos products have sought refuge from tort claims in the bankruptcy courts,\textsuperscript{134} victims of asbestos-related diseases have turned to premises owners, employers, and other users of asbestos products for compensation for their injuries. Consequently, courts must consider whether Texas law supports the imposition of liability on these users. In \textit{Union Carbide Corp. v. Smith},\textsuperscript{135} the Houston First Court of Appeals reversed a judgment based on a jury verdict in favor of a pipefitter, Oliver Smith, who developed mesothelioma after working on the premises of the two defendants.\textsuperscript{136} One of the defendants, Union Carbide Corporation, argued on appeal that the evidence was legally insufficient to support the jury’s finding that Union Carbide controlled the details of Smith’s work, as is required to impose liability on a premises

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at 2140.
  \item \textsuperscript{127} \textit{Id.} at 2141.
  \item \textsuperscript{128} 538 U.S. 135 (2003).
  \item \textsuperscript{129} \textit{Hensley}, 129 S. Ct. at 2140 (quoting \textit{Ayers}, 538 U.S. at 157).
  \item \textsuperscript{130} \textit{Id.} at 2142 (quoting \textit{Ayers}, 538 U.S. at 166 (internal quotation marks omitted)).
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} at 2143 (Stevens, J., dissenting).
  \item \textsuperscript{133} \textit{Id.} at 2144 (Stevens, J., dissenting).
  \item \textsuperscript{134} \textit{See supra} Part I.A.
  \item \textsuperscript{135} No. 01-08-00641-CV, 2009 WL 3152138 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, pet. filed).
  \item \textsuperscript{136} \textit{Id.} at *1.
\end{itemize}
owner for injuries sustained by an independent contractor.\textsuperscript{137} The other defendant, Hexion Specialty Chemicals, Inc., a successor-in-interest to one of Smith’s employers, contended that it was immune from liability under the exclusive remedy provision of the Texas Workers’ Compensation Act.\textsuperscript{138} The court of appeals agreed with both defendants.\textsuperscript{139} The court first rejected Smith’s contention that Union Carbide “controlled the manner” in which Smith performed his work by sending workers into Smith’s vicinity who worked with asbestos-containing insulation, finding no evidence that Union Carbide employed the installers or otherwise controlled the performance of their installation work.\textsuperscript{140} The court of appeals also rejected Smith’s argument that Union Carbide assumed a duty to Smith by providing him with asbestos-containing gaskets to install, holding no evidence supported that “Union Carbide retained or exercised any control over the manner in which [Smith] performed his work.”\textsuperscript{141} Turning to Smith’s claim against Hexion, the court of appeals noted that Hexion’s predecessor, which employed Smith, did not carry workers’ compensation insurance. But the court of appeals held that when Hexion acquired the predecessor and provided workers’ compensation coverage to Smith, it became shielded from tort liability even for that part of Smith’s harm caused by Hexion’s uninsured predecessor.\textsuperscript{142} The court of appeals declined to adopt Smith’s “dual-persona” theory, under which Hexion enjoyed immunity for the acts it committed while insured but not for acts committed by its uninsured predecessor, noting “no authority in Texas for applying the dual-persona doctrine under these circumstances.”\textsuperscript{143}

Under a long-recognized quirk in Texas law, the survivors of an employee that has sustained a fatal work-related injury due to the gross negligence of his employer may sue the employer for exemplary damages, even though the employer is immune from liability under the exclusive remedy provision of the Texas Workers’ Compensation Act.\textsuperscript{144} The right to recover such damages was long thought to be guaranteed by the Texas constitution.\textsuperscript{145} But even constitutional rights can be waived, and in \textit{Ross v. Union Carbide Corp.},\textsuperscript{146} the Houston Fourteenth Court of Appeals ruled that a release from liability executed by a worker in favor of his survivors from pursuing a claim for exemplary damages was enforceable, whether or not the worker had contemplated it at the time he signed the release.\textsuperscript{147} The court of appeals followed the rule that an employee who has executed an instrument releasing his employer from liability for acts committed “in the course of employment” is thereafter precluded from recovering damages from his employer for the same acts.\textsuperscript{148} The court of appeals found no evidence that Smith had notified his employer of his intention to seek recovery from it for his injuries.\textsuperscript{149}

\textsuperscript{137} \textit{See} \textit{TEX. CIV. PRAC. & REM. CODE ANN.} § 95.003 (Vernon 2005).

\textsuperscript{138} \textit{TEX. LAB. CODE ANN.} § 408.001(a) (Vernon 2006).

\textsuperscript{139} \textit{Union Carbide}, 2009 WL 3152138, at *1.

\textsuperscript{140} \textit{Id.} at *4.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at *8.

\textsuperscript{143} \textit{Id.} at *10.

\textsuperscript{144} \textit{See, e.g.,} Smith v. Atl. Richfield Co., 927 S.W.2d 85, 87-88 (Tex. App.—Houston [1st Dist.] 1996, writ denied); Travelers Indem. Co. of Ill. v. Fuller, 892 S.W.2d 848, 852-53 & n.4 (Tex. 1995) (describing the constitutional provision that gave rise to this quirk as “unique”).

\textsuperscript{145} \textit{Smith}, 927 S.W.2d at 87-88.

\textsuperscript{146} 296 S.W.3d 206 (Tex. App.—Houston [14th Dist.] 2009, pet. filed).
damages against the employer upon the worker’s death. The worker had settled a claim for asbestos-related injuries in 1989 with several manufacturers, and in exchange for the settlement, the worker signed a comprehensive release in favor of a larger group of companies, one of which happened to be his employer, Union Carbide. When the worker died in 2001, his survivors brought a gross negligence claim for exemplary damages against Union Carbide, which invoked the release as a defense. The survivors contended that the Texas constitution conferred the claim for exemplary damages not on the worker but on his survivors, and could not be released by the worker because “one cannot sell what one does not own.” The survivors also argued that the release was unenforceable because it was unconscionable and the product of unilateral mistake. The Houston Fourteenth Court of Appeals, sitting en banc, rejected these arguments. The court of appeals held that an action for exemplary damages against a decedent’s employer must be “asserted through the Wrongful Death Act, not separately from it,” and is therefore subject to the defense of release by pre-death contract. In so holding, the court of appeals expressly overruled its prior decision in Perez v. Todd Shipyards Corp., in which it held that an exemplary damages claim brought by a worker’s survivors was not derivative of the worker’s claim during his lifetime which had been discharged in the employer’s bankruptcy. The court of appeals also rejected the survivors’ arguments that because the release was inadvertent and because Union Carbide itself paid no money in the settlement, the release was unenforceable. The court of appeals cited the extensive release language and the fact that counsel represented the worker as support for its conclusion. In a concurring opinion, Justice Frost argued that it was not necessary to convene an en banc panel to overrule Perez, as that decision was clearly incompatible with precedent of the Texas Supreme Court. Senior Justice Price concurred “reluctantly,” expressing concern that “the Ross children had no input whatsoever in the release of their claims.”

III. CONCLUSION

It seems that at the very moment that one is prepared to pronounce the death of mass tort litigation, a new potential mass tort grabs the nation’s attention. Recent months saw the emergence of litigation involving

147. Id. at 208-09.
148. Id. at 212.
149. Id. at 213.
150. Id.
151. Id. at 214-16; 999 S.W.2d 31 (Tex. App.—Houston [14th Dist.] 1999), pet. denied,
35 S.W.3d 998 (Tex. 2000).
152. Perez, 999 S.W.2d at 35.
154. Id.
155. Id. at 221 (Frost, J., concurring).
156. Id. at 223, 225 (Price, S.J., concurring).
Toyota vehicles that could accelerate without prompting or notice,\textsuperscript{157} defective Chinese drywall materials used in thousands of homes,\textsuperscript{158} and even serious personal injuries allegedly caused by the use of denture cream.\textsuperscript{159} As long as Texans use chemicals, pharmaceuticals, and other mass-produced products, the substantive law governing liability for harm caused by such products, and the procedures available for managing mass litigation, will continue to warrant study by the academy, the bench, and the bar.

\begin{flushright}
\end{flushright}