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Toxic Torts and Mass Torts

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URING the Survey period, courts in Texas have continued to address a variety of substantive and procedural issues in toxic tort and mass tort litigation. The decisions of the Texas courts in toxic and mass tort cases have been marked by caution and skepticism. Courts have been reluctant to expand the scope of jurisdiction and the duties owed to workers and consumers, have regarded theories of scientific causation in toxic tort cases with mistrust, and have discouraged the aggressive use of aggregation devices, such as the class action and consolidation to resolve mass tort cases. Rather than distinguish toxic and mass tort cases from other types of cases, Texas courts appear to increasingly favor applying conventional legal theories and procedures to resolve the cases.

I. SUBSTANTIVE ISSUES

A. PERSONAL JURISDICTION

In American Type Culture Collection, Inc. v. Coleman, the Texas Supreme Court considered whether a Maryland company could constitutionally be haled into a Texas court to defend a class action brought by military veterans allegedly exposed to and injured by biological weapons during the Persian Gulf War. The veterans claimed that the defendants, including American Type Culture Collection, Inc. ("ATTC"), supplied material to the government of Iraq for use in biological and chemical weapons. ATTC, "a nonprofit ... repository center for living microorganisms, viruses, and cell lines," maintained its "principal place of business in Rockville, Maryland" and had no offices or property in Texas. It had, however, sold products to Texas residents for at least eighteen years. Its Texas sales accounted for 3.5% of its total annual sales and 5% of its total U.S. sales, generating approximately $350,000 in income. It also pur-
chased $378,000 of supplies from Texas vendors over a five year period.\textsuperscript{7} ATTC filed a special appearance challenging the exercise of personal jurisdiction over it by the Texas court.\textsuperscript{8} The trial court denied the special appearance and the Houston Court of Appeals for the First District affirmed the denial, noting ATTC’s “numerous and repetitive” sales in Texas.\textsuperscript{9} Justice O’Connor dissented from the court of appeals’ denial of rehearing en banc, providing the basis for jurisdiction in the Texas Supreme Court.\textsuperscript{10}

The supreme court restated the requirement that a nonresident’s contacts must demonstrate that it “‘purposefully availed’ itself of the privilege of conducting activities within Texas.”\textsuperscript{11} The supreme court found that ATCC purposefully structured its transactions not to avail itself of, but to avoid, the benefits and protections of Texas law.\textsuperscript{12} The supreme court cautioned that although the quantity of ATCC’s contacts with Texas may suggest a significant relationship with Texas, it is the quality of those contacts that is relevant to a jurisdictional analysis.\textsuperscript{13} Finding that there was no basis for jurisdiction, the supreme court unanimously reversed and rendered judgment dismissing the case against ATCC for lack of personal jurisdiction.\textsuperscript{14}

B. Limitations

In Bates v. Schneider National Carriers, Inc.,\textsuperscript{15} the First District Court of Appeals in Houston reversed the trial court’s grant of summary judgment for defendants on the statute of limitations because the court found a question of fact concerning whether the alleged nuisance was “permanent” or “temporary.” Community residents filed suit for damages caused by “emissions of noise, light, chemicals, dust, odors, and various other substances” from a local manufacturing facility.\textsuperscript{16} If the nuisance was permanent, the statute of limitations had expired because more than two years had passed since the nuisance began; if the nuisance was temporary, however, the plaintiffs could recover damages incurred in the two years preceding the filing of suit.\textsuperscript{17} The court considered the plaintiffs’ affidavits, which contained arguably conflicting statements that the problems were “constant” and that the plaintiffs’ symptoms occurred dur-

\begin{itemize}
\item \textsuperscript{7} Id. at 808.
\item \textsuperscript{8} Id. at 804.
\item \textsuperscript{9} Id. at 804-05.
\item \textsuperscript{10} Id. at 805. Although the Texas Supreme Court ordinarily lacks jurisdiction over interlocutory appeals, it has jurisdiction over an appeal if “the justices of [the] court of appeals disagree on a question of law material to the decision.” \textsc{Tex. Gov't Code Ann.} § 22.001(a)(1) (Vernon 1998).
\item \textsuperscript{11} \textit{Am. Type Culture}, 83 S.W.3d at 806.
\item \textsuperscript{12} Id. at 809.
\item \textsuperscript{13} Id. at 809-10.
\item \textsuperscript{14} Id. at 810.
\item \textsuperscript{15} Bates v. Schneider Nat'l Carriers, No. 01-00-01132-CV, 2002 WL 356714 (Tex. App.—Houston [1st Dist.] March 7, 2002, no pet.).
\item \textsuperscript{16} Id. at *1.
\item \textsuperscript{17} Id. at *2.
\end{itemize}
ing periods of rain, high humidity, or when the wind was from the south. Noting that permanent and temporary nuisances can be distinguished based on the "abatability" of the nuisance, the court observed that the affidavit of plaintiffs' expert contained recommendations for changing the defendant's operations "to prevent or reduce the nuisance conditions." Based on this conflicting testimony within the affidavits, the court of appeals found a genuine issue of material fact concerning the permanent or temporary nature of the nuisance and reversed the judgment of the trial court.

C. Duty and Defenses

In In re Norplant Contraceptive Products Liability Litigation, the federal district court presiding over the multidistrict litigation involving the contraceptive Norplant granted summary judgment on the vast bulk of the claims in favor of the manufacturer based on the learned intermediary doctrine and the lack of proof of causation. The plaintiffs alleged that the prescription drug Norplant—a contraceptive capsule implanted into the skin—caused them to develop a variety of diseases and conditions. Of the 976 adverse reactions alleged by the various plaintiffs, twenty-six were identified in the product labeling provided by the manufacturer Wyeth. Wyeth moved for summary judgment on all claims. As to the plaintiffs who alleged that they had sustained one or more of the twenty-six adverse reactions listed on the package insert, Wyeth argued that the learned intermediary doctrine barred the claims. Under that affirmative defense, the supplier of a prescription drug satisfies its duty to warn of the potential dangers of its product by providing adequate warnings to the prescribing physician. As to the plaintiffs alleging that they had developed one or more of the roughly 950 adverse reactions not listed in the package insert, Wyeth argued that the plaintiffs had presented no scientifically reliable evidence of general causation.

Because the court, pursuant to multidistrict transfer, had before it Norplant cases from all fifty states, it surveyed the law of every state and determined that, with one exception, every state recognized a learned intermediary defense that would bar claims based on an adverse reaction that had been identified in the package insert. The exception is New Jersey, which does not apply the learned intermediary doctrine when the prescription drug manufacturer advertises its product directly to the ulti-

18. Id. at *2-3.
19. Id. at *4.
20. Id.
22. Id. at 800.
23. Id. at 799-800.
24. Id. at 800.
25. Id. at 803.
26. Id. at 800.
27. Id. at 811-12.
mate consumer, as Wyeth had done with Norplant. The court determined that cases governed by New Jersey law were not subject to application of the learned intermediary doctrine and scoured its docket to identify cases governed by New Jersey law. The court ultimately determined that the learned intermediary defense would not apply to the claims of any plaintiff who had Norplant implanted in New Jersey. As to all other plaintiffs alleging an adverse reaction identified in the package insert, the court granted summary judgment based on the learned intermediary doctrine.

The court also granted summary judgment in favor of Wyeth in all cases in which the plaintiffs alleged that they had developed one or more of the 950 reactions not identified in the package insert, finding that plaintiffs had presented no admissible proof that Norplant actually caused the reactions. The plaintiffs resisted summary judgment, arguing that (1) they needed more time for discovery, (2) they were entitled to present lay testimony establishing their injuries and the cause of the injuries, and (3) the criteria for determining admissibility of expert testimony identified in Daubert v. Merrell Dow Pharmaceuticals, Inc., did not apply to such lay testimony. The court rejected the plaintiffs’ arguments, finding that it had provided them ample time for discovery and that the lay opinions offered by the plaintiffs were not exempt from scrutiny and were not scientifically reliable.

In Foster v. Denton Independent School District, the Fort Worth Court of Appeals affirmed summary judgment for the defendants in a case in which an elementary school teacher claimed that she had sustained injuries caused by toxic mold. The plaintiff sued her employer school district and the installer of the HVAC unit in the school for recurrent headaches and respiratory problems caused by exposure to mold and fungus growing in standing water beneath the school and dispersed through the school by the HVAC unit. The court of appeals affirmed the trial court’s ruling that the plaintiff’s claims against the school district were barred by sovereign immunity because her claims did not fall under the “takings” exception incorporated in article I, section 17 of the Texas Constitution or under the “motor vehicles” exception of the Texas Tort Claims Act. In addition, the court held that the plaintiff failed to state a claim under the Health and Safety Code because she did not allege that the mold was present in excess of fifty-five gallons or 500 pounds.

28. Id. at 813-23, 834.
29. Id. at 828.
30. Id. at 833-34.
33. Id. at 833-34.
35. Id. at 457.
36. Id. at 460-61.
37. Id. at 463-64.
court also found that the defendant HVAC installer had no duty, contractual or otherwise, to guarantee that the area around the school did not become contaminated with mold and fungus. 38 Although the mold was distributed around the school by the HVAC unit, the HVAC unit itself was not responsible for the growth of the mold and fungus, and thus, the risk was too remote to create a duty on the part of the HVAC installer. 39 The court therefore affirmed the trial court’s summary judgment in favor of both defendants. 40

In *Cook-Pizzi v. Van Waters & Rogers, Inc.*, 41 the Amarillo Court of Appeals affirmed summary judgment dismissing the plaintiffs’ DTPA, negligence, strict liability, and breach of warranty claims because the plaintiffs did not present summary judgment evidence to support those claims. Plaintiff Cook-Pizzi, a hospital ICU nurse, was injured by fumes after a coworker poured hydrogen peroxide and other chemicals into a clogged sink. 42 Cook-Pizzi and her husband sued Van Waters, the bulk supplier of the hydrogen peroxide to the hospital, and Degussa and DuPont, two suppliers of hydrogen peroxide to Van Waters, alleging that each defendant failed to warn of the dangers of using hydrogen peroxide to clear clogged drains. 43 The court quickly dispensed with Cook-Pizzi’s DTPA counts, finding that because she presented no summary judgment evidence that the hospital bought the hydrogen peroxide for her benefit, she was not a “consumer” and had no standing to bring a claim under the Act. 44 The court then rejected Cook-Pizzi’s common law strict liability and negligence claims. The court found that the defendants discharged their duty to warn of the hazards of their products by furnishing material safety data sheets to the hospital, the adequacy of which the plaintiffs did not challenge in the trial court. 45 Finally, the court upheld the trial court’s rejection of Cook-Pizzi’s breach of warranty claims because Cook-Pizzi presented no evidence that the hospital relied on the defendant suppliers to select or furnish a product that would be suitable for cleaning clogged drains. 46

II. ADMISSIBILITY OF EXPERT TESTIMONY AND PROOF OF CAUSATION

During this Survey period, appellate courts were especially active in scrutinizing the admissibility of expert causation testimony in toxic tort cases. Two appellate courts reversed jury verdicts for the plaintiffs based

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38. *Id.* at 466-67.
39. *Id.* at 467.
40. *Id.*
42. *Id.* at *1.
43. *Id.* at *2.
44. *Id.* at *5.
45. *Id.* at *6.
46. *Id.*
on the erroneous admission of expert causation testimony. In Coastal Tankships, U.S.A., Inc. v. Anderson, the Houston Court of Appeals for the First District, sitting en banc, reversed a jury verdict in favor of a plaintiff who claimed that her decedent developed bronchiolitis obliterans organizing pneumonia ("BOOP") as a result of his exposure to naphtha while working as a seaman. After his exposure to naphtha, the seaman began to suffer "headaches, shortness of breath, nausea, dizziness, shoulder stiffness, and tightness in his chest." He was referred to a pulmonary doctor who arrived at a "differential diagnosis" that his exposure to naphtha caused his BOOP. The pulmonary doctor based his diagnosis on his physical examination of the seaman, test results showing an inhalation injury, the timing of the illness, the seaman's medical history, and exclusion of other possible causes. The seaman brought claims against the shipowner for "negligence under the Jones Act and unseaworthiness under general maritime law." The jury awarded damages, the trial court entered judgment based on the jury's verdict, and the shipowner appealed, challenging the admissibility and sufficiency of the doctor's opinion on causation.

Because differential diagnosis is a clinical diagnostic technique "outside the hard science context," a majority of the court of appeals used a "translation" of the Daubert inquiry to determine whether the expert's differential diagnosis was reliable and admissible. The revised admissibility inquiry considers "(1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." Considering the differential diagnosis under this framework, the majority concluded that a "properly conducted and explained differential diagnosis is not 'junk science'" and "should be considered reliable enough to assist a fact finder in understanding certain evidence or determining certain fact issues." The court held, however, that a differential diagnosis can provide proof only of specific causation, not general causation, "because a differential diagnosis presumes that chemical X can cause condition Y generally, but does not itself so prove." The court concluded that there was no evidence in the record to show general causation and

48. Id. at 595.
49. Id. at 596-97.
50. Id.
51. Id. at 594.
52. Id.
53. Id. at 600 (quoting Nenno v. State, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998, no pet.)) (emphasis omitted).
54. Id. at 601.
55. Id. (discussing Nenno, 970 S.W.2d 549).
56. Id. at 604-05.
57. Id. at 608-09 (following Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 191 (Tex. App.—Texarkana 1998, pet. denied)).
held that in the absence of such evidence, the pulmonary doctor’s opinion on causation was unreliable and should not have been admitted. Justice Brister issued a concurring opinion taking issue with the majority’s general observations that an opinion based on a differential diagnosis need not satisfy all of the Daubert/Havner criteria and that proof of general (as opposed to specific) causation is always required in a toxic tort case. Justice Cohen dissented, arguing that the seaman’s medical records, entered without sufficient objection, and the naphtha material safety data sheets provided legally sufficient evidence of general causation.

In Missouri Pacific Railroad Company v. Navarro, the San Antonio Court of Appeals reversed a two million dollar award to a plaintiff who claimed that her exposure to diesel exhaust while working as a rail yard clerk caused her to develop multiple myeloma. The court held that the causation testimony of the plaintiff’s industrial hygienist was unreliable because (1) he relied on a single study to perform exposure estimates, (2) he did not address the cautions articulated in that study for using the estimates, (3) he shifted his initial estimates up dramatically by changing the job classification he used for comparison and by using the total particulate mass measure rather than the measure of extracted diesel particles (“adjustable extractable mass measure”), (4) he used an EPA document marked “do not cite or quote” to support an estimate based on the odor threshold for diesel, and (5) he lacked professional experience with diesel exhaust exposure. Because the other experts relied on these exposure estimates, their opinions were likewise unreliable. But the court also analyzed their opinions individually and found them lacking. The testimony of the plaintiff’s epidemiologist was unreliable because (1) he used two studies to find a causal relationship when the study authors themselves were unwilling to find one, (2) he ignored other studies that he conceded showed no association between exposure and disease, (3) he could not testify what level of exposure created the risk, and (4) he had no experience with diesel exhaust and multiple myeloma. The court also judged unreliable the testimony of the plaintiff’s oncologist/hematologist because (1) he could not state what exposure level was necessary to cause multiple myeloma, (2) he did not specify particular types of cancer that are caused by diesel exhaust exposure, and (3) he provided no support for his theory that diesel exhaust could reach the bone marrow though inhalation, ingestion, or dermal absorption. The testimony of the plaintiff’s toxicologist that “there is no safe level of exposure to cer-

58. Id. at 610-12.
59. Id. at 615-16 (Brister, J., concurring).
60. Id. at 616-17 (Brister, J., concurring).
61. Id. at 619-24 (Cohen, J., dissenting).
63. Id. at 756.
64. Id. at 757.
65. Id.
66. Id.
tain components of diesel exhaust" was rejected as an unacceptable "type of reasoning." Because of these flaws, the experts should not have been permitted to testify, and the plaintiff failed to prove general causation. The plaintiff's evidence of specific causation was also insufficient because the studies cited failed to show a doubling of the risk of multiple myeloma in people exposed to diesel exhaust and because the plaintiff's experts failed to rule out alternative causes of multiple myeloma.

Less conspicuously, Texas appellate courts also affirmed decisions to exclude expert testimony as within the trial court's discretion. In Neal v. Dow Agrosciences LLC, the Dallas Court of Appeals affirmed the trial court's exclusion of expert testimony that an infant's pre- and post-natal exposure to the pesticide Dursban caused him to develop a fatal brain tumor. The plaintiffs, parents of the infant, had been exposed to Dursban during the mother's pregnancy when it was used to eliminate ants in the plaintiffs' apartment. The plaintiffs' expert based his opinion of causation on medical records of the infant, an interview with the mother, and four studies which he testified showed a significant association between "extermination for insects' and the risk of brain cancer." Reviewing the trial court's decision to strike the testimony, the court of appeals itself analyzed the studies and concluded that no study cited by the expert supported his opinion of "general causation," that is, that Dursban is capable of causing brain cancer in the general population. The court noted that although one of the studies found an increased risk of pediatric brain tumor from exposure to flea/tick sprays or foggers, the study itself drew no conclusion but stated only that "there appear[ed] to be enough evidence to warrant further investigation." Another study cited by the expert reported an increased incidence of all cancers among children exposed to pesticides but found the results "inconclusive" and suggested that the increased incidence of cancer could be attributable to a greater inclination of parents of children with cancer to recall pesticide exposure. Finding that the expert's opinion of causation was "not supported by reliable evidence," the court affirmed the exclusion of the testimony and the resulting summary judgment for the defendants.

In Regan v. Schlumberger Technology Corp., the First District Court of Appeals in Houston upheld the trial court's decision to exclude an opinion of the plaintiff's expert witness that her decedent's exposure to

67. Id. at 758.
68. Id. at 758-59.
69. Id. at 758.
71. Id. at 470-71.
72. Id. at 473.
73. Id. at 473-74.
74. Id.
75. Id. at 474.
76. Id.
asbestos caused his fatal lung cancer. The court first considered whether the trial court abused its discretion by entertaining the defendants' motion to exclude the opinion on the day of trial and by deciding the motion without holding a full evidentiary hearing. Observing that "[j]ustices and scholars" have "strongly urged" courts to conduct early pretrial hearings on the admissibility of scientific evidence, the court nonetheless concluded that the trial court did not abuse its discretion in considering the defendants' motion to exclude on the day of trial without receiving oral testimony.\textsuperscript{78} The court noted that the plaintiff had prior notice of the motion, had planned to offer the expert's opinion by deposition and not by live testimony, and declined the judge's offer to continue the hearing until the next morning so that she could make a more detailed defense of her expert's opinion. Turning to the merits, the court held that the trial court did not abuse its discretion in finding the expert's testimony of causation unreliable and inadmissible.\textsuperscript{79} The plaintiff's expert relied on a single twenty-two-year-old study in support of his opinion that although the decedent did not have asbestosis, his lung cancer was attributable to asbestos exposure.\textsuperscript{80} Although the expert admitted that several studies had found an increased risk only in persons with asbestosis, he was unable to identify by name any recent studies that supported his position that lung cancer could be attributed to asbestos exposure in the absence of asbestosis.\textsuperscript{81} The court held that the trial court did not abuse its discretion in finding this testimony inadequate to support the admission of the expert's opinion.\textsuperscript{82}

In \textit{Dupuy v. American Ecology Environmental Services Corp.},\textsuperscript{83} the Tyler Court of Appeals held that the trial court did not abuse its discretion by excluding the conclusory causation testimony of the plaintiffs' expert. The expert opined in an affidavit that the plaintiffs' exposure to various chemicals while cleaning a hazardous waste tank on the defendant's premises caused their injuries. The plaintiffs' expert failed, however, to support his opinion; instead, he offered only a bald assertion that "'[t]he facts and data underlying [his] opinions herein are the type generally and reasonably relied on by experts in forming opinions.'"\textsuperscript{84} The court of appeals noted that the expert's affidavit included no "objective facts" upon which the expert based his opinions, such as the concentration or duration of exposure or even the names of the chemicals to which the plaintiffs were exposed.\textsuperscript{85} The information in the expert's affidavit was thus insufficient to meet plaintiffs' burden of establishing the reliabil-

\textsuperscript{78} Id. at *3.
\textsuperscript{79} Id. at *9-13.
\textsuperscript{80} Id. at *9.
\textsuperscript{81} Id. at *9-10.
\textsuperscript{82} Id. at *13.
\textsuperscript{84} Id. at *4-5 (first alteration in original).
\textsuperscript{85} Id. at *4.
III. PROCEDURAL ISSUES

A. CLASS ACTIONS AND CONSOLIDATION

In *Schein v. Stromboe*, the Texas Supreme Court added to its jurisprudence discouraging the use of class actions to resolve personal injury or consumer tort claims. The plaintiffs in *Schein* alleged that the dental practice management software developed and sold by the defendants was defective and sought to impose liability on the defendants for "breach of contract, breach of express and implied warranties, fraudulent and negligent misrepresentations, and violations of the Texas Deceptive Trade Practices—Consumer Protection Act." They also sought certification of a nationwide class of purchasers of the software. The trial court certified the class, and the Austin Court of Appeals affirmed on interlocutory appeal. A majority of the supreme court determined that it had jurisdiction over the defendants' interlocutory appeal because the court of appeals' opinion conflicted with *Southwestern Refining Co. v. Bernal*, in that it did not provide a specific explanation of how the claims could be tried together. The supreme court also found that the court of appeals' standard of review was insufficiently "rigorous" under *Bernal* because it granted the trial court's ruling the benefit of every presumption.

The supreme court found numerous problems with the certification order itself. First, certification under Rule 42(b)(1) was not proper because the plaintiffs did not show how prosecution of individual claims separately would "establish incompatible standards of conduct" for defendants or threaten the interests of other class members. Certification was improper under Rule 42(b)(4) because the plaintiffs had not shown that common questions predominated over individual ones; for example, not every class member relied on the defendant's misrepresentations. Although it refused to state a bright-line rule that certification is never proper when individual reliance is a necessary element of the plaintiffs' claims, the supreme court held that "the plaintiffs in this case have failed to show that individual issues of reliance do not preclude the necessary finding of predominance under Rule 42(b)(4)." Likewise, the plaintiffs...
failed to show how actual damages (beyond disgorgement of the software sale price) or exemplary and statutory damages could be determined on a class-wide basis. The plaintiffs also failed to demonstrate that application of Texas law was proper in such a high percentage of the cases in which common legal issues predominated. Finally, the plaintiffs failed to show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The court was unconvinced by the trial court's conclusion that the amount recoverable in individual claims made those claims not economically feasible to pursue separately. The court also expressed reservations that class actions are the most fair and efficient means of resolving such claims, approving a "market model" rather than a "central planning model" for the resolution of mass torts. The court reversed the certification order and remanded the case to the trial court for further proceedings.

In *In re Jobe Concrete Products, Inc.*, the El Paso Court of Appeals found that consolidation of 850 plaintiffs was not proper and granted mandamus relief in a suit alleging personal injuries and property damage arising from exposure to noise and emissions from Jobe's rock crushing and concrete facility. The original lawsuit was filed by three plaintiffs, who later filed amended petitions adding 847 additional plaintiffs. The trial court denied Jobe's motion to strike all 847 additional plaintiffs or to sever those plaintiffs for a separate trial. Jobe filed a petition for writ of mandamus. The court of appeals found that intervention was proper because all the plaintiffs resided near the Jobe facility and were exposed to the effects of blasting at the facility, but the appellate court ordered the claims to be severed into individual cause numbers for separate trials. Although the plaintiffs' claims shared common questions of law, the exposures to noise and emitted substances, the timing of the exposures, the type of injuries suffered, and the causation of those injuries would vary from plaintiff to plaintiff. The court concluded that "[g]iven the absence of any identifiable advantage to joinder of these

98. *Id.* at *14-15.
99. *Id.* at *16.
100. *Id.* at *17.
101. *Id.* at *18.
102. *Id.* at *18-19.
103. *Id.* at *19.
104. *Id.* at *19-22 (O'Neill, J., dissenting).
106. *Id.*
107. *Id.* at *2.
108. *Id.* at *5.
109. *Id.* at *9.
110. *Id.* at *8.
claims and the existence of tremendous potential for prejudice, severance is required to prevent manifest injustice." The court cautioned, however, that its opinion "should not be read as prohibiting [the trial court] from consolidating certain claims of the additional plaintiffs into appropriate trial units."

B. Discovery and Case Management

In *In re Van Waters & Rogers, Inc.*, the Texas Supreme Court conditionally granted a writ of mandamus to compel the trial court to allow discovery to proceed in a suit brought by 448 workers who alleged that they had sustained injuries as a result of exposure to "toxic soup" created by the use of chemicals at the Parker-Hannifin Corporation processing plant in McAllen, Texas. The plaintiffs sued more than fifty manufacturers, suppliers, and distributors of chemical products to the plant. The defendants propounded an interrogatory to all plaintiffs seeking the names of physicians who could provide evidentiary support for the plaintiffs' allegation regarding causation of their injuries, and the plaintiffs uniformly answered that they did not recall. The trial court then restricted discovery to a group of twenty plaintiffs selected for trial by plaintiffs' counsel and ordered that all discovery be limited to those twenty plaintiffs' claims.

The defendants sought mandamus relief from the order restricting discovery. The court denied relief so the trial court could reconsider its order in light of the court's intervening decision in *In re Colonial Pipeline Co.*, in which the court held that a "similar abatement of discovery was a clear abuse of discretion." After the supreme court issued its order, the trial court designated a new group of twenty-five plaintiffs for trial but did not order plaintiffs to provide a substantive answer to the interrogatory regarding causation. The trial court also refused to allow any discovery regarding the claims of plaintiffs who were not in the group of twenty-five trial plaintiffs. The defendants again sought mandamus relief, and the court of appeals agreed that the trial court had abused its discretion by refusing to require the twenty-five trial plaintiffs to answer the causation interrogatory but refused to disturb the trial court's order abating other discovery.

111. *Id.*
112. *Id.* at *9 n.13.
114. *Id.* at 198.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 199.
119. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 943 (Tex. 1998).
120. *In re Van Waters & Rogers, Inc.*, 62 S.W.3d at 199.
121. *Id.* at 199-200.
122. *Id.* at 200.
The supreme court 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.\(^\text{123}\) 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” and cautioned that “the parties now face the very real threat that after seven years evidence will be destroyed, witnesses will die or disappear, and memories will be impaired.”\(^\text{124}\)

The supreme court additionally noted that the trial court’s restriction on discovery prevented it from selecting an appropriate group of cases to try.\(^\text{125}\) The court pointed out that its decisions in *In re Ethyl Corp.*\(^\text{126}\) and *In re Bristol-Myers Squibb Co.*\(^\text{127}\) established the factors to be considered in determining whether cases should be consolidated for trial. Without discovery regarding the entire group of cases, the trial court could not determine whether the factors permitting consolidation were satisfied.\(^\text{128}\) Consequently, the Texas Supreme Court ordered the trial court to permit discovery concerning all plaintiffs’ claims without further delay and then to determine how the claims will be tried in compliance with *Ethyl* and *Bristol-Myers.*\(^\text{129}\)

In *In re The Lincoln Electric Co.*,\(^\text{130}\) the Beaumont Court of Appeals held that a defendant in a multi-party toxic tort case had not waived its privilege objections to the plaintiffs’ discovery requests by failing to assert the objections in its first discovery responses. In response to a discovery request, the defendant filed objections and motions for protective orders but did not assert privilege.\(^\text{131}\) Only after the trial court overruled the objections did the defendant assert the attorney-client and work product privileges.\(^\text{132}\) After the trial court ruled that the privileges had been waived, the defendant filed a petition for a writ of mandamus. The court of appeals rejected the contention that the defendant had waived its privilege objection by initially making other objections to the plaintiff’s requests, pointing to the “overall spirit of non-waiver apparent in the applicable discovery rules.”\(^\text{133}\) The court conditionally granted the petition for writ of mandamus, requiring the trial court to consider the merits of the defendant’s privilege objections.\(^\text{134}\) Justice Burgess dissented, arguing that “the making of frivolous objections should not extend the time when

\(^{123}\) Id.

\(^{124}\) Id.

\(^{125}\) Id. at 201.

\(^{126}\) *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998).

\(^{127}\) *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601 (Tex. 1998).

\(^{128}\) *In re Van Waters & Rogers, Inc.*, 62 S.W.3d at 201.

\(^{129}\) Id.


\(^{131}\) Id. at 433-35.

\(^{132}\) Id. at 434.

\(^{133}\) Id at 437.

\(^{134}\) Id. at 438.
Lincoln was required to assert its privileges.”

In *Baker v. Monsanto Co.*, the Houston Court of Appeals for the First District affirmed a summary judgment for a defendant in a toxic tort case after the intervening plaintiffs failed to timely serve the defendant. The original plaintiffs sued several defendants including Monsanto, alleging personal injury and property damage caused by a Superfund site. Before the original plaintiffs served Monsanto with citation, the intervenors filed their petition in intervention and sent it to Monsanto via certified mail. Monsanto refused service because it had not been served with citation, and the intervenors made no further attempt at service. Two years later, the trial court granted Monsanto’s motion for summary judgment asserting limitations as an affirmative defense against the intervenors. The court of appeals affirmed, holding that because Monsanto was not yet a party to the underlying suit when the intervenors attempted service, the intervenors were required to serve Monsanto personally rather than serve them by certified mail. Therefore, the attempted service was defective, and the appellants could not show due diligence in procuring service upon Monsanto. The intervenors argued that Monsanto waived any defect in service by filing an answer and motion for summary judgment in the underlying lawsuit. The court of appeals rejected this argument, holding that Monsanto’s answer was directed specifically to the original plaintiffs who had properly served Monsanto and that its motion for summary judgment was made after limitations had run on the intervenors’ claims. Finding no waiver, the court overruled these issues and affirmed the summary judgment.

C. FEDERAL REMOVAL JURISDICTION

With increasing frequency, defendants in mass tort cases have sought to move cases from state to federal courts as part of a strategy to achieve global resolution of the litigation through multidistrict transfer, a nationwide class action, or bankruptcy. In *Arnold v. Garlock, Inc.*, the Fifth Circuit disapproved a systematic effort to remove and consolidate asbestos claims in federal court under 28 U.S.C. § 157(b)(5), a provision allowing related tort claims to be tried in the district court where a bankruptcy is pending. While acknowledging that certain mass tort

135. *Id.* at 438-39 (Burgess, J., dissenting).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 481.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 481-82.
claims in some circumstances might be consolidated with bankruptcy proceedings in a single district in accordance with § 157(b)(5), the court concluded that such a transfer was not appropriate in the context of asbestos litigation.\textsuperscript{147}

Garlock, a manufacturer of asbestos-containing gaskets, was one of numerous defendants in many asbestos-related personal injury and wrongful death claims pending in Texas state courts. After one of its co-defendants, Federal-Mogul, Inc., filed for bankruptcy protection,\textsuperscript{148} Garlock removed thirty-seven asbestos cases pending in state courts in Austin, Beaumont, Corpus Christi, Dallas, Galveston, Paris, and San Antonio to the federal courts in the respective districts.\textsuperscript{149} To support the removals, Garlock argued that its contribution claims against Federal-Mogul were “related to” the tort claims against Federal-Mogul within the meaning of 28 U.S.C. § 1334(b), which gives federal courts jurisdiction over civil proceedings “arising in or related to” bankruptcy proceedings.\textsuperscript{150} Garlock moved to transfer each of the cases to the District of Delaware, where the Federal-Mogul bankruptcy was pending, under 28 U.S.C. § 157(b)(5).\textsuperscript{151}

The federal district courts generally rejected Garlock’s theory of removal jurisdiction. Some of the courts simply remanded the cases outright for lack of subject matter jurisdiction, while others took additional procedural steps, such as dismissing the claims against Federal-Mogul with prejudice, severing claims against Federal-Mogul and transferring those claims to the District of Delaware, or remanding for equitable reasons under 28 U.S.C. § 1452(b).\textsuperscript{152} The net result in each case was that claims against Garlock and the other non-bankrupt manufacturers were returned to state court. The Fifth Circuit then issued a temporary stay of these orders to allow it to consider the propriety of the removals.\textsuperscript{153}

In a lengthy opinion, the Fifth Circuit declined to permit the claims to remain in federal court by extending the temporary stay. The court noted that the Bankruptcy Code's automatic stay provision\textsuperscript{154} is “rarely . . . a valid basis on which to stay actions against non-debtors.”\textsuperscript{155} The court also held that the ten-day stay of judgments under Federal Rule of Civil Procedure 62(a) does not apply to remand orders.\textsuperscript{156} With respect to Garlock's request for a stay pending appeal of the denial of transfer

\textsuperscript{147} Id. at 444.

\textsuperscript{148} In October 2001, Federal-Mogul filed for bankruptcy on behalf of itself and its affiliates and subsidiaries, including Gasket Holdings, Inc., which was the successor to Flexitallic, another gasket manufacturer. Id. at 431, 439.

\textsuperscript{149} Id. at 432.

\textsuperscript{150} See id. at 431-36.

\textsuperscript{151} Id. at 431.

\textsuperscript{152} Id. at 432.

\textsuperscript{153} Id. at 433.


\textsuperscript{155} Arnold, 278 F.2d at 436 (citing Wedgeworth v. Fibreboard Corp., 706 F.2d 541, 544 (5th Cir. 1983)).

\textsuperscript{156} Id. at 437.
under § 157(b)(5), the court concluded that Garlock had not shown sufficient probability of success on appeal to justify a stay. In part, this decision was based on the court’s conclusion that Garlock had no valid contribution claim against Federal-Mogul “upon which to assert ‘related to’ jurisdiction under the bankruptcy laws.”

With respect to the cases in which the claims against Federal-Mogul were dismissed with prejudice, the court held that Texas law foreclosed any contribution claims.

Even in cases in which the Federal-Mogul claims had not been dismissed, the court found that Garlock’s “universally-pled claims against all defendants in all asbestos lawsuits in which Garlock appears as a co-defendant” were insufficient to justify a transfer under § 157(b)(5).

The court distinguished *A.H. Robbins v. Piccinin* and *In re Dow Corning*, two mass tort cases in which courts authorized transfers under § 157(b)(5). *A.H. Robbins* involved the Dalkon Shield litigation, in which the co-defendants were “employees or other close associates who were contractually indemnified by Robins.” The court contrasted this with asbestos litigation, in which “the various co-defendants manufacture, use, specify, or handle many different asbestos products without such close relationship.”

The *Dow Corning* case involved breast implant litigation, in which the co-defendants were “closely involved in using the same material, originating with the debtor, to make the same, singular product, sold to the same market and incurring substantially similar injuries.” The result was a “unity of identity between the debtor and the co-defendants not present here, where the co-defendants variously use asbestos for brake friction products, insulation, gaskets, and other uses.”

While holding that consolidation under § 157(b)(5) was inappropriate in the context of asbestos litigation, the court explicitly refused to preclude such consolidation in other mass tort cases, depending on “the relationship or unity of identity of the co-defendants and the debtor(s), the uniformity of source of the injury or wrongful death, and the general status of pending cases in the state courts and the effect a consolidation would have on them.”

In addition to finding that Garlock had failed to demonstrate a probability of success on the merits, the court held that a stay would substantially harm the other parties. The court explained that “delay where plaintiffs have mesothelioma, asbestosis, or pleural disease, or where decedents’ survivors await compensation for support substantially harms those parties” and that “lengthy interruption of state court proceedings

157. Id. at 433.
158. Id. at 439.
159. Id. at 440.
161. *In re Dow Corning*, 86 F.3d 482 (6th Cir. 1996).
162. *Arnold*, 278 F.3d at 440.
163. Id.
164. Id.
165. Id.
166. Id. at 440 n.12.
already in progress for months or years may substantially harm the ability of the state courts to resolve the cases.”

In discussing whether the stay would serve the public interest, the court observed that “[i]n a mass tort case of the scope of asbestos litigation, transferring cases related to a bankruptcy could well result in depriving the states of cognizance over thousands of cases . . . . The negative effect on comity between the federal and state court systems must be given some account.”

Garlock also argued that transfer under § 157(b)(5) would provide a centralized forum for decisions that could be given “preclusive effect in future actions.” The court noted that the manufacturers of asbestos brake products were advancing this proposal in Delaware, arguing that consolidation would enable the court to hold comprehensive Daubert hearings to determine the admissibility of expert testimony. The court concluded that such arguments faced “formidable obstacles.” The court explained that “no matter how creative the procedural avenue, and in spite of the fact that this litigation would benefit from a uniform approach, at almost every turn this circuit has rejected attempts at aggregation and issue preclusion in asbestos cases . . . . We refused to tolerate deviation from fundamental principles of due process simply because asbestos cases threatened to swamp the resources of the federal courts.”

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167. Id. at 441.
168. Id.
169. Id. at 442.
170. See id. at 442 n.15 (citing Daubert, 509 U.S. at 589).
171. Arnold, 278 F.3d at 442. The Third Circuit subsequently reached the same conclusion. See In re Federal-Mogul Global, Inc., 300 F.3d 368, 390 (3d Cir. 2002) (“Arguably, a procedure authorizing the aggregation of state court cases, such as the Friction Product Claims, into a nationwide class action would provide a mechanism for a Daubert hearing like the one Defendants seek, but such proposals, frequently made, have not passed both houses of Congress.”), cert. denied, 123 S. Ct. 884 (2003).
172. Arnold, 278 F.3d at 443.