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 COMMENTARY

The quest for the next ‘solvent bystander’ in asbestos litigation: Will Texas resume the search?

Eric G. Lasker and Richard O. Faulk of Hollingsworth LLP in Washington discuss the present state of asbestos litigation in Texas and what could loom on the horizon since the Texas Supreme Court granted review in Georgia-Pacific Corp. v. Bostic.

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BENZENE EXPOSURE

Paint manufacturer must face benzene death suit

A Wisconsin federal judge has denied summary judgment to a paint manufacturer in a benzene exposure and wrongful-death suit on remand of an appeals court ruling that an oncologist’s expert testimony is admissible in the suit.


U.S. District Judge Rudolph T. Randa of the Eastern District of Wisconsin declined to disturb the 7th U.S. Circuit Court of Appeals’ finding that an industrial hygienist’s calculations of Donald W. Schultz’s total benzene exposure, which formed the basis of the oncologist’s testimony, were scientifically reliable.

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The quest for the next ‘solvent bystander’ in asbestos litigation: Will Texas resume the search?

Hollingsworth LLP

In one of the most infamous, and remarkably honest, statements in American legal history, plaintiffs' counsel Richard “Dickie” Scruggs once described asbestos litigation as an “endless search for a solvent bystander.” When the statement was made, the asbestos litigation behemoth was plainly running amok and, even years later most courts, including the state courts in Texas, had done little to resolve the “elephantine mass” of asbestos litigation clogging the nation's judicial system. Company after company turned to the federal bankruptcy courts to solve a problem that the state courts could not, or would not, address.

Asbestos litigation increasingly became a “cold war” where armies of lawyers prepared for trials that seldom occurred and hundreds of millions of dollars changed hands in settlements that left every major liability issue unresolved. The system was marvelously self-perpetuating. Without judicial intervention regarding controlling legal issues, the system seemed to be an inexhaustible source of litigation and revenue for lawyers on both sides of the controversy. After decades of expanding liability to increasingly broader categories of defendants, some courts finally recognized rational ways to use the common law as a means of containment. They drew the line against claims that any exposure to asbestos was capable of causing illnesses and required proof that the exposures to each defendant's product were, in fact, sufficient to cause asbestos-related diseases, including mesothelioma. Texas was among the first states to recognize this common-law requirement.

In light of Flores, Texas asbestos cases are treated like other toxic tort cases, that is, before a case can be sent to the jury there must be real proof of specific causation: proof that ties the particular defendant’s product to the particular plaintiff’s illness.

In Borg Warner v. Flores, the Texas Supreme Court required proof that the exposure was a “substantial factor” in causing the illness and held that standard “[d]efendant-specific evidence relating to the approximate dose to which plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease will suffice.” This essential endorsement of “but for” causation was consistent with decades of Texas law that had been applied to virtually every type of tort, including product liability, but that had never before been applied in Texas asbestos litigation.

In light of Flores, Texas asbestos cases are treated like other toxic tort cases, that is, before a case can be sent to the jury there must be real proof of specific causation — proof that ties the particular defendant’s product to the particular plaintiff’s illness.

In Georgia-Pacific Corp. v. Bostic, the state's Court of Appeals in Dallas followed Flores and held as a matter of law that asbestos plaintiffs failed to demonstrate that “but for” exposure to the defendant Georgia Pacific’s product, the decedent's mesothelioma would not have occurred. The plaintiffs appealed to the Texas Supreme Court, which initially denied review without comment. When the plaintiffs moved for rehearing, however, the court changed course and granted review of the lower court’s decision. The decision to grant review is especially odd because the jury in the trial court was given the “but for” instruction without objection. It is therefore questionable whether the issue has been preserved for review. Nevertheless, the parties and numerous amicus curiae have filed briefs on the rehearing, including one of the authors of this article wrote.
The arguments the Bostic plaintiffs raised to challenge the Flores rule are creative but unavailing. For example, they argue that alternative liability cases like Summers v. Tice control Bostic. But those cases rest on the necessary predicate that the actions of each defendant alone would have been sufficient to cause injury. In Bostic, the plaintiffs failed to show that Timothy Bostic’s exposure to Georgia Pacific’s products alone was sufficient to cause or contribute to his injury. So, the Summers rule cannot apply.

Of equal importance, the Bostic plaintiffs also failed to appreciate that the Texas Supreme Court rejected the alternative liability rule in asbestos personal injury cases already. In Gaulding v. Celotex Corp., the plaintiffs sought to hold the defendants liable even though they could not prove that any particular defendant manufactured the product that actually caused the decedent’s mesothelioma.

Although Texas authorized and implemented a statewide multidistrict litigation for asbestos suits, the volume of cases rapidly decreased to the point where supervision by a full-time judge was unnecessary.

As in Bostic, the Gaulding plaintiffs relied on Summers and other authorities, such as Landers v. East Texas Salt Water Disposal Co., to excuse their lack of proof. The court rejected the plaintiffs’ attempt to escape their causation burden for two reasons.

First, the court explained that the issue in Landers was not causation, that is, whether each of the defendants’ actions were “but for” causes of injury to the plaintiff. The Landers court was reviewing a dismissal on the pleadings, and it was unequivocally alleged that each of the two defendants released large volumes of salt water that contaminated the plaintiffs’ land and contributed to the overall injury.

The issue in Landers was proof of damages: whether the defendants could escape liability because the plaintiff could not prove each defendant’s allocated share of damages. Second, the Gaulding court stressed that “[a] crucial element to alternative liability is that all possible wrongdoers must be brought before the court.” In Bostic, there are numerous possible defendants not before the court, and the plaintiffs cannot negate the possibility that idiopathic causes unrelated to any workplace or bystander asbestos exposures caused Bostic’s mesothelioma. Under these circumstances, alternative liability is completely inapposite.

Despite these clear precedents that undermine plaintiffs’ arguments, the court is now poised to review the case, and the decision to do so seems inevitably tied to questions regarding continued allegiance to Flores.

Questions abound. Is Texas preparing to resume the “endless search” for the next “solvent bystander”? Is the Texas Supreme Court considering a departure not only from Flores, but also from decades of settled Texas law regarding causation in tort cases?

Will the court carve a special “exception” to those principles in asbestos litigation, particularly mesothelioma cases? Is the court prepared to renew Texas as a “magnet” jurisdiction for asbestos litigation, much like West Virginia and California, states with far more liberal views of causation requirements?

Of course, the court may simply adhere to Flores and, upon consideration, refuse to change the law. Hopefully, the memory of the disastrous and wasteful “cold war” of asbestos litigation will persist and rational common-law limits will not be sacrificed to resurrect a demonstrably abusive system.

NOTES
3. See Faulk, supra note 2, at 945-956.
4. Id. at 954-956.
7. Flores, 232 S.W.3d at 773.
8. See Faulk, supra note 2, at 963 discussing cause-in-fact requirement under Texas law. Although the Flores court did not specifically refer to the “but for” test as a component of “substantial factor” causation, it relied on earlier cases that expressly defined “substantial factor” as incorporating “cause in fact.” Those cases defined “cause in fact” as a “substantial factor in bringing about the injury which would not otherwise have occurred.” See, e.g., Union Pump Co. v. Albritton, 898 S.W.2d 773, 775 (Tex. 1995). Moreover, the court has stressed “but for” causation in cases decided since Flores. See Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211, 225 (Tex. 2010) (holding that a jury instruction on causation that lacks the but-for component is reversible error).
9. As such, Flores manifests the continuing intent of the Texas Supreme Court to apply, in asbestos cases, the “fundamental principle of traditional products liability law… that the plaintiff must prove that the defendants supplied the product which caused the injury.” Gaulding v. Celotex Corp., 772 S.W.2d 66, 68 (Tex. 1989).
10. Flores was ultimately extended to all asbestos-related diseases. See Smith v. Kelly-Moore Paint Co., 307 S.W.3d 829, 834 (Tex. App., Forth Worth 2010) (Flores cannot be read “so narrowly as to apply only to asbestos or asbestos exposure cases other than mesothelioma.”).
12. Id. at 601.
13. The charge defined “proximate cause” as “that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred.” (emphasis added). See Ford Motor Co. v. Ledesma,
See Bostic, brief of amici curiae, supra note 11.

15 See Gaulding, 183 N.W.519 (Minn. 1921).


17 772 S.W.2d 66, 68-69 (Tex. 1989).

18 Plaintiffs’ inability to establish causation in Gaulding was due to lack of evidence as to who had manufactured the product at issue rather than lack of evidence of sufficient exposure.

19 248 S.W.2d 731 (Tex. 1952).

20 See Gaulding, 772 S.W.2d at 68-69.

21 Id. at 68; see Landers, 248 S.W.2d at 731-32.

22 See Landers, 248 S.W.2d at 734.

23 Gaulding, 772 S.W.2d at 69. “When a plaintiff fails to join all possible defendants, alternative liability does not apply.” Id.

24 See Bostic, 320 S.W.3d at 594-95.

25 See, e.g., Christine Rake et al., Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case Control Study, 100 Brnt. J. CANCER 1175, 1181 (2009) (unexplained cases accounted for 14 percent of male and 62 percent of female mesotheliomas in Britain); Mary Jane Teta et al., US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates, 17 EUR. J. CANCER PREVENTION 525, 534 (2008) (upward of 300 cases of mesothelioma every year “may be unrelated to asbestos exposure” and may “reflect spontaneous causes”); Brooke T. Mossman et al., Asbestos: Scientific Developments & Implications for Public Policy, 247 SCIENCE 294, 295 (1990) (“approximately 20 to 30 percent of mesotheliomas occur in the general population in adults not exposed occupationally to asbestos”).

**RECENT COURT FILINGS**

**SOAP CAUSED WOMAN’S FACE TO BLISTER, SUIT SAYS**

A Los Angeles woman alleges she suffered blisters on her face after using a “defective” bar of Ambi Complexion Cleansing soap. Shamaiya Hill alleges she immediately experienced a burning sensation when she used the soap on July 21, 2012. Her mother later went to Superior Grocers, where Hill bought the soap, but found the product had been removed from the shelves, the complaint says. Hill claims Ambi’s corporate owner, Suresource, and Superior Grocer’s operator, Super Center Concepts, are liable for negligently designing, manufacturing and selling the soap. The defendants also breached express and implied warranties to Hill, the complaint says. She seeks unspecified compensation for medical expenses, lost wages and other damages.

*Hill v. Suresource LLC et al., No. BCS20498, complaint filed (Cal. Super. Ct., L.A. County Sept. 6, 2013).*

**TEXAS SEEKS CIVIL PENALTIES FOR CHEMICAL PLANT EMISSIONS**

Texas authorities are seeking to recover civil penalties from petrochemical manufacturer AkzoNobel Polymer Chemicals for emissions violations that injured plant employees. The state, acting on behalf of the Texas Commission on Environmental Quality, claims in a Harris County District Court complaint that an unauthorized emission of pivaloyl chloride on Feb. 1 created a hydrogen chloride vapor cloud that sent 11 people to the hospital and injured 18 facility employees. AkzoNobel reported another emissions event March 4 that occurred when a fire broke out in a manufacturing unit, causing thousands of pounds of butyl ethyl magnesium to be released into the air and necessitating the closure of an area road, the complaint says. The complaint says AkzoNobel is liable for up to $25,000 for each day of air contaminant violations.

*Harris County, Texas et al. v. AkzoNobel Polymer Chemicals, No. 2013-53241, complaint filed (Tex. Dist. Ct., Harris County Sept. 10, 2013).*

**CVS ACCUSED OF FAILING TO WARN CONSUMERS ABOUT CARCINOGEN**

CVS Pharmacy sells shampoo and soap products containing the carcinogen cocamide diethanolamine, or DEA, in its California stores without required warnings, according to a Los Angeles County lawsuit. The complaint, filed by citizen group Shefa LMV, says the state’s Proposition 65 required businesses to start including warnings on products containing DEA a year after the state added the chemical to its list of carcinogens on June 22, 2012. CVS and health and beauty manufacturer PH Beauty Labs allegedly knew users of products sold under the CVS brand name and others would be exposed to DEA but continued to manufacture and sell them. The suit says the defendants should be subject to civil penalties of $2,500 per day for each violation.

*Shefa LMV LLC v. CVS Pharmacy Inc. et al., No. BCS20411, complaint filed (Cal. Super. Ct., L.A. County Sept. 4, 2013).*