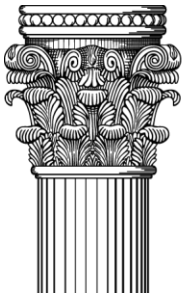

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TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

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RECENT TOXIC TORT CASES OF INTEREST

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INTRODUCTION

This edition of the ENVIRONMENTAL/TOXIC TORT NEWSLETTER contains decisions from the Texas Courts of Appeals and the Texas Supreme Court, as well as general information concerning toxic tort practice.

This paper attempts to analyze and/or provide pertinent excerpts from recent Texas activity and cases which address issues relevant to the environmental/toxic tort area of legal practice. Due to space limitations, every issue, fact or argument cannot be included and, consequently, this paper contains some of the most precedential, defining and/or reinterpreted issues currently at hand. Obviously, many of the decisions may be subject to rehearing, further appeal, or *en banc* consideration and should therefore be used "with caution" in the future. The following are excerpts from opinions which have addressed issues relevant to this topic. Quotation marks have been omitted but the following consists of quotes from the opinions in the form of a summary.

SUMMARY

As has been the situation over the past three reports of this newsletter, environmental litigation in Texas has maintained its diminished capacity in Texas as a result of the effects of Chapter 90 of the Texas Civil Practice & Remedies Code.

The silica docket remains silent, the asbestos docket continues movement at a slow pace. Very few, if any, cases are moving from the pre-trial docket to the trial docket. In fact, only thirty cases (approximately) have been certified for trial since the inception of Chapter 90. Judge Joseph "Tad" Halbach, Jr. is now the presiding judge of the silica multi-district litigation.

The asbestos docket remains stabilized. While the overall number of new case filings is down significantly from the pre-Chapter 90 level, Plaintiffs' firms are continuing to file new asbestos exposure cases in Texas. At the same time, these firms are also continuing to file suits in other, more friendly states.

During Summer 2010, the Multi-District Litigation courts for both asbestos and silica were required to submit their respective first accountings of the state of litigation in the era of Chapter 90. The silica docket, in particular, was the subject of competing suggestions from the plaintiff and defense bars to Judge Halbach in his impending report to the Legislature.

As reported in Mealey's Litigation Reporter Silica, John M. Black of Heard, Robins, Cloud & Black requested,

> that Judge Halbach should advise the Legislature to amend Section 90.008, which allows, but does not compel, plaintiffs to voluntarily dismiss their cases without prejudice if they are then unable to meet the requirements of Sections 90.004 or 90.010(d)… According to Black, cases filed prior to 2003 - before amendments to Texas Civil Practice and Remedies Code Chapter 33 fundamentally altered the proportionate responsibility scheme in Texas - have not been dismissed pursuant to Section 90.008 because the dismissal would prejudice a later-compliant plaintiff by robbing him of the substantive law currently applicable to his claim. Judge Halbach should recommend an amendment that would allow a plaintiff to voluntarily dismiss his claim to refile under the substantive law in effect when his claim was originally brought, Black says.
>
> Among other things, Black takes issue with the use of the AMA Guides to define functional impairment, citing a statement by the American College of Occupational and Environmental Medicine (ACOEM) that indicates that many workers have lung function that is above average and may lose lung function at an excessive rate but still remain in the normal range. The fact that they remain in this range does not mean they are healthy, and "[f]or these workers, the widespread practice of repeatedly comparing serial test results with the traditional normal range may not detect serious pulmonary function deterioration," according to the text Black cites. The ACOEM advocates using a longitudinal plot of a patient's own lung function deterioration over time to determine impairment, Black says.

8-11 Mealey's Litig. Rep. Silica 2 (2010).

Obviously, in response, the defense bar contended that Chapter 90 has achieved its purpose in eliminating claims without merit. In their response, they claimed that,

> Of the more than 5,000 exposed persons in the MDL, the certain defendants say, it is unknown how many meet the criteria of Section 90.004 because only 54 individuals, or about 1 percent of the total, have served medical reports in an attempt to comply; of these, 22 have already been deemed by the court not to pass Chapter 90 muster. The plaintiffs have proffered various reasons for their failure to serve more Section 90.004 medical reports, including financial considerations, lack of sufficient evidence of causation, failure to even be examined for silica-related disease and lack of client cooperation...
>
> "The fact that so many exposed persons did not try to meet the criteria does not mean . . . that the criteria are not effective or fair," the certain defendants argue. "Indeed, there is no evidence that any exposed person with a reliable diagnosis of a silica-related injury (as defined by the Texas Supreme Court) and impairment has been unable to pursue his or her claims. The fact that 99 percent or more of the plaintiffs chose not to pursue their claims for economic or other reasons is not a condemnation of Chapter 90, but a comment by those plaintiffs on the value they place on their claims."
>
> While maintaining that the Section 90.004 medical criteria are effective and need not be changed, the certain defendants suggest that Judge Halbach endorse continued use of the B-read process; identify and dismiss cases of plaintiffs who elect not to pursue complete testing or retesting for any reason; and recommend to the Legislature that Section 90.008 be amended to allow the judge to dismiss cases that are noncompliant for lack of B-reads, chest X-rays or medical examinations for silica-related injury.

8-11 Mealey's Litig. Rep. Silica 2 (2010).

As the asbestos docket continues to slowly progress, rumors exist that the Legislature may eliminate the Multi-District Litigation court, due to budgetary concerns as well as a decreased need for statewide oversight given the state of the litigation. If elimination occurs, the requirements of Chapter 90, particularly the medical requirements, will remain in place but will be applied by the individual trial courts.

As has been the case for many years since the advent of Chapter 90, toxic tort litigation in Texas continues to remain a shell of its former self. Plaintiffs' firms continue pursuit of litigation in other states, maintaining a high level of litigation activity and achieving some successes. In fact, in May 2011, the Dallas firm of Hossley & Embrey won a $322 million dollar verdict against Union Carbide in Mississippi in a drilling mud asbestos exposure case.

Robinson v. Crown Cork & Seal Co.
NO. 06-0714, SUPREME COURT OF TEXAS
2010 Tex. LEXIS 796; 54 Tex. Sup. J. 71, February 7, 2008
Argued, October 22, 2010, Opinion Delivered, Released for Publication April 29, 2011.

ISSUE: Whether a statute that limits certain corporations' successor liability for personal injury claims of asbestos exposure violates the prohibition against retroactive laws contained in article I, section 16 of the Texas Constitution as applied to a pending action.

FACTS: In 2002, petitioner Barbara Robinson ("Robinson") and her husband, John, Texas residents, filed suit alleging that John, age 63, had contracted mesothelioma from workplace exposure to asbestos products suing twenty-one defendants, including respondent Crown Cork & Seal Co., alleging that they were all jointly and severally liable. With respect to Crown, the Robinsons claimed that during John's service in the United States Navy from 1956 to 1976, he worked with asbestos insulation manufactured by the Mundet Cork Corporation, and that when Crown and Mundet merged, Crown succeeded to Mundet's liabilities. Crown has never itself engaged in the manufacture or sale of asbestos products. Crown acknowledged that under New York and Pennsylvania law, it succeeded to Mundet's liabilities, which, as pertaining to Mundet's asbestos business, have been hefty. Over the years, Crown has been named in thousands of lawsuits claiming damages from exposure to asbestos manufactured by Mundet. While Crown acquired Mundet for only about $ 7 million, by May 2003 Crown had paid over $ 413 million in settlements, and Crown's parent company estimated in its 2003 Annual Report that payments could reach $ 239 million more. At first, Crown did not contest its successor liability to the Robinsons for any compensatory damages; consequently, the trial court granted the Robinsons' motion for partial summary judgment on that issue. But about the same time, the Texas Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code, which limits certain corporations' successor liability for asbestos claims. For a covered corporation (again with some exceptions not relevant here), "the cumulative successor asbestos-related liabilities . . . are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation", including "the aggregate coverage under any applicable liability insurance that was issued to the transferor . . . collectable to cover successor asbestos-related liabilities". This cap does not apply to a successor that continued in the asbestos business after the consolidation or merger. By restricting application of the cap to a corporation that had never engaged in selling asbestos products itself and had succeeded to another's liability for asbestos claims at a time when the extent of that liability was not fully appreciated, the supporters of Chapter 149 intended to protect only what they called the "innocent successor".

Crown promptly moved for summary judgment under the new law, requesting that the prior order establishing its successor liability to the Robinsons be vacated and that their claims for asbestos exposure be dismissed. Crown asserted that the summary judgment evidence established that its merger with Mundet occurred before May 13, 1968, that it had never engaged in Mundet's insulation business, and that its successor asbestos-related liabilities, already more than $413 million, greatly exceeded the fair market value of Mundet's total gross assets determined as required by the statute – about $ 15 million in 1966 (some $ 57 million in 2003 dollars). Thus,

Crown contended, Chapter 149 barred the Robinsons from recovering on their claims. In response, the Robinsons argued that the record did not establish the applicability of Chapter 149, or if it did, the statute violated several provisions of the Texas Constitution.

The trial court granted Crown's motion. Days later, John Robinson died. [29] Barbara Robinson amended her petition to assert statutory wrongful death [30] and survival actions [31] against Crown and the other defendants still remaining in the case. (Several defendants had settled for amounts totaling $859,067 and been dismissed.) Without addressing these statutory actions, Crown moved to sever the summary judgment to make it final and appealable, [32] and the trial court granted the motion. The court also stayed proceedings in Robinson's case against the other defendants.

On appeal, Robinson contends that Chapter 149 is a retroactive law prohibited by article I, section 16 of the Texas Constitution. The law is well-settled, she asserts, that the Legislature has no authority to extinguish vested rights, and that her accrued cause of action against Crown is a vested right. A majority of the court of appeals did not "find the law on vested rights to be as consistent and lucid as Mrs. Robinson claims" [33] and concluded that it provides "no clear answer" to whether Chapter 149 is an invalid retroactive law.

The Supreme Court granted Robinson's petition for review.

HOLDING: After an exhaustive discussion of the appropriate standards by which a court reviews *ex post facto* issues, the Supreme Court held that a statute that limits certain corporations' successor liability for personal injury claims of asbestos exposure violates the prohibition against retroactive laws contained in article I, section 16 of the Texas Constitution as applied to a pending action, reversed the judgment of the court of appeals and remanded the case to the trial court. The Supreme Court stated:

> We think our cases establish that the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; it protects settled expectations that rules are to govern the play and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment. No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws in article I, section 17 of the Texas Constitution, courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.

In re Kan. City Southern Ry. Co.
NO. 14-11-00336-CV
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON
2011 Tex. App. LEXIS 3126, April 28, 2011, Memornadum Opinion Filed

ISSUE: Whether a writ of mandamus is available for failure to vacate a motion to dismiss for failure to serve a medical report compliant with Chapter 90.

FACTS: On April 20, 2011, relator The Kansas City Southern Railway Company filed a petition for writ of mandamus. In the petition, relator asks for an order to compel the Honorable Mark Davidson, Multidistrict Litigation pretrial judge of the 11th District Court of Harris County to vacate his order denying relator's motion to dismiss. On September 27, 2010, real parties in interest Nathaniel Dinkins, Vernon Brooks, Earnest Henderson, and Melvin Goines filed suit against relator alleging injury from exposure to "harmful and/or hazardous substances, including but not limited to dusts, fumes, and vapors." The suit is governed by the Federal Employers' Liability Act (FELA) 45 U.S.C. §51, et. seq. On December 10, 2010, relator filed a motion to dismiss pursuant to section 90.007 of the Texas Civil Practice and Remedies Code because the employees failed to serve a compliant report for any asbestos exposure claims.

HOLDING: Mandamus relief is available when the trial court abuses its discretion and there is no adequate remedy at law, such as by appeal. *In re Prudential Ins. Co*., 148 S.W.3d 124, 135-36 (Tex. 2004); *In re Dana Corp*., 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (*citing Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)). Section 51.014(a)(11) of the Texas Civil Practice and Remedies Code permits appeal from an interlocutory order that "denies a motion to dismiss filed under Section 90.007." Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(11). Consequently, a party challenging the denial of a motion to dismiss filed under Section 90.007 has an adequate remedy by appeal. Relator has not established entitlement to the extraordinary relief of a writ of mandamus. Relator's remedy lies with an interlocutory appeal of the trial court's order. Accordingly, relator's petition for writ of mandamus was denied.

Faust v. BNSF Ry. Co.
NO. 02-08-00226-CV
COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH
2011 Tex. App. LEXIS 644, January 27, 2011, Delivered

ISSUE: Whether a specific causation instruction is required in toxic tort cases.

FACTS: Linda Faust and Donnie Faust sued Appellee BNSF Railway Company (BNSF) for personal injuries and damages that they allegedly sustained from exposure to chemicals released by BNSF's wood treatment facility in Somerville, Texas. After a lengthy trial, a jury rendered a verdict in favor of BNSF, concluding that BNSF's negligence, if any, did not proximately cause Linda's stomach cancer. In two issues, the Fausts argue that the trial court committed reversible error by overruling their objection to a specific causation instruction and that the evidence is factually insufficient to support the jury's "No" answer to question number 1. A jury of the 96th District Court of Tarrant County, Texas, rendered a verdict for the company, finding that its negligence, if any, did not cause the wife's stomach cancer. Plaintiffs appealed.

HOLDING: The court of appeals found no error from a specific causation instruction stating that other plausible causes of plaintiff's gastric cancer had to be excluded with reasonable certainty. There was evidence that the cancer could have been caused by H. pylori or cigarette smoking, and the burden to exclude those other plausible causes of injury did not relate solely to the trial court's reliability inquiry under Tex. R. Evid. 702; thus the trial court's gatekeeper function was not improperly shifted. The court also held that the evidence was factually sufficient to support the jury's refusal to find that the owner was negligent, despite testimony from plaintiff's expert that the owner negligently operated the plant, in that it failed to properly dispose of waste; emitted harmful toxins into the atmosphere; failed to use a pollution control device on its boilers; failed to perform air monitoring of the emissions from the boilers; failed to inform its employees of the risks from chemicals used at the plant; and failed to heed various recommendations, including to provide its employees with protective clothing and equipment. The owner presented contrary evidence on each point. The appellate court affirmed.

The appellate court found that Fausts' argument disregards the distinction between the trial court's responsibility to determine whether proffered scientific evidence is based on a reliable foundation and, therefore, admissible and a proponent's burden to prove causation in a toxic tort case in which an expert relies on epidemiological studies to support his opinion that the plaintiff's exposure to a particular substance caused the plaintiff's complained-of injury.

Markwardt v. Tex. Indus.
NO. 14-09-00335-CV
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON
325 S.W.3d 876; 2010 Tex. App. LEXIS 9300, November 23, 2010, Opinion Filed

ISSUE: Whether the continuing tort and fraudulent concealment doctrines apply to personal injury and property damage claims.

FACTS: Appellant property owner challenged a decision of the 40th District Court, Ellis County (Texas), which granted summary judgment under Tex. R. Civ. P. 166a(c) to appellee company in the owner's action for trespass, nuisance, negligence, and gross negligence. The owner alleged the she suffered damages arising out of emissions from the company's cement plant, located near the owner's property. The trial court granted the company summary judgment and the court affirmed. The owner alleged the she suffered damages arising out of emissions from the company's cement plant, located near the owner's property. The trial court granted the company summary judgment and the court affirmed.

HOLDING: For statute of limitations purposes under Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Supp. 2009), the alleged nuisance that began in 1987 or 1988 was classified as permanent and the owner did not assert any new and different nuisance that began within two years of her filing suit. The owner's claims were barred by limitations. By 2001, a doctor had suggested to the owner a connection between the company's emissions and her conditions, plus water testing revealed contamination that alleged caused her health problems. Thus, the owner knew or should have known by 2001 that her health problems were allegedly caused by the company's emissions. The continuing tort doctrine could not apply to the owner's causes of action for nuisance and real-property damages. Even courts of appeals addressing the doctrine held it did not apply to permanent injury to land. The trial court did not err by refusing to apply the fraudulent concealment doctrine. The court affirmed.

Pink v. Goodyear Tire & Rubber Co.
NO. 09-09-00241-CV, COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT
324 S.W.3d 290; 2010 Tex. App. LEXIS 7461
April 8, 2010, Submitted, September 9, 2010, Opinion Delivered, Petition for review filed by, 10/27/2010

ISSUE: What the propoer standard in evaluation of a no-evidence motion for summary judgment is.

FACTS: Alleging that his exposure to benzene while working at Goodyear Tire & Rubber Company caused renal cell carcinoma, Veryl L. Pink and his wife Charlcie Pink sued Goodyear and a number of product suppliers, including Texaco Refining & Marketing, Inc. After Veryl's death, Charlcie Pink maintained the lawsuit. In this appeal, Pink contends the trial court erred in granting a no-evidence motion for summary judgment filed by Goodyear, and in signing a take-nothing judgment in favor of Texaco. No issue is raised on appeal concerning the judgments granted in favor of other defendants.

HOLDING: Having voluntarily discontinued the lawsuit against the supplier in trial court, the widow could not complain of that disposition for the first time on appeal. The company owed a decedent a duty to use ordinary care in providing a safe workplace, for purposes of Tex. Lab. Code Ann. § 411.103 (2006). The treating oncologist's report referenced materials he consulted. The court could not say that the opinion concerning etiology was conclusory. The court was not to consider the company's reliability objections as implicitly sustained by the trial court. The necessary process missing was a hearing under Tex. R. Evid. 104(a). Without an express ruling that the oncologist's causation opinion was unreliable, however, the treating oncologist's affidavit remained part of the proof and provided some evidence to defeat the no-evidence motion. Reversal as to the company was required.

The judgment as to Texaco is affirmed, because Pink voluntarily discontinued the lawsuit against Texaco. Texaco did not file an answer in the trial court to Pink's petition. Pink did not file a non-suit of the claims against Texaco. After the trial court granted several summary judgments in favor of some defendants and signed an order of non-suit as to other defendants, Pink requested that the trial court sign a final appealable judgment disposing of all the claims; Pink did not request a severance of the claims against Texaco or a default judgment against Texaco. Pink did not complain in the trial court of the judgment disposing of the claims against Texaco. Having voluntarily discontinued the lawsuit against Texaco in the trial court, Pink may not complain of that disposition for the first time on appeal.

Pink produced some evidence supporting the elements of a claim against Goodyear. They reversed the trial court's summary judgment as to Goodyear and remanded the case to the trial court for further proceedings consistent with the opinion.

Georgia-Pacific Corp. v. Bostic
No. 05-08-01390-CV, COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS
320 S.W.3d 588; 2010 Tex. App. LEXIS 7072,
August 26, 2010, Opinion Filed, Released for Publication October 28, 2010.
Petition for review filed by, 11/12/2010

ISSUE: What the degree of proof of causation is in asbestos litigation.

FACTS: Appellant company challenged a decision of the County Court at Law No. 1, Dallas County (Texas), which, after granting a motion to vacate an order granting a new trial, entered judgment for appellees, a wife, individually and as personal representative, a son, and a mother, for their negligence and strict liability marketing defect claims. A jury found that the company was 75 percent liable for the worker's death. Appellees claimed that the company was negligent, strictly liable for a product marketing defect, and grossly negligent. The trial court awarded appellees damages

HOLDING: The court reversed the judgment and rendered judgment that appellees take nothing on their claims against the company. Because a plaintiff had to prove that a defendant's conduct was a cause in fact of the harm, appellees' evidence did not satisfy the required substantial factor causation elements for maintaining their suit. The court agreed that appellees did not establish substantial factor causation to the extent they improperly based their showing of specific causation on their expert's testimony that each and every exposure to asbestos caused or contributed to the worker's mesothelioma. There was insufficient evidence of the worker's frequent and regular exposure to the company's joint compound during the relevant time period.

UOP, L.L.C. v. Kozak
NO. 01-08-00896-CV, COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON
2010 Tex. App. LEXIS 3876, May 20, 2010, Opinion Issued

ISSUE: Whether a certificate of merit is required for claims against contractors.

FACTS: The deceased worked at an oil refinery for several decades. The claimants alleged that the company designed the oil refinery and acted afterwards as a general contractor at the refinery facility. In 2005, the deceased died of mesothelioma, a form of cancer usually linked to asbestos exposure. The claimants did not procure a certificate of merit, and argued that they should be excused from the requirement because the facility in question no longer existed. The company argued that the trial court abused its discretion by not dismissing the remaining failure-to-warn claim.

HOLDING: The appellate court ruled that the failure-to-warn claim, whether alleged against the company in its capacity as a designer or general contractor, was a claim for damages arising out of the provision of professional services by a licensed or registered professional engineer within the meaning of former Tex. Civ. Prac. & Rem. Code Ann. §150.002(a). The alleged source of the company's knowledge concerning asbestos was the same regardless of the capacity in which it was sued. Also, the failure-to-warn claim alleged against the company in either capacity sounded in negligence. The order was reversed to the extent that it denied the company's motion to dismiss the failure-to-warn claim against the company, the order was affirmed in all other respects, and the case was remanded with instructions for the trial court to dismiss the referenced claim.