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JOURNAL SPECIAL REPORT

A Texas success story: Asbestos and silica lawsuit reform

Ending abusive litigation and restoring fairness

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On the cover:
View of the Texas Supreme Court bench and Latin inscription, *sicut patribus, sit Deus nobis,* or "Just as to our fathers, may God be to us."

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TEXAS CIVIL JUSTICE LEAGUE JOURNAL
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A Texas success story: Asbestos and silica lawsuit reform
Ending abusive litigation and restoring fairness

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Front matter

Texas courts were overwhelmed with asbestos-injury cases—and were becoming inundated in silica-injury cases—when the Texas Legislature passed S.B. 15 in 2005. In passing S.B. 15, the Texas Legislature led the nation in addressing the obvious and widespread abuses in asbestos and silica litigation.

The success of S.B. 15 in achieving the Legislature's objectives is unquestionable. People who have been truly injured by exposure to asbestos or silica have their "day in court" quickly, while those who may have an asbestos-related or silica-related disease, but who are not currently suffering health impairment, are able to pursue their cases when and if a disease manifests.

The purpose of this special issue is to report on the current state of asbestos and silica litigation in Texas state courts. We begin Part One with an article providing a brief history of asbestos and silica litigation in the United States and an overview of the legislative efforts in Texas to address abuses in asbestos and silica litigation (see **How did we get here?** on page 3). We follow the introductory article with a description of asbestos and silica litigation in Texas's two multidistrict litigation pretrial courts handling asbestos and silica cases (see **The current status of asbestos and silica litigation** on page 7). You'll see that, in compliance with S.B. 15, the MDL pretrial courts are fairly and efficiently handling cases involving thousands of plaintiffs.

In Part Two, we turn to recent issues in asbestos litigation; and specifically to the science-based evidentiary standards required by the Texas Supreme Court's decision in *Borg-Warner Corp. v. Flores.* The first article (**Science v. Speculation** on page 14) provides a scholarly discussion of "causation" and *Borg-Warner.* The article is followed by a commentary by former Texas Supreme Court Justice Scott Brister about *Borg-Warner* (see **Brister on Borg-Warner** on page 21). This commentary was taken from Justice Brister's 2010 testimony to a House committee and provides an eloquent defense of the need for the law to follow (not ignore) science.

Part Three focuses on asbestos claimant compensation. The first article discusses the role of bankruptcy trusts in compensating asbestos claimants, and shows how the bankruptcy trust payment system can provide substantial compensation to asbestos victims, but is a "black box" system that remains hidden from public scrutiny (see **The role of bankruptcy trusts** on page 25). The second article discusses the relationship between attorney fees charged to claimants and claimant recoveries (see **Attorney fees** on page 28).

Part Four provides resource materials. It includes a **Legal and legislative timeline** (page 31), **Asbestos and silica lawsuit reform bill summaries** (page 33), and the text of the two MDL pretrial judges' reports (see **2010 MDL court reports** on page 35).

This special issue is intended primarily to provide information about asbestos and silica litigation in Texas. It does not make legislative recommendations, although possible statutory changes may be drawn from the material. We hope it is useful to members of the Texas Legislature and others who are interested in asbestos and silica litigation in Texas and nationwide.

PART ONE

Senate Bill 15

Ending asbestos lawsuit abuse and opening courts for legitimate cases

How did we get here?

Brief history of Texas asbestos and silica litigation

The great bulk of asbestos litigation in Texas resulted from entrepreneurial activity by lawyers who filed lawsuits on behalf of tens of thousands of people suffering no discernable illness. Enterprising lawyers then decided to replicate the asbestos-litigation model with silica litigation, again filing cases on behalf of thousands of people suffering no injury. With the passage of S.B. 15 in 2005, the Texas Legislature took a leading role in the national effort to end the abusive aspects of asbestos and silica litigation.

Asbestos exposure and disease

Asbestos is the name given to a number of naturally occurring fibrous minerals with high tensile strength, the ability to be woven, and superior resistance to heat and chemicals. Because of its unique properties, asbestos was used extensively in industrial applications from the 1930s to the early 1970s, when its use peaked in the United States. Among other things, it was used to help protect warships from destruction by fire and in a wide range of goods, including insulation, roofing shingles, ceiling and floor tiles, paper and cement products, textiles, coatings, and automobile clutch, brake, and transmission parts.

There is no question that asbestos exposure can cause injury and death. It has been linked to a number of diseases, ranging from relative innocuous lung-tissue scarring to an often-fatal form of cancer called mesothelioma. (See page 15 discussing the health effects of asbestos exposure.) Most commentators agree that millions of American workers may have been exposed to asbestos during the time when its use was common in the United States.

Because of the serious health implications associated with asbestos exposure, asbestos use has declined dramatically since 1973. Today, it is used in very few products, and its use is tightly regulated.

The first three decades of asbestos litigation[1]

The effects of asbestos exposure began to be studied in the 1960s, and asbestos-related personal injury cases began to be filed throughout the United States shortly thereafter. Most of the early cases were unsuccessful. Asbestos-related litigation took flight, however, in 1973 when the United States Fifth Circuit Court of Appeals decided *Borel v. Fiberboard Paper Prod. Corp.*[2] In *Borel*, the court held that asbestos manufacturers could be strictly liable under a product liability theory for injuries caused to workers exposed to the manufacturers' asbestos products. (See *Borel* sidebar on page 22.) Initially, asbestos litigation targeted the companies that manufactured products containing large amounts of asbestos, such as the manufacturers of asbestos-containing insulation, because the asbestos fibers in many of these products were relatively loose or easily disturbed, which allowed the fibers to be inhaled.

Within a decade of the *Borel* decision, more than 20,000 claimants had joined lawsuits alleging injuries from asbestos exposure. Johns-Manville Corp., the nation's largest supplier of asbestos-containing insulation products, was a defendant in many of these cases. In 1982, the crush of asbestos litigation caused Johns-Manville to declare bankruptcy. At the time Johns-Manville filed bankruptcy, it had about 16,000

asbestos claims pending against it—but that was nothing compared to what other defendants would see happen. The real tidal wave was yet to come.

By the early 1990s, between 15,000 and 20,000 new asbestos lawsuits were being filed each year in the United States. By the late 1990s, the yearly filings had doubled.

By the early 1990s, between 15,000 and 20,000 new asbestos lawsuits were being filed *each year* in the United States. This rate of case filing prompted a blue-ribbon panel appointed by the United States Supreme Court to state that the asbestos litigation situation had "reached critical dimensions" and was "getting worse."[3] But the case filings continued, faster than ever.

By the late 1990s, the yearly filings had doubled again. In 1997, the United States Supreme Court declared an "asbestos-litigation crisis."[4] But declaring a crisis did not stem the tide of asbestos-case filings, which continued unabated.

By the mid-2000s, it is estimated that more than 700,000 people had filed claims for asbestos-related injuries in United States courts, and there was no end in sight. Texas was a magnet for asbestos litigation. From 1988 through 2005, more asbestos-related lawsuits were filed in Texas than in any other state. No one knows for sure how many asbestos plaintiffs filed cases in Texas during the heyday of asbestos lawsuit filing, but everyone agrees that it was in the tens of thousands.

The filing of tens of thousands of lawsuits by hundreds of thousands of claimants had a direct and substantial effect on American businesses. By mid-2004, seventy-three companies had filed bankruptcy due to the weight of asbestos litigation. Bankruptcies had cost United States workers an estimated 60,000 jobs by 2002.[5] Through the end of 2002, it is estimated that defendants and insurers had spent a total of $70 billion on asbestos litigation. Another twenty-three companies have filed bankruptcy since then, bringing the total to ninety-six.[6] Sixty-three of these bankruptcy filings have resulted in the establishment or the proposed establishment of asbestos victim compensation trust funds,[7] which are believed to have as much as $60 billion in assets available to pay asbestos-injury claims.[8]

Asbestos litigation abuse

The worst kept secret in United States courthouses was that the vast majority of plaintiffs in the tens of thousands of asbestos cases were unimpaired and had been signed-up by enterprising lawyers who paid litigation screening companies to identify potential asbestos claimants. The highly profitable screening process identified individuals with markings inside their lungs (detected by an x-ray often taken in the back of a van in a parking lot) that allegedly were "consistent with" asbestos-related disease. No actual diagnosis of a disease would be made, so it is not surprising that the vast majority of the plaintiffs were not experiencing symptoms of any asbestos-related disease.

Texas was a magnet for asbestos litigation. From 1988 through 2005, more asbestos-related lawsuits were filed in Texas than in any other state.

Large numbers of these unimpaired plaintiffs would be lumped into a single case that typically also included a few plaintiffs suffering mesothelioma or another type of cancer allegedly caused by asbestos exposure. The plaintiffs would be represented, of course, by the lawyer who paid the screening company. Thus, each individual case typically contained hundreds of plaintiffs, and tens of thousands of these cases were pending.

The magnitude of the litigation was overwhelming and unmanageable. And, to make matters worse, those suffering mesothelioma—who were truly injured—seemed to be nothing more than pawns in the game. Typically, their claims would be set for trial along with the claims of dozens of unimpaired claimants to enable the plaintiffs' lawyer to argue that the unimpaired claimants would eventually suffer from the same horrible disease as the mesothelioma victims. Facing the risk that a jury may agree with the plaintiffs' counsel that the unimpaired claimant may suffer from the same horrible disease, defendants were forced to settle the claims of the unimpaired claimants. Because they were pawns in the game, mesothelioma victims had their claims presented only when the plaintiffs' attorney determined it to be in the best interest of the case as a whole.

Legislation offered in 2003 and 2005 to cure the abuse

The patina of legitimacy for asbestos litigation had worn off by 2003 (if not long before). The litigation was abusive to the

judicial system and the defendants; but it was particularly abusive to the claimants suffering from mesothelioma. The status quo was utterly indefensible.

In the early days of the 2003 legislative session, several members of the Texas Legislature decided to try to fix the problem. Senator Kyle Janek introduced S.B. 496 and Representative Joe Nixon introduced H.B. 1240. Both bills proposed to implement medical criteria for determining impairment resulting from a non-malignant asbestos-related disease and to create an "inactive docket" to house cases in which the plaintiffs could not meet the medical criteria.

The two bills passed out of their respective committees, but were opposed by lawyers who had invested in asbestos-case manufacturing and reaped substantial benefits from their efforts. These lawyers, who apparently did not see a problem needing a solution, secured the help of a sufficient number of "blockers" in the Senate to kill S.B. 496. The House chose not to move its bill, knowing that it would not pass the Senate.

Things changed in 2005. Governor Perry declared in his state-of-the-state address that the Legislature needed to "end Texas's status as the home of frivolous asbestos lawsuits." Lieutenant Governor Dewhurst made asbestos litigation a priority for the Senate.

Senator Janek introduced S.B. 15, again crafted to move unimpaired asbestos claimants to an inactive docket and to allow these plaintiffs to reinvigorate their cases when they met scientifically valid medical criteria for asbestos-related diseases. But S.B. 15 also added something new—medical criteria to govern silica litigation.

Silica litigation abuse

Silica-caused illness was not unknown in the United States before 2005, but silica-disease litigation was relatively uncommon. Because of government intervention dating to the 1930s, workers for decades had been taking precautions against inhalation of silica dust to prevent silica-related disease. Consequently, the incidence of silicosis (a non-malignant silica-related disease) was limited, as was the number of silica lawsuits filed each year in the United States. This trend, however, changed unexpectedly and dramatically in 2002.

In 2002 one of the nation's largest suppliers of industrial sand had ten times more silica-injury cases filed against it than had been filed against it the year before. In 2003, it had more than 15,000 new claims filed against it in the first six months of the year, three times the number of claims filed against it in 2002—a number that had shattered the previous record. Given that nothing had happened in the United States to suggest a silica-*disease* epidemic, it seemed clear that there was a silica-*litigation* epidemic.

As with asbestos litigation, it turned out that individuals allegedly having silicosis were being identified through the efforts of enterprising lawyers applying the techniques used to generate asbestos cases. This time, however, some of the lawyers elected to save money by avoiding the expense of having an x-ray performed. Instead, they hired doctors to re-read old asbestos-claimant x-rays.

Astonishingly, these doctors found that an incredibly high percentage of people previously found to have a non-malignant asbestos-related disease also might have lung scarring consistent with a non-malignant silica-related disease. As with asbestos-related cases, the lawyers then filed cases on behalf of groups of plaintiffs against multiple defendants. And, as with asbestos-related cases, most of these plaintiffs were not exhibiting signs of silica-related illness.

Passage of legislation to cure the abuse in 2005

With evidence of a second but related kind of abusive litigation, S.B. 15 proposed medical criteria to be applicable to both silica and asbestos-disease cases.

Because of the Lieutenant Governor's support of S.B. 15, the opponents of reform knew they could not muster a sufficient number of blockers to prevent the bill from passing the Senate. Faced with certainty that the days of abusive litigation were numbered, the bill's opponents entered into negotiations with the reformers, and a compromise was reached.

The "compromise bill" passed the Senate April 27, 2005, and passed the House two weeks later, May 11, 2005. The Governor signed S.B. 15 into law May 19, 2005, and it became effective September 1, 2005.

The stated purpose of S.B. 15 was "to protect the right of people with impairing asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos or silica but have no functional or physical impairment from asbestos-related or silica-related disease."

Evaluating the effectiveness of S.B. 15

To ensure that the law accomplished its purpose and did not impose injustice on litigants in Texas, the Legislature dictated

that it be provided information about the effectiveness of S.B. 15 on or before September 1, 2010, as follows:

Each MDL pretrial court having jurisdiction over cases to which this chapter applies shall deliver a report to the governor, lieutenant governor, and the speaker of the house of representatives stating:

> (1) the number of cases on the court's multidistrict litigation docket as of August 1, 2010;
>
> (2) the number of cases on the court's multidistrict litigation docket as of August 1, 2010, that do not meet the criteria of Section 90.003 or 90.004, to the extent known;
>
> (3) the court's evaluation of the effectiveness of the medical criteria established by Sections 90.003 and 90.004;
>
> (4) the court's recommendation, if any, as to how medical criteria should be applied to the cases on the court's multidistrict litigation docket as of August 1, 2010; and
>
> (5) any other information regarding the administration of cases in the MDL pretrial courts that the court deems appropriate."[9]

The MDL pretrial courts handling the asbestos and silica dockets filed their reports in a timely manner. Both conclude that S.B. 15 is achieving its goals. (See article on page 7. The judges' reports begin on pages 35 and 37.) Appropriately, neither judge comments on whether the dockets are full of cases that were generated by lawyers for profit and should not have been filed in the first place; but "reading between the lines" of the reports, that conclusion is warranted. The reports show that S.B. 15 successfully moved the cases that should not have been filed to an "inactive" docket, thus opening Texas courts to people who have a legitimate case and deserve their "day in court."

This publication is written to expand on the reports written by the MDL judges and to provide further information about the state of asbestos and silica litigation in Texas.

Post-2005 activity related to asbestos and silica litigation

In 2007 there was legislative activity related to asbestos litigation. The state district judge overseeing pretrial proceedings in asbestos cases pending in Texas courts indicated his concern that trials in some mesothelioma cases were being postponed, which defeated part of the purpose of S.B. 15. In response, the proponents and opponents of S.B. 15 reached an agreement during the 2007 legislative session on a bill intended to ensure that the cases would proceed to trial without delay, thus preserving one of the goals of S.B. 15.[10]

The next important event occurred June 8, 2007, when the Texas Supreme Court handed down its opinion in *Borg-Warner Corp. v. Flores*. In *Borg-Warner*, the court held that a plaintiff in an asbestosis case must present "defendant-specific evidence relating to the approximate dose [of asbestos] to which the plaintiff was exposed."[11] According to the court, "[i]t is not adequate to simply establish that 'some' exposure occurred. Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred."[12] The holding from *Borg-Warner* was quickly applied by lower courts to mesothelioma cases.[13]

The *Borg-Warner* decision prompted the filing of two bills during the 2009 legislative session: S.B. 1123 by Senator Robert Duncan and H.B. 1811 by Representative Craig Eiland. These identical bills sought to legislatively overrule *Borg-Warner* in part by providing that a plaintiff in a mesothelioma case could not be required to prove "for any purpose, a quantitative dose, approximate quantitative dose, or estimated quantitative dose of asbestos fibers to which the exposed person was exposed." S.B. 1123 passed the Senate, but died in the House Judiciary and Civil Jurisprudence Committee, along with H.B. 1811.

The failure of S.B. 1123 and H.B. 1811 to pass prompted the House Judicial and Civil Jurisprudence Committee to hold a hearing in May 2010, during the interim between the 81st and 82nd legislative sessions, to discuss *Borg-Warner* further.

Finally, the most recent notable event relating to asbestos and silica litigation occurred September 1, 2010, when the MDL judges' reports—required by S.B. 15—were provided to the legislature. For all that has happened in asbestos and silica litigation over the years, the reports (which are reprinted in this publication) are quite brief.

Current status of Texas asbestos and silica litigation

The Texas Legislature deserves credit for passing S.B. 15—the asbestos and silica medical criteria bill—in 2005. Five years after S.B. 15 took effect, the success is obvious: S.B. 15 helped eliminate some of the most abusive mass tort litigation in this nation's history while, at the same time, re-opening Texas's courts to people who are truly injured.

Handling asbestos and silica cases in Texas through the MDL process

In 2003 the Texas Legislature passed H.B. 4, which included a provision creating the Judicial Panel on Multidistrict Litigation. The Legislature empowered the MDL Panel to designate district courts (called "MDL pretrial courts") to which factually similar cases from throughout Texas would be transferred for consolidated pretrial proceedings.[14] The Legislature also asked the Texas Supreme Court to enact procedural rules governing the transfer of cases. In compliance with the legislation, the Court promulgated Texas Rule of Judicial Administration 13 and designated the initial members of the MDL Panel.[15]

Two of the earliest MDL pretrial courts designated by the MDL Panel were for asbestos and silica cases pending in Texas trial courts.[16] District Judge Mark Davidson of Harris County was appointed as the MDL judge for asbestos litigation in January 2004.[17] Harris County District Judge Tracy Christopher was appointed as the MDL judge for silica litigation in November 2004. Subsequently, Judge Christopher was appointed to Texas's Fourteenth Court of Appeals, and Harris County District Judge Joseph J. "Tad" Halbach, Jr., was appointed as the silica MDL pretrial judge in December 2009.

In summary, the MDL process works this way:

(1) A defendant who is named in multiple factually similar cases files a motion with the MDL Panel asking that the cases be consolidated for pretrial proceedings.

(2) The plaintiffs respond.

(3) The Panel decides whether the cases are sufficiently similar to be consolidated.

(4) If the Panel decides that the cases are appropriate for pretrial consolidation, it designates a single trial court to preside over the consolidated cases, and orders the transfer of the cases to the MDL pretrial court from the originating courts.

(5) Other defendants having similar cases ("tag-along cases") then may ask that their cases be transferred to the MDL pretrial court. The MDL Panel also may institute rules for the regular transfer of tag-along cases.

(6) Once the cases are transferred, it is common for the pretrial court to issue a "case management order" governing proceedings in all transferred cases. The point of the order is to ensure quick and equal treatment of all cases and to streamline the pretrial discovery process by reducing redundant requests and responses.

(7) The MDL pretrial court is authorized to rule on all pretrial motions, which can include motions for summary judgment and other motions that may dispose of the case without a trial.

(8) When discovery and other pretrial proceedings are completed and a case is ready for trial, the plaintiff will ask that the case be returned to the originating court.

(9) The MDL pretrial court will transfer the case back to the originating court, which conducts the trial of the case. The originating court typically cannot change rulings made by the MDL pretrial court.

Through this process, virtually all asbestos cases pending in Texas state courts were transferred to Judge Davidson's court (the 11th District Court) during 2004 and 2005. Similarly,

virtually all silica cases pending in Texas state courts were transferred to Judge Christopher's court (the 295th District Court) during 2005, and subsequently transferred to Judge Halbach's court (the 333rd District Court) in 2009. Consequently, for more than five years—to the great benefit of the judicial system, the parties, and the taxpayers of Texas—these very capable judges have handled all pretrial proceedings for all Texas asbestos and silica cases.

The MDL courts' work: By the numbers

As noted in the introductory article, the two MDL pretrial courts were required by S.B. 15 to provide status reports to the Legislature on or before September 1, 2010. Neither judge reported the number of cases transferred to the MDL pretrial courts, but both reported the number of cases pending on the MDL dockets.

Judge Davidson has reported to the Legislature that as of August 1, 2010, there are 7,959 cases pending on the MDL asbestos docket. (See Judge Davidson's report on page 35.) Of these, 6,451 are inactive cases and 1,517 are active cases. These figures have little to do with the number of plaintiffs in the asbestos MDL. While the 1,517 active cases all are single exposed-person cases, most of the inactive cases are multi-plaintiff cases. There are many plaintiffs whose cases are jointly filed and sitting on the inactive docket. According to Judge Davidson, "[t]he number of plaintiffs in those cases is difficult, and probably impossible, to calculate. I have heard estimates of the number of inactive plaintiffs that range between 25,000 and 84,000…For the most part, these are cases that are indefinitely abated until such a time, if any, that the plaintiff's breathing ability diminishes to the point that they meet the criteria."

The silica MDL has a much smaller number of pending cases—only 667. In responding to a "census" order entered by the silica MDL pretrial court, plaintiffs' attorneys reported a total of 5,122 exposed persons in these 667 cases. (See Judge Halbach's report on page 37.) The defendants responded that they believed the plaintiffs' attorneys may have underreported the number of exposed persons. The defendants' counsel advised the court they believe the true number is 5,839. A motion to address the issue of "missing plaintiffs" was filed in September 2010 and is pending.

Distinguishing between malignancy and non-malignancy cases

The heart of S.B. 15 is its medical criteria and the interplay the law creates between the medical criteria and litigation. This interplay manifests in the distinction S.B. 15 made between cases in which the plaintiff alleges a malignant asbestos or silica-related disease and cases in which the plaintiff alleges only a non-malignant disease.

In regard to non-malignant diseases, S.B. 15 sets out medical criteria for determining whether a person is suffering from a legally compensable asbestos or silica-related disease. The basic idea is that a non-malignant disease will not be regarded as compensable in law unless the plaintiff files a report incorporating a doctor's diagnosis—applying the statute's criteria—that the plaintiff has an actual impairment attributable to exposure to asbestos or silica. The statutory criteria are detailed, but represent only the minimum criteria necessary under medical science to establish an actual impairing disease.

In regard to malignant diseases, the statute merely requires that the plaintiff file a report incorporating a doctor's diagnosis of a malignant disease attributable to exposure to either asbestos or silica.

The effect of S.B. 15 was to make "inactive" thousands of asbestos and silica cases that were transferred to the two MDL pretrial courts because the plaintiffs cannot meet—or have not made the effort to meet—the minimum medical criteria set out in the statute.

Thus, a plaintiff with a pending asbestos or silica case cannot proceed to trial until a report fulfilling the statutory criteria is filed. The effect of S.B. 15 was to make "inactive" thousands of asbestos and silica cases that were transferred to the two MDL pretrial courts because the plaintiffs cannot meet—or have not made the effort to meet—the minimum medical criteria set out in the statute. (The MDL pretrial courts' reports detailing the number of cases that have met the statute's criteria can be found on pages 35 and 37 and are discussed below.)

The status of Texas-based asbestos litigation: The truly sick get their day in court

Literally thousands of asbestos cases were transferred to the asbestos MDL pretrial court in 2004 and 2005 from trial courts across Texas. Most of these cases were filed on behalf of dozens or hundreds of plaintiffs, and most of the plaintiffs were alleging a non-malignant disease caused by asbestos exposure.

A great majority of the cases in which a plaintiff has alleged a non-malignant disease have not filed the report necessary to move off the "inactive docket," so these cases are not consuming much of the MDL court's time. This phenomenon was not unexpected or unwanted. These cases probably should not have been filed in the first place, and one goal of S.B. 15 was to set these cases to the side, at least temporarily.

A plaintiff alleging a malignant disease caused by asbestos exposure may proceed with his or her case by filing a report, supported by a qualified doctor's diagnosis of an asbestos-related disease. To date, a number plaintiffs (mostly mesothelioma plaintiffs) have filed the necessary report and proceeded with their case in the asbestos MDL. Thus, the asbestos MDL pretrial court has been active since passage of S.B. 15, dealing almost exclusively with mesothelioma and other cancer cases.

One of the goals of S.B. 15 in 2005 was to ensure that plaintiffs suffering from a real asbestos-related disease could obtain their day in court as quickly as possible.

As noted in the introductory article, one of the goals of S.B. 15 was to ensure that plaintiffs suffering from a real asbestos-related disease could obtain their day in court as quickly as possible. The Legislature sought to accomplish this goal three ways. First, non-malignancy cases are set aside and do not clog the court's docket. Second, multi-plaintiff cases are banned, thus decoupling plaintiffs suffering a malignant disease from plaintiffs having no actual injury.[18] Consequently, the malignancy cases are able to proceed through the MDL process and to trial fairly quickly. Third, many malignancy cases are supposed to be expedited by the MDL pretrial court. Section 90.010(c) provides that the MDL pretrial court "shall expedite" an action in which the exposed person is living and has been diagnosed with a malignant disease. The MDL pretrial court "should, as far as reasonably possible, ensure that such action is brought to trial or final disposition within six months from the date the action is transferred to the MDL pretrial court."

In his September 2010 report to the Legislature, Judge Davidson noted that S.B. 15 was achieving its goal.

> My opinion of the "effectiveness" of the medical criteria depends on what the intent of the Legislature was in enacting the statute. The criteria make it difficult, if not impossible, for a person with no or few pulmonary problems to seek redress. That is a legitimate public policy well within the purview of the Legislature. A public policy concern that was enunciated at the time of enactment of Chapter 90 was to allow the sickest to be able to proceed in our courts. The relative ease of meeting the criteria for cancer patients and the preference given those cases certainly have aided that goal. In summary, I cannot conclude that the medical criteria have deterred many of the sickest Plaintiffs, those with cancer or serious medical problems caused by asbestos, from effective access to the courthouses of our state.

Because of Section 90.010's requirement for expedited treatment of cases in which a malignancy is alleged and the injured person is alive, the MDL pretrial court has provided that the plaintiff's lawyer can put these cases on a "fast track" in compliance with the terms of the case management order (CMO). The CMO provides that fast-track cases are to be remanded to the originating court for trial within 120 days from the date the case is certified as ready for trial, while normal-track cases are to be remanded 180 days from certification.

The concept of "certification" is one implemented by the asbestos MDL pretrial court to help manage the hundreds of cases pending in that court. Under the "certification" process, plaintiffs are required to request a trial setting and certify that the case is ready for a trial setting. Although the procedures are somewhat different for "fast track" cases and "normal track" cases, the plaintiffs are required to certify that written discovery responses have been provided and the primary depositions have been concluded. The defendants are provided an opportunity to object to certification and request outstanding records and discovery. Practitioners in the asbestos MDL report that this procedure has been very useful in minimizing requests for continuance.

The asbestos MDL pretrial court adopted the CMO fairly quickly after being designated as the MDL court for asbestos cases.[19] Among other things, the CMO creates an orderly pre-trial procedure for conducting discovery in all pending asbestos cases. As a part of the CMO, a set of "master" discovery requests were adopted for plaintiffs and defendants. This has eliminated many of the discovery battles and inconsistencies in rulings that existed prior to the creation of the asbestos MDL pretrial court.

Additionally, Judge Davidson has conducted a number of hearings in which he has decided issues having broad application to the asbestos-case docket. For example, early in his tenure as the MDL pretrial judge, he considered whether expert testimony could support a conclusion that mesothelioma could be caused by exposure to brake linings in automobiles and trucks, a decision that was applicable to plaintiffs and defendants in a large number of cases.[20] Later he considered the applicability of Texas's *forum non conveniens* statute (allowing the dismissal of a case that is brought in a court that is inconvenient for the parties and witnesses) to mesothelioma cases filed in Texas by out-of-state plaintiffs.[21] Clearly, the forum provided by the MDL court is conducive to issues common to the litigation being fully briefed and argued with appropriate witnesses being presented. And it ensures consistent decisions on these widely applicable issues.

The general consensus among the litigants practicing in the asbestos MDL pretrial court is that the predictable procedures, certification process, and pre-trial hearings have provided the consistency and predictability intended by H.B. 4 (2003).

Furthermore, over the past six and a half years, Judge Davidson has established procedures to create uniformity and consistency in the asbestos MDL court. Each Friday morning, for example, Judge Davidson hears motions in asbestos cases pending in the MDL. The hearings usually last from one to three hours, and there is a systematic approach at each hearing: trial certifications, motions for summary judgment, and all other motions are called before the court.

Judge Davidson also sets pretrial hearings for all cases that have been certified as being ready for trial. These pretrial hearings typically occur approximately seven to ten days before the trial setting. At the pretrial hearing, Judge Davidson rules on pending issues, including objections to exhibits, objections to deposition testimony, and any other pretrial motions that may remain. Then he orders the transfer of the case back to the originating court for trial. In other words, the asbestos MDL pretrial court manages these cases virtually up to the day of trial.

The general consensus among the litigants practicing in the asbestos MDL pretrial court is that the predictable procedures, certification process, and pretrial hearings have provided the consistency and predictability intended by the enactment of the MDL procedure in H.B. 4. In addition to being respected by lawyers practicing in the asbestos MDL process, Judge Davidson reports that the process is "well thought of" in other states as well as being effective to achieve its goals.

> I have no way of knowing whether there are worthy cases that have not been filed in Texas, or anywhere else, that were deterred by the criteria. Judges in other states tell me that the Texas system of administration of asbestos cases is well thought of. They also tell me that the kind of cases that the medical criteria was designed to discourage—non-malignant cases of asbestosis with minor pulmonary disablement—are now largely not being filed in most states. The reasons for this nationwide diminution in the number of filings are complex and disputed —and beyond the scope of this report. It is clear that the Texas statute has been effective in what it set out to do—reduce the number of non-malignant claimants in our courts. The Texas statute, together with the administrative uniformity of the MDL, has given all parties to asbestos litigation a relatively "bright line" to walk.

Thus, the issues in the asbestos MDL court are not whether a claimant is impaired, but whether and how the claimant can establish one or more defendant's liability for his or her cancer. As noted above, the court decided that some expert testimony could not support a finding that asbestos encased in brake pads caused mesothelioma, thus making it more difficult to plaintiffs to prevail against brake pad manufacturers. On the other hand, the court initially decided that out-of-state plaintiffs having very slight connections with Texas could sue in Texas courts, thus allowing a number of plaintiffs to continue with litigation in Texas. (The court subsequently has dismissed a number of cases on *forum non conveniens* grounds after receiving appellate court guidance.)

The most controversial ruling—which is the subject of Part Two of this publication—is the MDL pretrial court's application of the Texas Supreme Court's holding in *Borg-Warner Corp. v. Flores*[22] to mesothelioma cases.[23] *Borg-Warner* is an asbestosis case, not a cancer case. In *Borg-Warner*, the court held that a plaintiff in an asbestosis case must present "defendant-specific evidence relating to the approximate dose [of asbestos] to which the plaintiff was exposed."[24]

The application of *Borg-Warner* to mesothelioma cases prompted the filing of two unsuccessful bills during the 2009 legislative session: S.B. 1123 by Senator Duncan and H.B. 1811 by Representative Eiland. These bills sought to legislatively overrule *Borg-Warner* by providing that a plaintiff in a mesothelioma case could not be required to prove "for any purpose, a quantitative dose, approximate quantitative dose, or estimated quantitative dose of asbestos fibers to which the exposed person was exposed." Both bills failed to pass the Legislature.

The status of Texas-based silica litigation: A return to normal

The silica MDL experience has been quite different than the asbestos MDL. The silica MDL has a much smaller number of pending cases (667), and there is relatively little activity in those cases because very few of the plaintiffs in these cases have attempted to satisfy S.B. 15's medical criteria. This suggests that the claimants in the silica MDL generally are not sick—at least not from silica exposure.

According to Judge Halbach's report to the Legislature, of the 5,800 exposed persons in the silica MDL, only 54 served medical reports in attempts to comply with S.B. 15's medical criteria. Of those 54 reports, 22 were found compliant, and the claims of those exposed persons became "active." Those 22 claims are either still pending or were settled. Unlike the asbestos MDL, not a single silica claim has been remanded for trial during the six years since creation of the silica MDL, again suggesting that the vast majority of claimants in the silica MDL generally are not sick.

Judge Halbach reports that, to his knowledge, all cases pending in the silica MDL pretrial court involve claims for non-carcinogenic silica-based disease. "I am aware of no cases involving silica-related cancer. Thus, based on my review, I cannot conclude that claimants with cancer or severe medical problems caused by silica have been prevented access to the courts."

Judge Halbach, like Judge Davidson, concludes that S.B. 15 was effective in achieving its apparent goals.

> If the goal is to give priority to claimants who have a current physical impairment over those who do not, and at the same time preserve the claims of the unimpaired until such time as they show severe or significant

Dismissing inactive cases

S.B. 15 is codified in Chapter 90 of the Texas Civil Practice and Remedies Code. Section 90.007 provides that a defendant in an asbestos or silica case can move to dismiss a case "filed on or after the date this chapter becomes law, if a claimant fails to timely serve a report on a defendant, or serves on the defendant a report that does not comply with the requirements of Section 90.003 or 90.004." But a defendant has no right or ability to compel the dismissal of these old cases.

Under Section 90.008, a plaintiff can voluntarily dismiss a case filed before September 1, 2005, in which the plaintiff cannot meet or has not attempted to meet the statute's medical criteria. Such a voluntary dismissal "is without prejudice to the claimant's right to file a subsequent action seeking damages arising from an asbestos-related injury or a silica-related injury."

According to Judge Davidson, there are 6,451 inactive cases on the asbestos MDL docket containing between 25,000 and 84,000 claimants. According to Judge Halbach, there are 667 inactive cases on the silica MDL docket containing 5,839 claimants. Presumably, all or most of these cases were filed before September 1, 2005, but the plaintiffs have not elected voluntary dismissal in many cases, and the defendants cannot compel dismissal.

In his report to the Legislature, Judge Davidson addresses this problem:

> There is one matter, however, that should be addressed that relates solely to matters of administration of cases that is governed by the abatement requirements of the statue. There are now tens of thousands of cases that have been inactive since 2005. In some of those cases, the Plaintiff may now have died of non-asbestos causes. In some of those cases, the Plaintiff may no longer want to go forward. In a few of the cases, I have allowed Plaintiff's counsel to withdraw when their clients instructed them to dismiss the case or withdraw. In no case has any discovery or motion practice been allowed, in compliance with the legislative mandate. All of this begs the question: At what point, if any, may these cases be dismissed for want of prosecution?

Given that the Legislature specifically addressed dismissal of asbestos and silica cases in Chapter 90, but did not provide for dismissal for want of prosecution, do Judges Davidson and Halbach have the power to dismiss these old cases? A specific grant of authority to the MDL pretrial courts to dismiss (without prejudice) these inactive cases would clear up ambiguity and, therefore, may be appropriate.

> pulmonary impairment, then the statute is effective. The medical criteria established by the statute have certainly divided silica claimants into two distinct categories: those who can proceed and those who cannot. And it would not appear that "scarce judicial and litigant resources" have been "misdirected," a legislative concern stated in S.B. 15.

Although Judge Halbach is cautious in his report to not overstep the bounds of propriety for a judge presiding over a large docket, events occurring after passage of S.B. 15 confirm that the legislation was necessary and its goals were appropriate. On June 30, 2005, barely a month after Governor Perry signed S.B. 15 into law, United States District Judge Janis Graham Jack[25] handed down a scathing 249-page order relating to 111 silica cases (filed on behalf of 10,000 plaintiffs) transferred to her court pursuant to the federal MDL process for pretrial proceedings. Among other indictments of the lawyers, doctors, and screening companies involved in these silica cases, Judge Jack stated:

> [The silicosis] diagnoses were about litigation rather than health care. And yet this statement, while true, overestimates the motives of the people who engineered them. The word "litigation" implies (or should imply) the search for truth and the quest for justice. But it is apparent that truth and justice had very little to do with these diagnoses–otherwise more effort would have been devoted to ensuring they were accurate. Instead, these diagnoses were driven by neither health nor justice; they were manufactured for money. The record does not reveal who originally devised this scheme, but it is clear that the lawyers, doctors and screening companies were all willing participants. And if the lawyers turned a blind eye to the mechanics of the scheme, each lawyer had to know that Mississippi was not experiencing the worst outbreak of silicosis in recorded history. Each lawyer had to know that he or she was filing at least some claims that falsely alleged silicosis. The fact that some claims are likely legitimate, and the fact that the lawyers could not precisely identify which claims were false, cannot absolve them of responsibility for these mass misdiagnoses which they have dumped into the judicial system.

Judge Jack's order effectively ended abusive silica litigation throughout the United States. As was the case before the spike in silica case filings in the early 2000s, very few silica disease cases are now being filed each year. This is at least circumstantial evidence that the vast majority of silica cases sitting on the silica MDL court's inactive docket are there because they should not have been filed in the first place—because they were filed on behalf of plaintiffs having no actual disease.

Judge Jack's order effectively ended abusive silica litigation throughout the United States. As was the case before the spike in silica case filings in the early 2000s, very few silica disease cases are now being filed each year.

For the few cases that are active, procedures were put in place early in the history of the silica MDL to promote uniformity and consistency. Judge Christopher entered a case management order (CMO) and approved forms of master discovery requests to be answered by the parties in "active" cases. The silica CMO follows S.B. 15's requirements, providing that a plaintiff's claim cannot proceed until the plaintiff serves a medical report complying with Civil Practice and Remedies Chapter 90 (where S.B. 15 was codified).

There have been some hearings in the silica MDL addressing issues applicable to the entire docket, including hearings on the scope of master discovery and fact sheets to be completed by the parties, the pulmonary function test standards applicable to medical reports, and whether cardiopulmonary exercise testing is required by the American Medical Association Guides to the Evaluation of Permanent Impairment (which is incorporated in S.B. 15). In 2008, some plaintiffs filed challenges to the constitutionality of Chapter 90; however, they have not pursued hearings on those challenges, which were never ruled upon by the MDL court.

Conclusion

S.B. 15 has been effective. For both asbestos and silica, the cases that should not have been filed in the first place have been moved to an "inactive" docket, where they remain pending until the claimant actually has an impairing disease. The manufacturing of asbestos and silica cases for profit has virtually ended nationwide. Silica litigation has returned to normal, with a relatively few cases being filed each year. And for asbestos, the MDL court has focused on mesothelioma and other cancer cases, quickly giving those claimants their "day in court." By any reasonable measure, S.B. 15 has been a great success.

PART TWO

Borg-Warner v. Flores

Ending the "asbestos exception" to toxic tort rules

Science v. Speculation

Evidence standards in asbestos lawsuits

In 2007, in *Borg-Warner Corp. v. Flores*,[26] the Texas Supreme Court announced what already should have been apparent—its prior decisions regarding the need to apply sound science in toxic tort cases would apply to asbestos litigation. *Borg-Warner* eliminated the unwritten and unsupportable "asbestos exception," bringing asbestos litigation into line with all other kinds of toxic tort litigation in Texas.

Introduction

Asbestos litigation has been ongoing for more than four decades. Both the scientific knowledge relating to asbestos and its propensity to cause disease, and the legal doctrines relating to the admissibility of scientific evidence, have evolved during these four decades. But the legal standards relating to proving and asbestos-caused disease seemed to be stuck in the 1970s. At least until 2007.

In its 2007 decision in *Borg-Warner Corp. v. Flores*, the Texas Supreme Court made it clear that the standards relating to the admissibility of scientific evidence that were developed during the 1990s and 2000s—in the context of mass torts such as Bendectin, benzene, and silicone breast implants—would also apply to asbestos.

Viewed from this standpoint, *Borg-Warner* was unremarkable. What *was* remarkable was the fact that courts had effectively created an "asbestos exception" to the standards governing the admissibility of scientific evidence. Specifically, courts had held that all a plaintiff needed to prove in an asbestos case prior to *Borg-Warner* was that the plaintiff was exposed to "any" asbestos attributable to the defendant, even if there was no reliable science indicating that "any" exposure was sufficient to have caused the plaintiff's asbestos-related injury.

Borg-Warner eliminated the unwritten and unsupportable "asbestos exception," bringing asbestos litigation into line with all other kinds of toxic tort litigation in Texas.

After *Borg-Warner,* an asbestos plaintiff in Texas is required to present reliable scientific evidence demonstrating that the particular asbestos exposure attributable to each defendant was a "substantial factor" in causing the plaintiff's asbestos-related injury. This necessarily includes evidence of the approximate dose of asbestos attributable to each defendant ("the dose makes the poison"). *Borg-Warner* eliminated the unwritten and unsupportable "asbestos exception," bringing

asbestos litigation into line with all other kinds of toxic tort litigation in Texas.

The evolution of asbestos litigation

"Asbestos" does not refer to a manufactured product, but is a generic term for a group of naturally occurring fibrous minerals that possess high tensile strength, stability, and thermal properties. Not all asbestos is the same. There are two distinct mineralogical groups of asbestos: "amphibole" asbestos and "serpentine" asbestos. The amphibole group of asbestos comprises several needlelike fiber types, including crocidolite and amosite. The serpentine group of asbestos includes one fiber type: chrysotile. These two types of asbestos have very different chemical, physical and biological properties and, consequently, very different health effects—particularly with respect to disease causation.

The scientific understanding of the differences in asbestos fiber types with respect to disease causation developed over time. Asbestos litigation began in the late 1960s while scientific knowledge was still developing. At that point, differences in fiber type were not well understood. Accordingly, judicial decisions from the 1970s and 1980s treated all asbestos fibers as similarly carcinogenic. At some point, however, these decisions ceased to be based upon reliable science because it is now established that amphibole asbestos is significantly more potent with respect to mesothelioma causation than is chrysotile asbestos.

In its 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that federal trial courts must act as "gatekeepers" to ensure that the opinions of expert witnesses utilizing "junk science" were inadmissible.[27] The Court outlined standards designed to ensure that only reliable scientific evidence is presented to juries.

The Texas Supreme Court followed *Daubert* in 1995 (See *E. I. DuPont de Nemours v. Robinson*[28]) and refined its application in the toxic tort context in 1997 (See *Merrell Dow Pharmaceuticals, Inc. v. Havner*[29]). Nevertheless, trial courts—and at least one intermediate court of appeals in Texas—continued to apply the "asbestos exception" (the "any

Health hazard

Asbestos has been studied as a potential health hazard since at least the 1920s. Early studies of textile workers indicated that heavy asbestos exposure during the manufacture of asbestos-containing products caused a progressive scarring of lungs known as "asbestosis."

These early studies did not involve "end-users" (people who worked around products such as thermal insulation with some asbestos as an ingredient), but rather the workers who used asbestos in manufacturing facilities.

Subsequent studies of shipyard workers during World War II seemed to suggest that even relatively heavy asbestos exposure of end-users in the confined space of military ships (asbestos insulation was used extensively by the military because of its fire retardant properties) did not cause asbestosis. These studies involving end-users caused industry and the industrial hygiene community to believe that end-users were not at risk for asbestosis because their exposure was less than workers involved in the manufacturing of the products.

In retrospect, these studies ignored a critical issue: latency. Most of the shipyard workers had less than ten years from first asbestos exposure, but we now know that asbestosis can take several decades to develop. Accordingly, these studies missed the risk of asbestosis among end-users of asbestos-containing products.

The link between asbestos exposure and cancer was not discovered until the 1950s, and even then the only cancer linked to asbestos exposure was lung cancer. It was not until 1960 that asbestos was first linked to mesothelioma, a cancer of the lining of the lung. This study involved exposure to "crocidolite" asbestos among workers in asbestos mines in South Africa.

In 1964 one of the seminal studies involving insulators and mesothelioma was published, eventually leading to efforts to decrease asbestos exposure among end-users of asbestos-containing products. Throughout the 1960s, it was generally believed—incorrectly, it turns out—that reducing asbestos exposure sufficiently to prevent asbestosis would also prevent asbestos-related cancers such as mesothelioma.

In 1972 Congress established the Occupational Safety and Health Administration (OSHA). OSHA's first regulation involved asbestos. In the 1970s, scientists, industry and regulators began to recognize that reducing asbestos exposure sufficiently to prevent asbestosis might not prevent asbestos-related cancer, particularly mesothelioma.

Nevertheless, the occupational use of asbestos was still permitted by OSHA, though at substantially reduced levels, which have decreased further over time. Industry began developing alternatives to asbestos such that asbestos generally ceased being used by the end of the 1970s, though people were still exposed to "asbestos in place" into the 1980s and beyond.

exposure" test) to cases filed in Texas.[30] Asbestos plaintiffs generally were not required to present evidence of dose or evidence that exposure at a particular dose increased the plaintiff's risk of injury sufficiently to be considered a cause of the plaintiff's asbestos-related injury. In *Borg-Warner*, the Court made it clear that *Daubert* and *Havner* apply to asbestos litigation, just as they apply to every other toxic tort.

Lohrmann and the "frequency, regularity and proximity" test

In 1986 the United States Court of Appeals for the Fourth Circuit announced what came to be known as the "*Lohrmann* standard" (also known as the "frequency, regularity and proximity" test).[31] *Lohrmann v. Pittsburgh Corning Corp.* involved a plaintiff with asbestosis and circumstantial evidence of asbestos exposure (i.e., a situation where there is no direct evidence that an asbestos plaintiff was exposed to a product of a particular defendant). The plaintiffs in *Lohrmann* asked the court to "adopt a rule that if the plaintiff can present any evidence that a company's product was at the workplace, a jury question was established as to whether that product contributed as a proximate cause to the plaintiff's disease."[32] In other words, the plaintiff would not have to prove dose, or even exposure, only that both the plaintiff and the product were both present at the same workplace, in this case a shipyard (i.e., a very large workplace employing thousands of workers).[33]

The *Lohrmann* court, while not requiring evidence of dose or evidence that a certain dose is capable of causing injury, rejected the plaintiffs' request to permit rank speculation with respect to asbestos exposure, instead adopting the "frequency, regularity, proximity" test: "To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."[34] Courts in various jurisdictions adopted the *Lohrmann* standard, including in situations where there was direct, as opposed to circumstantial, evidence of exposure. For example, even if an asbestos plaintiff had direct evidence of exposure to a particular product (unlike the plaintiff in *Lohrmann*), courts adopting the *Lohrmann* standard still required evidence of frequent and regular exposure in proximity to where the plaintiff actually worked.

There are several problems with the *Lohrmann* standard. First, the terms "frequency, regularity, and proximity" are not defined. How frequent? How regular? How close to where the plaintiff actually worked? Second, the *Lohrmann* standard confuses exposure with causation. While it may be acceptable as a matter of judicial convenience to permit a plaintiff to provide circumstantial evidence of *exposure* to prove frequent and regular exposure in close proximity to where the plaintiff actually worked, this says nothing about whether the exposure *caused* injury. Continuing with the logical fallacy of *Borel*'s "any" exposure standard (see sidebar page 22), courts applying the *Lohrmann* standard typically overlooked this distinction.[35] Third, even though the standard arose in the context of asbestosis, not mesothelioma, courts began to apply the standard to both diseases, notwithstanding the fact that it was widely acknowledged as early as the 1970s that mesothelioma could occur at exposure levels insufficient to cause asbestosis. Fourth, when applied to mesothelioma and other asbestos-related cancers, the *Lohrmann* standard implicitly assumes that all asbestos fiber types are equally carcinogenic. Even if it were true that frequent and regular exposure in close proximity to where the plaintiff actually worked (whatever that means) is sufficient to cause mesothelioma in the context of exposure to *amphibole* asbestos, it does not follow that the same exposure would be sufficient to cause mesothelioma in the context of *chrysotile* asbestos. Amphibole asbestos is more carcinogenic than chrysotile asbestos; therefore, it is not scientifically reliable to treat exposure to both types of asbestos as equally likely to cause mesothelioma.

Havner: Texas mandates reliable science in the courtroom

In *Merrell Dow Pharmaceuticals v. Havner*, the Texas Supreme Court detailed standards relating to the admissibility of expert causation testimony in the toxic tort context.[36] The Court recognized that causation necessarily must be established in one of two ways: directly or probabilistically.[37] As is true in most toxic torts, in asbestos litigation it is not scientifically possible to directly link a particular asbestos exposure to mesothelioma because the disease mechanism is unknown. In such a situation, probabilistic evidence of causation (i.e., epidemiology) is the only way a plaintiff may meet his "more likely than not" burden:

> [I]n many toxic tort cases, direct experimentation cannot be done, and there will be no reliable evidence of specific causation. In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury. The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance. Such a theory concedes that science cannot tell us what caused a particular plaintiff's injury. It is based on a policy

> determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits a disease or injury can raise a fact question on causation.[38]

Epidemiology, the study of disease patterns in humans, is probabilistic evidence often used to establish causation in the toxic tort context.

Epidemiology, the study of disease patterns in humans, is probabilistic evidence often used to establish causation in the toxic tort context. "In the absence of an understanding of the biological and pathological mechanisms by which disease develops, epidemiological evidence is the most valid type of scientific evidence of toxic causation."[39] The mechanism by which asbestos exposure causes mesothelioma remains a mystery. Hence, the only way a mesothelioma plaintiff may demonstrate causation is via epidemiological studies. For example, while one can observe a car accident and conclude that the injuries suffered by the occupant were directly related to the accident, it is impossible to have similar direct evidence of causation in the toxic tort context, particularly where the mechanism by which the exposure is alleged to cause injury is unknown.[40]

Where it is scientifically impossible to come forward with direct evidence of causation, epidemiology is, by default, the only reliable way by which causation may be established. As one intermediate Texas Court of Appeals observed in the context of the silicone breast implant litigation, as a practical matter, epidemiology is all that is available in many toxic torts.

> If a plaintiff does not have reliable epidemiological evidence, what evidence can he or she offer to support a finding of causation? This is a good question. The Texas Supreme Court did not give any guidance as to what a plaintiff could offer that would be sufficient, but they did give guidance as to what type of evidence would not be sufficient.[41]

The court went on to identify all of the non-epidemiological categories of causation evidence identified by *Havner* as unreliable (e.g., case reports, clinical experience, animal studies, etc.) before concluding that the breast implant plaintiffs failed to present reliable evidence of causation where their only causation evidence was non-epidemiological.

Havner's holding that probabilistic evidence of causation (i.e., epidemiology) may be used only where direct evidence of causation is unavailable is consistent with the notion that naked statistical evidence should be used to prove causation sparingly. An often-used analogy is one in which more than half the buses in a town are owned by the Blue Bus Company, with the remainder owned by the Red Bus Company. A plaintiff is hit by a bus, but is unable to identify the color. Even though it is statistically "more likely than not" that the bus belonged to the Blue Bus Company, the plaintiff cannot recover. This is because the scientific knowledge exists to determine what color bus hit the plaintiff. The fact that the plaintiff did not *see* the color of the bus does not justify the use of statistical evidence in lieu of direct evidence of causation.

But, as explained by "Judge Weinstein, whose decision in the Agent Orange Litigation has been widely discussed and followed,"[42] "plaintiffs in many mass tort cases would be unable to prove that a defendant caused an illness were it not for statistical epidemiological data."[43]

This concern was undoubtedly what the *Havner* court had in mind when it stated that the law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for any injury unless the preponderance of the evidence supports cause in fact. "The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science."[44]

In short, epidemiology showing a doubling of the risk is not required in all cases, but in the toxic tort context it is all that is available where scientific knowledge is such that there is no direct evidence of causation. One cannot observe a particular asbestos exposure causing mesothelioma the way one can observe the color of a bus hitting a pedestrian.

Borg-Warner applies Havner to the asbestos litigation

Under *Havner*, a toxic tort plaintiff must introduce reliable evidence linking the plaintiff to the epidemiology establishing a doubling of the risk:

> [A] claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include [1] proof that the injured person was exposed to the same substance, [2] that the exposure or dose levels were comparable to or greater than

> those in the studies, [3] that the exposure occurred before the onset of injury, [4] and that the timing of the onset of injury was consistent with that experience by those in the study. Further, [5] if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.[45]

The first factor from *Havner* referenced above requires plaintiffs' causation experts to come forward with fiber-specific epidemiology ("same substance"), whereas the second factor relates to dose (i.e., proof "that the exposure or dose levels were comparable to or greater than those in the studies").[46]

Borg-Warner applied this second factor relating to dose to the asbestos litigation. It rejected the "asbestos exception" to toxic tort law (developed for the most part prior to *Daubert*, beginning with *Borel* in 1973) whereby an asbestos plaintiff met his burden of proving causation merely by proving "any" exposure. One of the "central tenants of toxicology" is that "the dose makes the poison."[47] As the Fifth Circuit held in a non-asbestos toxic tort case a few years after *Daubert*, "[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are *minimal* facts necessary to sustain the plaintiffs' burden in a toxic tort case."[48]

Outside of the asbestos context, the intermediate courts of appeals in Texas also applied this standard: "It is fundamental that a plaintiff in a toxic tort case must prove the levels of exposure that are dangerous to humans generally, and must also prove the actual level of exposure of the injured party

Dose reconstruction

Epidemiology, industrial hygiene, and retrospective exposure assessment

In *Borg-Warner Corp. v. Flores*, the Texas Supreme Court held that a plaintiff in an asbestosis case must present "defendant-specific evidence relating to the approximate dose [of asbestos] to which the plaintiff was exposed."[49] According to the court, "[i]t is not adequate to simply establish that 'some' exposure occurred. Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred."[50]

Thus, the requirement to prove "approximate dose" is central to *Borg-Warner* (and all toxic tort litigation). But in asbestos litigation (like other toxic tort litigation), the actual exposure levels for most plaintiffs cannot be determined. How does a plaintiff prove the approximate dose he received thirty or more years in the past? The fact that actual exposure levels cannot be determined after the fact, however, "does not preclude an estimation of exposure performed with an acceptable degree of scientific probability," Eric K. Falk of Davies, McFarland & Carroll PC writes in the American Bar Association's *Toxic Torts and Environmental Law Committee Newsletter* (Winter 2009).[51]

The science behind dose reconstruction—or retrospective exposure assessment—has been around for more than thirty years. As Falk explains, "Retrospective exposure assessment is a methodology that calculates past exposures to various agents. The scientific principles underlying it have been well described in the published scientific literature for decades."

According to ChemRisk, a prominent environmental services consulting firm led by Dr. Dennis J. Paustenbach, "The availability of inexpensive computational approaches and advanced modeling, as well as super sensitive analytical techniques, allows scientists to characterize the range of possible exposures with increasing precision." Dr. David H. Garabrant, a physician and professor emeritus of the University of Michigan School of Public Health, says that dose reconstruction in toxic tort lawsuits is scientifically "necessary and feasible" and that the field has "come a long way since frequency, proximity and regularity" of the 1986 *Lohrmann* decision.

"Detractors to the contrary, the medical and scientific literature is replete with peer reviewed articles and studies that have utilized retrospective exposure assessment methodology," Falk adds. "Exposures studied using this methodology include asbestos, silica, chlorophenate, beryllium, benzene, manmade mineral fibers, diatomaceous earth, hexavalent chromium, acrylonitrile, formaldehyde, acid anhydrides, manganese, fiberglass, rock wool, slag wool, coke fumes, diesel exhaust, radiation, TCE, and solvents… The list is practically endless…."

In fact, many government agencies issue guidelines for use of dose reconstruction and retrospective exposure assessment research, including the Environmental Protection Agency, Centers for Disease Control and Prevention, Department of Health and Human Services, National Institute of Occupational Safety, and OSHA. "Exposure assessment is simply not novel, despite claims to the contrary," Falk concludes.[52]

to the defendant's toxic substances."[53] *Borg-Warner* simply applied the post-*Daubert* standards of scientific reliability to the asbestos litigation, squarely rejecting the "any" exposure standard first announced in *Borel* and requiring asbestos plaintiffs to come forward with "defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease…."[54] While this standard constituted a dramatic change from the point of view of asbestos litigants, this is only because the "asbestos exception" first announced in *Borel* in 1973 continued long after both the law and science had evolved.

Shortly after *Borg-Warner*, an intermediate court of appeals in Texas applied the *Borg-Warner* standard to an asbestos case tried before *Borg-Warner*. In *Georgia-Pacific Corp. v. Stephens*, the court reversed a trial court judgement where the asbestos plaintiff relied on the "any exposure" theory of causation.[55] The Plaintiffs' causation experts cited studies addressing the issue of how much asbestos a worker may be exposed to by virtue of mixing and sanding asbestos-containing joint compounds. The evidence was insufficient to prove causation under *Borg-Warner* because the studies "dealt solely with potential exposures during the mixing and sanding processes. They did not attempt to correlate the exposures to any incidence of mesothelioma or asbestos-related disease among the study subjects."[56] The

Borg-Warner is mainstream jurisprudence

Plaintiffs' lawyers and other supporters of legislative efforts to overturn Borg-Warner have testified repeatedly in House and Senate hearings that the Texas Supreme Court's 2007 decision was a legal outlier and an impossible standard for plaintiffs to meet. The truth is quite the opposite. It was the plaintiffs' bar that successfully created an asbestos exception—alone among toxic torts—from the requirements of dose evidence. The Texas Supreme Court merely brought Texas back into the mainstream of common law by saying a plaintiff must prove that the dose of a defendant's product caused his or her illness. That notion is neither new nor radical. Asbestos litigation was the outlier, not *Borg-Warner*.

In fact, opponents of *Borg-Warner* would be hard-pressed to show how the decision is anything but mainstream jurisprudence. Merely stating that many states still rely on the "*Lohrmann* standard" of "frequency, proximity and regularity" does not mean *Borg-Warner* is an outlier and wrongly decided. It just means that the 1986 *Lohrmann* decision is still useful for evaluating evidence in certain types of asbestos claims (e.g., where the dose is significant and known, such as elevated occupational exposure). Science has improved in the two-and-a-half decades since *Lohrmann*, and it's wrong to claim otherwise. Plaintiffs' lawyers want to return Texas to the dark ages of *Lohrmann*, when we know much more now and are able to produce reliable dose reconstructions based on epidemiological studies.

Former Texas Supreme Court Justice Deborah Hankinson of Hankinson, Levenger LLP in Dallas, together with co-authors William L. Anderson and Elaine Panagakos of Crowell & Moring LLP in Washington, D.C., explained the impact of *Borg-Warner* in a recent commentary published on November 3, 2010 in *Mealey's Litigation Report: Asbestos.*

> When the Texas Supreme Court decided *Borg-Warner*, it joined a growing number of courts throughout the country that have rejected the *any exposure* theory as scientifically unfounded and insufficient to prove causation… *Borg-Warner* does not establish either an impossible of even particularly difficult causation standard, except that it will tend to reduce asbestos lawsuits that should not be in court in the first place—an entirely appropriate development.

Reviewing decades of case law, Hankinson, Anderson and Panagakos maintain that the "Texas Supreme Court is far from the first to recognize that normal rules require evidence of dose to prove causation claims just as they do in all other species of toxic torts."

The law must follow science, and "attempts to paint *Borg-Warner* as outside the mainstream and an insurmountable causation hurdle are not well taken. The only basis for such a claim is the contention that mesothelioma justifies any claim against any defendant regardless of dose, which is not a scientifically supportable proposition."

The authors cite more than seventeen opinions since 2004 where "courts have repeatedly rejected the *any exposure* theory, in the process establishing that some evidence of an effective dose is a requirement for asbestos litigation" and that "the vast majority of courts have begun to concur with the *Borg-Warner* approach to causation."

"Asbestos litigation, as the *Borg-Warner* court recognized, has been treated as an outlier for too long," Hankinson and her co-authors conclude.

court of appeals recognized that proof of exposure, by itself, is not reliable evidence of causation.

The experts in *Stephens*, which was tried before the *Borg-Warner* decision was handed down, instead relied upon the "any exposure" theory of causation that the Texas Supreme Court has rejected. Without quantitative evidence of exposure and any scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma, "we hold that the opinions offered by the Stephenses' experts in this case lack the factual and scientific foundation required by *Borg-Warner* and thus are legally insufficient to support the jury's causation finding."[57]

Likewise, another intermediate court of appeals also held that the "each and every exposure" testimony relied upon by the mesothelioma plaintiff's expert in a case tried prior to *Borg-Warner* failed to establish substantial factor causation: "We agree with Georgia-Pacific's assertion that appellees did not establish substantial-factor causation to the extent they improperly based their showing of specific causation on their expert's testimony and the testimony of Dr. Kronenberg that each and every exposure to asbestos caused or contributed to cause Timothy's mesothelioma."[58]

In the first post-*Borg-Warner* appeal of a case, the Fort Worth Court of Appeals affirmed a summary judgment on the grounds that *Havner*'s "same substance" standard requires fiber-specific epidemiology. In *Smith v. Kelly-Moore Paint Co., Inc.*, the court rejected the asbestos plaintiff's effort to cite epidemiology involving low dose *amphibole* asbestos exposure to satisfy *Havner*'s epidemiology requirement as to a defendant who manufactured a product containing *chrysotile* asbestos.[59] Just as the fact that some people who use Viagra a single time suffer a heart attack does not mean that Viagra doubles the risk of heart attacks, the asbestos plaintiff's argument that some mesotheliomas have been reported after brief exposures to *amphibole* asbestos does not mean that exposure to *chrysotile* asbestos doubles the risk of mesothelioma. As the court of appeals noted in *Smith*, "The Smiths' evidence ultimately suffers the same defect as the plaintiff's in *Stephens*: 'without . . . scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma' from exposure to *chrysotile-only* asbestos, such as that contained in Kelly-Moore's joint compound, Dr. Maddox's opinion lacks 'the factual and scientific foundation required by *Borg-Warner*' and, thus, is insufficient to raise a fact issue as to specific causation."[60]

Conclusion

Much has changed since 1973. Twenty years before the United States Supreme Court imposed *Daubert's* gatekeeping requirement upon federal judges, and in the context of high-dose asbestos litigation, *Borel's* weakened asbestos standard of causation might have sufficed. In today's low-dose litigation, however, both science and legal principles demand a better and more scientific approach that acknowledges and requires proof of a harmful dose. At a time when little was known of the relative potency of asbestos fibers such as amphiboles and chrysotile, it may have been acceptable to treat all asbestos fibers as the same. As both the law of scientific evidence and scientific knowledge relating to asbestos evolved, it was no longer acceptable to continue to apply the "asbestos exception." Indeed, ten years before *Borg-Warner*, the *Havner* court outlined standards that constituted the death knell of the asbestos exception.

> It has been contended that '[f]or some cases that very well may mean creating a compensatory mechanism even in the absence of clear scientific proof of cause and effect' and that '[d]eferring to scientific judgments about fault only obscures the core policy questions that are addressed by the laws that the court is applying.' We expressly reject these views. Our legal system requires that claimants prove their cases by a preponderance of the evidence. In keeping with this sound proposition at the heart of our jurisprudence, the law should not be hasty to impose liability when scientifically reliable evidence is unavailable. As Judge Posner has said, '[l]aw lags science; it does not lead it.'[61]

Indeed, the surprise is not that *Borg-Warner* applied *Havner* to the asbestos litigation. The surprise is that it took ten years for a case to come before the Texas Supreme Court in which the Court had an opportunity to say that it meant what it said in *Havner*, even in the context of asbestos.

Brister on Borg-Warner

Testimony before the Texas House of Representatives Judiciary and Civil Jurisprudence Committee, May 26, 2010

Scott Brister

Scott Brister served as a judge for twenty years at all levels of the judicial system: six years on the Texas Supreme Court, three years on a Houston Courts of Appeals, and eleven years as a district judge. During his years on the bench, he presided over 670 trials and wrote more than 600 appellate opinions. Board certified in civil appellate, civil trial, and personal injury law, he now heads the appellate section of Andrews Kurth LLP in Austin. Brister is a graduate of Duke University (1977, summa cum laude) and Harvard Law School (1980, cum laude). He was a member of the Supreme Court that decided the *Borg-Warner v. Flores* case in 2007, and he testified at the House Judiciary and Civil Jurisprudence Committee interim hearing May 26, 2010, about *Borg-Warner* and causation in asbestos litigation. These excerpts from Brister's remarks at the House Judiciary and Civil Jurisprudence Committee's interim hearing were edited for clarity and length.

The law must follow and apply science. The law should neither lead nor ignore scientific knowledge about the matter in litigation. In any toxic tort case in which actual causation cannot be demonstrated, a plaintiff must show that he received a sufficient dose of the toxin produced by the defendant for it to be scientifically possible that the defendant's toxin caused the plaintiff's disease. If a court is not requiring proof of approximate dose of the defendant's toxin received by the plaintiff, the court is not relying on any reliable standard.

Three years ago I joined the Texas Supreme Court's unanimous opinion in *Borg-Warner v. Flores* regarding proof of causation in asbestos cases. I thought the decision was right at the time and still think it's right. Here's why.

Lohrmann v. Pittsburgh Corning Corp. was an early effort to address baseless cases. It was not an attempt to address what kind of scientific causation you need. *Borg-Warner* was addressed to scientific causation. So the two were for different purposes and not in conflict. As *Borg-Warner* says about *Lohrmann*, it is still "necessary but not sufficient."

Lohrmann is adequate to dismiss baseless cases, but too indistinct to decide what cases have scientific merit. Because of the number of defendants and the latency period and just the volume of cases, the tendency is just to sue a whole bunch of defendants, and then drop them out as you go along. Now to address that problem, *Lohrmann*, twenty-five years ago, said whether a plaintiff could successfully get to trial will depend upon the *frequency* of the use of the product, the *regularity* or extent of the plaintiff's employment in *proximity* thereto.

Lohrmann was a *de minimis* rule for cases where there was *zero* evidence of exposure to a particular product or a particular defendant. And, in fact, most of the cases adopting *Lohrmann* or following it do it in "zero evidence" cases.

These cases didn't have to say how frequent do you mean by frequent and how close do you mean by proximate, because there was no exposure at all. They didn't know whether they

were exposed to a particular defendant's product. And for that, the *Lohrmann* standard does work fine. It says you have to prove you were frequently around it, and if you don't know what you were around, you can't do that.

Here's the problem. What if you know you were around some product from a particular defendant? Then *Lohrmann* doesn't help you. If I'm the trial judge looking at the *Lohrmann* standard, it says the exposure has to be "frequent." How frequent is frequent? Does that mean every day, every week, every month?

You're going to have to draw lines with the *Lohrmann* standard. In fact, any standard you use, you're going to have to draw lines. If you tell the trial judge it just needs to be frequent enough and proximate enough, of course you're going to have to make that up; just make it up. The alternative is to borrow what science uses, which is how much you need to be exposed to to be at risk of this particular disease. The term scientists use for that is *dose*. In other words, how much were you exposed to? If you use anything other than dose, you're going to include people you shouldn't or exclude people you should.

For many years, the courts weren't picky about dose. Basically, if you had an expert to say, "A caused B," that was fine. But that came to an end in the Bendectin cases in the '70s and '80s when several juries, judges, and appeals courts said Bendectin causes birth defects, even though, in fact, Bendectin doesn't. Bendectin is used in Canada today, and they have fewer birth defects than the United States. Scientists knew it didn't cause birth defects, but courts were signing judgments saying it did. That's when the U.S. Supreme Court got involved in *Daubert*, and the Texas Supreme Court said four years later in *Havner* that experts are going to have to meet some scientific standards.

So, the problem is: if you use anything other than dose, you're going to get an imprecise measurement compared to science.

So, the problem is: if you use anything other than dose, you're going to get an imprecise measurement compared to science. If you adopt the *Lohrmann* standard, the scientist may say what caused the disease, but if we use frequency and regularity and it wasn't frequent, you're out of luck. You're going to exclude people who should recover. That's why *Borg-Warner* used the dose standard. It doesn't take sides. It just says what science says is the dose standard, that's going to be our standard in court.

We're not asking the attorneys to do anything more than the epidemiologists do.

Let me say this on the argument that it's "impossible" to meet *Borg-Warner*. I've had a lot of attorneys in my years on

Borel: Genesis of the "any" exposure causation theory

In 1973 the United States Court of Appeals for the Fifth Circuit outlined principles that would shape asbestos litigation for decades. *Borel v. Fibreboard Paper Products Corp.* involved a career insulator who suffered from both asbestosis and mesothelioma.[62] The Court noted that, in the context of asbestosis, "it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to [the plaintiff]."[63]

Because "the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury . . . the jury could find that each defendant was the cause in fact of some injury to [the plaintiff]."[64] Courts in various jurisdictions, including Texas, applied the "cumulative injury" language from *Borel* and held that an asbestos plaintiff satisfied his burden of proving causation as to each defendant by demonstrating that he was exposed to *any* asbestos attributable to that defendant.[65]

However, *Borel* wrongly assumes that all types of asbestos fibers are equally tumerogenic. While there is currently a debate within the scientific community with respect to the *extent* to which amphibole asbestos is more tumerogenic than chrysotile asbestos, virtually all scientists agree there is a difference. Some studies have concluded that the difference is large (i.e., the ratio of potency with respect to mesothelioma among crocidolite, amphibole, and chrysotile asbestos is estimated to be 500:100:1).[66]

the bench tell me it was impossible to do something, and a lot of the time it just meant "I don't want to do it." It's not impossible to do because all epidemiological studies are done retrospectively. We're not asking the attorneys to do anything more than the epidemiologists do.

Is it a higher standard than other states? The *Borg-Warner* standard is whatever science says it is, which may be lower than what other states use. Whether the standard should be changed because plaintiffs are filing suits elsewhere depends on why they're filing suits elsewhere. If Texas courts won't allow legitimate claims, that's a cause for grave concern. If Texas courts won't allow trivial claims, that's a good thing. If Texas courts won't allow reasonable damages, that's a cause for concern. If they won't allow excessive damages, that's a good thing. It's no secret that a lot of plaintiffs' attorneys prefer to file their suits in South Texas. Can we conclude, therefore, that there must be injustice everywhere else in the State of Texas or just that they perceive advantages of filing suit there?

Lohrmann was an early effort to cull out baseless suits twenty-five years ago. It was seven years before *Daubert* and ten or eleven years before *Havner*. Courts have become somewhat more sophisticated. Some people say more restrictive. But as Justice Owen said in *Havner*, the point is not to try to help or hurt plaintiffs or defendants; the point is to try not to get ahead or behind science. Now, science may change. We've done injustices to people—plaintiffs and defendants—in the past, but the best we can do is what the science is *right now* when the case goes to trial.

The reason *Borg-Warner* exists is because we're not going to make a lower standard just for asbestos cases. *Havner* still applies to everything, whether you're claiming birth defects or pharmaceuticals or smoking or whatever. You're going to have to prove it. The question in *Borg-Warner* was: should we have a rule for everybody and then an exception for asbestos? The reason the answer is "no" is so that you don't come out with different answers than the scientists come out with. You don't want to get ahead or behind the scientists.

There are people in tough circumstances every day that can't win cases. There are "hit and run" cases where you can't identify who did it. There's just nothing we can do about that. We could have a system where we say, "Here's somebody that needs money," and then look around and say, "You pay for it." We don't do that because ours is a fault-based system. You're going to have to identify a defendant and show their fault. That's going to leave some people "out of luck." It's difficult, but that's the system. I've known a lot of people who have had painful deaths, and there was nobody to sue. Courts try to establish the law, and then people win or lose according to the law.

All I'm suggesting is that there's a problem if you draw a line other than one based on science.

PART THREE

Asbestos claimants compensation

The role of bankruptcy trusts in compensating asbestos-disease claimants

To date, ninety-six companies have filed for bankruptcy due in whole or part to present and future asbestos liabilities. Sixty-three of those companies have created or are creating a trust fund to pay asbestos-injury claims. The trust funds hold an estimated $60 billion in assets to pay claims. These bankruptcy trust funds provide an avenue for substantial compensation to mesothelioma victims—an avenue that is above and beyond the substantial recoveries most victims obtain through litigation. But the trust funds are "black boxes" that do not reveal payment histories to specific claimants, making it nearly impossible to determine the amount of money mesothelioma victims receive through the civil justice system.

Bankruptcy trusts

In 1982, under the crush of asbestos litigation, Johns-Manville Corp. filed bankruptcy. At the time, it had about 16,000 asbestos claims pending against it. It filed Chapter 11 bankruptcy, seeking to reorganize its business—not Chapter 7 bankruptcy by which it would have liquidated its assets. In 1988 it emerged from bankruptcy. As part of its reorganization, it created a trust to pay past and future asbestos claims—the Manville Personal Injury Settlement Trust.

The Manville Trust was given:

(1) a majority of the shares of the reorganized company's common stock;

(2) and payouts on insurance policies Johns-Manville had purchased to cover product liability losses.

The initial value of the Manville Trust was $2.5 billion. From the company's perspective, the benefit of the Manville Trust was that the trust assumed all of the company's present and future asbestos-related liabilities, thus protecting the company from future claims and allowing it to continue in business.

The Manville Trust was almost immediately inundated with asbestos claims and quickly ran out of money. But its creation served as a model that the United States Congress adopted in 1994. The Congress amended Section 524 of the United States Bankruptcy Code to allow any company facing substantial asbestos liability to fund a trust that would assume the company's present and future asbestos liability in exchange for an injunction shielding the company from asbestos claims.[67]

Since the Manville Trust was created, numerous other companies have faltered under the weight of asbestos litigation and elected to file bankruptcy and create a Section 524(g) trust. For example, in 2006:

- Dana Corporation, an automotive part supplier, filed bankruptcy. Dana had disclosed that 88,000 asbestos-related product liability claims were pending against it in a form filed with the Securities and Exchange Commission in late 2005.

• ABB Lummus Global Inc. filed bankruptcy, showing 11,011 asbestos claims pending against it.

• Lloyd E. Mitchell Inc., a former mechanical contracting company that ceased doing business in the 1970s, filed bankruptcy, showing 19,450 asbestos claims pending against it.[68]

To date, ninety-six companies have filed bankruptcy due in whole or part to present and future asbestos liabilities.

To date, ninety-six companies have filed bankruptcy due in whole or part to present and future asbestos liabilities.[69] Sixty-three of these companies have created or proposed to create a Section 524(g) trust to compensate asbestos claimants.[70] These trusts are believed to have as much as $60 billion in assets available to pay asbestos-injury claims.[71]

Typically, these trusts are governed—at least nominally—by trustees. But they do not do so alone. A "future claims representative" is appointed by the bankruptcy court to represent the interests of future claimants in matters of trust administration, and a court-appointed "trust advisory committee" represents the interests of current claimholders in trust administration matters. These trust advisory committees are comprised of attorneys from law firms that represent asbestos claimants, thus giving the asbestos plaintiffs' bar substantial input into the administration of these trusts.

Filing claims and obtaining compensation from bankruptcy trusts[72]

Some information about the trusts is reasonably available. Other information is not. It is known that the bankruptcy trusts pay claims for all asbestos-related diseases, from pleural disease without significant restriction to pulmonary function to mesothelioma, and everything in between.

A claimant, of course, must identify the trusts from which he will seek compensation. Nothing prevents a claimant from seeking compensation from more than one trust, and most apparently do. The claimant's work history determines the trust or trusts from which the claimant will seek compensation. Compensation is sought by submitting a claim along with supporting documentation showing the claimant's work and exposure history.

Most trusts apparently have two main methods for reviewing claims: expedited review and individual review. The claimant determines which method of review he will seek.

The expedited review procedure is designed to pay claims quickly at a fixed value. Different diseases, of course, are valued differently, with more severe diseases having a higher value. Claimants know the scheduled value of a claim in advance, and claimants know the evidence required to support the claim. The trusts presume that claims supported by the proper evidence are valid. In the individual review process, a claimant receives consideration of his individual claim.

The trusts review the claims submitted to them and pay the claims that are found to be properly supported. The amount paid varies greatly from trust to trust.

The amount paid to individual claimants is not made available to the public either by the trusts or by the attorneys representing the claimants. Thus, except in unusual circumstances, it is almost impossible for an outsider to ascertain the trusts from which an individual receives money, the amount of money the individual receives from any particular trust, or the total amount of money the individual receives from all bankruptcy trusts. Additionally, the trusts generally do not coordinate to determine whether the work and exposure evidence a claimant is submitting to one trust is consistent with the work and exposure evidence that claimant is submitting to other trusts.

At a May 2010 meeting of Texas House Judiciary and Civil Jurisprudence Committee, a lawyer who represents claimants in asbestos litigation was clearly reluctant to talk about the amounts claimants receive from bankruptcy trusts. After first refusing to provide an average recovery from the bankruptcy trusts ("there is no average"), the witness informed the committee, "I think the high, the most we've ever gotten for a plaintiff, and this would be a plaintiff who sustained exposure and had all kinds of products and all kinds of trades, might be in the very high six figures." But, he testified, "The typical recovery is far less." Some claimants, he testified, have recovered nothing from the bankruptcy trusts, "but in the vast majority of cases we get some payments from some trusts."[71]

A dual-track for compensation

Applying for or receiving compensation from bankruptcy trusts does not preclude a person from also bringing a civil suit for damages against solvent defendants. In fact, it is common to do both. Thus, a person suffering an asbestos-related disease—unlike almost any other injured person—has two tracks provided by the judicial system for obtaining compensation from those who may have caused his disease.

Both tracks can result in substantial recoveries by the claimant. As noted above, an attorney with personal knowledge testified in a Texas legislative hearing in May 2010 that at least one claimant represented by his law firm had recovered "in the very high six figures" from bankruptcy trusts.[73] The same witness also conceded that a mesothelioma plaintiff he represented was paid $1.7 million through litigation settlements with "three or four" defendants.[74]

The ability to pursue two tracks for compensation, coupled with Texas's procedural rules, creates an ability for plaintiffs to "work the system" to their advantage. Under Texas law, a defendant is entitled to a dollar-for-dollar "settlement credit" when a co-defendant settles with a plaintiff who is suing both defendants.[75] Applying this law, if a plaintiff receives compensation from bankruptcy trusts prior to resolving his litigation with solvent defendants, the defendants are entitled to the same dollar-for-dollar settlement credit for the amounts received by the plaintiff from the trusts. The effect, obviously, would be to substantially reduce the amount the plaintiff may recover from the solvent defendants through litigation.

As a consequence, plaintiffs filing asbestos law suits in Texas often wait to file their claims with the bankruptcy trusts *after* the litigation has concluded. In this way, they are able to avoid the settlement credit problem and maximize their recovery from the solvent defendants. And their compensation from the bankruptcy trusts is unaffected. This procedural advantage is accentuated by the fact that Texas law requires the asbestos MDL pretrial court to resolve malignant asbestos disease cases very quickly (see page 8–9), which allows the claimant to receive compensation from the solvent defendants before he has to worry about the clock running out on filing claims with the bankruptcy trust.

Responsible third-parties

When H.B. 4 [76] passed in 2003, the Texas Legislature amended Chapter 33 of the Texas Civil Practice and Remedies Code to allow a defendant to designate as a "responsible third-party" any person who might be liable for the plaintiff's injury. Then, at the end of the case, the jury is asked to allocate fault among all persons who might be culpable—the plaintiff himself, all defendants, and all properly designated responsible third-parties.[77]

"Responsible third-party" is defined in Chapter 33 as "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these."[78] This definition would reach (and was intended to reach) a person who is potentially culpable for a plaintiff's injury, but is not a defendant because he has filed bankruptcy and, therefore, is immune from suit under the bankruptcy laws.

Many companies that mined asbestos or manufactured asbestos-containing products have filed bankruptcy over the past thirty years. And many of these companies have created trust funds to pay claims filed by asbestos claimants. Before the *Borg-Warner* decision was handed down by the Texas Supreme Court, defendants named bankrupt companies as responsible third parties in asbestos litigation when the evidence showed that the plaintiff had filed a claim with the company's asbestos trust administrator. This, of course, made perfect sense. If a plaintiff filed claim with the trust administrator asserting (implicitly or explicitly) that the bankrupt company caused his injury and should compensate him for doing so, it is reasonable for a defendant in litigation with that plaintiff to believe that the bankrupt company should be designated as a responsible third party (i.e., a person who "caused or contributed to causing in any way the harm for which recovery of damages is sought").

This all changed January 16, 2009, when Judge Davidson handed down an opinion applicable to all cases pending in the asbestos MDL. Judge Davidson held that the mere fact that a plaintiff sought compensation from a company's bankruptcy trust fund was not a sufficient basis for assuming that the bankrupt company may have "caused or contributed to causing in any way the harm for which recovery of damages is sought." Instead, in order for a defendant to name a bankrupt company as a responsible third-party, Judge Davidson now requires that the defendant meet *Borg-Warner's* requirement of presenting evidence of the approximate dose of the bankrupt company's asbestos to which the plaintiff was exposed.[79]

Consequently, a plaintiff's admission that a bankrupt company caused his disease is no longer enough to support the designation of that company as a potentially responsible third-party in litigation brought by that plaintiff against solvent defendants.

Attorney fees substantially affect the injured person's compensation

Texas attorneys typically are paid 40 percent of the plaintiff's total recovery, whether that recovery is from settlement, judgment, or bankruptcy trusts. This is so even though there is very little risk that the plaintiff will be denied any recovery and, therefore, very little risk the lawyer will be uncompensated. This large fee substantially affects the amount of compensation the injured person actually receives.

The amount of attorney fees a lawyer may charge a client in Texas is governed by the Texas Disciplinary Rules of Professional Conduct—the ethics rules for Texas lawyers. Rule 1.04 provides that a lawyer "shall not enter into an arrangement for, charge, or collect an unconscionable fee." A fee is unconscionable "if a competent lawyer could not form a reasonable belief that the fee is reasonable." The factors that may be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.[80]

According to an asbestos plantiff's attorney testifying before the Texas House Judiciary and Civil Jurisprudence Committee on May 26, 2010, the standard fee charged by an attorney in Texas representing a plaintiff in a mesothelioma case is 40 percent of the plaintiff's recovery, apparently without regard to whether the recovery is from settlements, a judgment, or bankruptcy trust funds.[81]

Approximately 98 percent of mesothelioma cases settle without a trial.

Among all kinds of litigation, asbestos litigation is unique in that a plaintiff alleging asbestos-caused mesothelioma and showing an occupational exposure to asbestos *will be compensated through the legal system*, either from defendants in litigation, bankruptcy trust funds, or both. (The lawyer referenced above also testified that a "in the vast majority of cases we get some payments from some trusts.") Furthermore, approximately 98 percent of mesothelioma cases settle without a trial. Thus, in almost all cases, a plaintiff's entire recovery is through settlements with litigation defendants and through the uncontested bankruptcy trust claims process.

It follows, therefore, that a lawyer representing a mesothelioma plaintiff is essentially guaranteed to be paid a fee. The lawyer should feel no "uncertainty of collection [of a fee] before the legal services are rendered," as would warrant charging or collecting a substantial contingent fee under Rule 1.04. And the time invested on the plaintiff's behalf that yields the fee is far less than in many other kinds of litigation because the fees are almost always derived without a trial.

Of course, the amount of fee charged by an attorney to a mesothelioma claimant affects the claimant's net recovery. It is possible for the Texas Legislature to regulate the fee that a lawyer may charge in mesothelioma litigation (or any other kind of litigation), which could substantially increase mesothelioma plaintiffs' net recovery. But, to date, the Texas Legislature has not regulated attorney fee agreements.

PART FOUR

Reference and resources

Legal and legislative timeline

1973 **Borel v. Fiberboard Paper Products Corp.** United States 5th Circuit Court of Appeals

Asbestos manufacturers could be strictly liable under a product liability theory for injuries caused to workers exposed to the manufacturers' asbestos products. Provided the basis for the "any exposure" theory of causation.

1986 **Lohrmann v. Pittsburgh Corning Corp.** United States 4th Circuit Court of Appeals

"Evidence of exposure to specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."

1989 **Gaulding v. Celotex Corp.** Texas Supreme Court

Plaintiff must prove defendants supplied the product that caused the injury.

1990 **Celotex Corp. v. Tate.** Corpus Christi Court of Appeals

Causation is presumed if plaintiff proves "any exposure" to asbestos. Dismissed because of settlement before Texas Supreme Court reviewed the decision.

1997 **Merrell Dow Pharmaceuticals, Inc. v. Havner.** Texas Supreme Court

Specific causation and general causation must be shown. Injured person must show that the "dose or exposure levels" experienced were comparable to or greater than levels in reliable epidemiological studies.

2003 **H.B. 3**

Comprehensive legal reform legislation created a multidistrict litigation panel to consolidate cases. Expands responsible third party practice so non-parties can be allocated a percentage of responsibility.

2005 **S.B. 15**

Established medical criteria for asbestos and silica claims and required a showing of impairment for non-malignancy claims. Permitted transfer of all asbestos and silica cases into the multidistrict litigation courts. Provided that multiple asbestos plaintiffs cannot be consolidated for trial. Put mesothelioma cases at the front of the line for trial.

2007 **S.B. 749**

MDL pretrial judges have the right to bring an appellate action to prevent continuances in mesothelioma and other asbestos and silica-related cancer cases.

Borg-Warner Corp. v. Flores. Texas Supreme Court

Court found no evidence that *Borg-Warner* products were a substantial cause of plaintiff's injury because of failure to introduce evidence of the approximate dose of the defendant's product to which the plaintiff was exposed. Sufficient evidence requires "defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed" and evidence that the dose was a substantial factor in causing the asbestos-related disease.

Georgia-Pacific Corp. v. Stephens. Houston Court of Appeals

Stephens did not demonstrate that the frequency and regularity of his alleged exposure to joint compound were comparable to or greater than the exposures in the epidemiological studies that supported causation. Court applied *Borg-Warner* in this mesothelioma case, reversed trial court judgement for Stephens, and rendered judgment for Georgia-Pacific.

2009

Boyd v. Texas Utilities Electric Co. Waco Court of Appeals

Borg-Warner v. Flores was cited and followed, with the court finding that none of plaintiff's experts established approximate dose (paint fume exposure).

Lockett v. H.B. Zachry Co. Houston Court of Appeals

Borg-Warner v. Flores was cited throughout this opinion, with the court holding that the plaintiff must prove exposure in quantity and duration sufficient to be a contributing cause (benzene exposure).

In re Allied Chem. Corp. Corpus Christi Court of Appeals

This opinion assumed, without holding, that the dose requirement set out in *Borg-Warner v. Flores* is applicable in this case of general chemical exposure.

2010

Smith v. Kelly-Moore Paint Co. Inc. Fort Worth Court of Appeals

Court affirmed a no evidence summary judgment in favor of the paint company. Court found the plaintiff failed to present scientific evidence of the minimum exposure level of chrysotile asbestos that would increase the risk of mesothelioma. In the absence of an expert opinion with the factual and scientific foundation required by *Borg-Warner v. Flores,* there was no evidence of specific causation.

Georgia-Pacific Corp. v. Bostic. Dallas Court of Appeals

Court reversed a jury verdict for plaintiff and rendered a take-nothing judgment. The specific causation expert witness for plaintiff was unable to opine that, but for the exposure to Georgia-Pacific products, plaintiff would not have developed mesothelioma. The court also found inadequate evidence of quantified dose, as plaintiff's expert admitted he lacked information on the conditions of plaintiff's exposure.

Asbestos and silica lawsuit reform bill summaries

Senate Bill 15 by Janek (2005)

S.B. 15 requires a person seeking damages for asbestos-related injury or silica-related injury to provide:

> (1) a report from a board-certified physician stating that the exposed person has been diagnosed with mesothelioma or other cancer caused by exposure to asbestos or silica; or
>
> (2) a report from a board-certified physician verifying that the exposed person has actual physical impairment caused by exposure to asbestos or silica and that the physical impairment meets specific criteria on x-rays and pulmonary function tests.

If a report is not timely served or if the report does not meet the specified criteria, the defendant may file a motion to dismiss the asbestos or silica case. This dismissal provision of S.B. 15 applies only to cases filed after the effective date of the act. Cases pending when the act became effective could not be dismissed, but also could not be remanded by the MDL pretrial court to the originating court for trial unless complying reports were provided.

S.B. 15 also provides an exception for use in unusual cases by providing that cases in the MDL may survive dismissal or be remanded for trial if they meet the criteria of Section 90.010(f) for exceptional or unusual cases. 90.010(f) is for those unusual cases where the exposed person has unique or extraordinary physical characteristics that prevent the medical criteria in the statute from adequately assessing the person's impairment. The provision is expressly limited to exceptional circumstances and cannot be used to negate the medical requirements of the statute.

S.B. 15 prohibits physicians from relying on findings, testing or screening performed in violation of regulations, or from relying on reports or opinions of doctors or labs that required the claimant to retain the services of the law firm sponsoring the exams or test.

The law also prohibits joining more than one claimant in a case and provides that the statute of limitations for all asbestos-related or silica-related injury claims (cancer and non-malignant) is extended to the earlier of:

> (1) two years after the injured person's death; or
>
> (2) two years after the person serves a report on a defendant that complies with the statute.

Importantly, it requires that malignancy cases be expedited for trial. It also creates a right to an interlocutory appeal of a denial of a motion to dismiss and for a direct appeal to the Texas Supreme Court in the event of a constitutional challenge to the law.

Senate Bill 749 by Janek (2007)

The preamble to S.B. 15 (2005) provided that the purpose of the bill was "to protect the right of people with impairing asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos or silica but have no functional or physical impairment from asbestos-related or silica-related disease." To effectuate this purpose, the Legislature provided that in "an action transferred to an MDL pretrial court in which the exposed person is living and has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer, malignant silica-related cancer, or acute silicosis, the MDL pretrial court *shall expedite the action in a manner calculated to provide the exposed person with a trial or other disposition in the shortest period that is fair to all parties and consistent with the principles*

of due process. The MDL pretrial court should, as far as reasonably possible, ensure that such action is brought to trial or final disposition within six months from the date the action is transferred to the MDL pretrial court...."

After enactment of H.B. 4 in 2003, virtually all asbestos and silica disease cases pending in Texas state courts were consolidated for pretrial proceedings through the MDL process. As to cases that would be remanded to the originating court for trial, the judge presiding over the asbestos MDL docket instituted a process by which he would call the judge of the originating trial court to obtain a trial setting. Then he would send the case back to the originating court for trial. He found, however, that a number of cases he sent back to the originating court for trial were subsequently postponed by the originating court, thus defeating the legislative policy of obtaining final disposition within six months from the date the action was transferred to the MDL pretrial court.

In 2007 the Texas Legislature passed S.B. 749, a "clean-up" bill intended to ensure that the purposes of Senate Bill 15 were carried out. The bill gave standing to the presiding judges of the asbestos and silica MDL courts to pursue a petition for writ of mandamus in an appellate court for the purpose of preventing originating courts from postponing trials in asbestos and silica that had gone through the MDL process. To date, the MDL pretrial judges have not had to access this unusual procedure.

2010 MDL court reports

Asbestos multidistrict litigation court

Judge Mark Davidson
MDL Asbestos Court
201 Caroline, Eighth Floor
Houston, Texas 77002

August 30, 2010

Governor Rick Perry
Lieutenant Governor David Dewhurst
Honorable Joe Strauss

Section 90.010 of the Civil Practices and Remedies Code requires each Multidistrict Litigation Pretrial Court having jurisdiction over cases to which Chapter 90 of the Civil Practices and Remedies Code applies to submit a report to the Governor, Lieutenant Governor and Speaker of the House on or before September 1, 2010. The undersigned is the judge appointed by the Multi District Litigation Panel to serve as the pretrial judge on asbestos litigation. This letter constitutes the report relevant to asbestos litigation.[82]

Scope of the report

The statute requires the following data to be within this report:

- The number of cases on the court's multidistrict litigation docket as of August 1, 2010;
- The number of cases on the court's multidistrict litigation docket as of August 1, 2010 that do not meet the criteria of Section 90.003, to the extent known;
- The court's evaluation of the effectiveness of the medical criteria established by Sections 90.003 and 90.004.
- The court's recommendation, if any, as to how medical criteria should be applied to the cases on the court's multidistrict litigation docket as of August 1, 2010; and
- Any other information regarding the administration of cases in the MDL pretrial courts that the courts deems appropriate. Tex. Civ. Prac. & Rem. Code § 90.010.

Number of cases on court's docket

For purposes of this report, I have literally interpreted the statute, and I am providing the number of cases pending. This is different from the number of Plaintiffs pending. The reason for the difference is that prior to the adoption of Senate Bill 15's requirement that each person seeking recovery of asbestos-related diseases have their case tried one at a time, cases were filed and tried in large groups. It has been related to me that one case in Jefferson County has or has had 12,000 plaintiffs seeking damages in the same case since it was first filed in the 1970s.

Different counties have addressed this in different ways prior to the creation of the MDL. In Harris County, the Board of Civil Judges mandated that no more than one plaintiff could have their claims considered in a case. In Dallas County, the limit was

placed at three plaintiffs. In Cass County, the limit was set at ten. In Cameron County, the limit was 700. In Jefferson County, there was no limit. This observation is in no way meant to be critical of any judge or judges, but to state why the wording of the statute is not necessarily instructive of the number of claimants on the inactive docket of Chapter 90 cases.

The report of this court is that, as of August 1, 2010, there are 7,959 cases pending on the MDL Asbestos Docket. Of those, 6,451 are inactive cases and 1,517 are active cases. I have collected the number of cases that originated in each county in the state. Those figures are available on request to you, or to any member of the Legislature.

This is not the number of plaintiffs in the MDL. As stated above, there are many plaintiffs whose cases are jointly filed. The number of plaintiffs in those cases is difficult, and probably impossible, to calculate. I have heard estimates of the number of inactive plaintiffs that range between 25,000 and 84,000. Because many of these case files are not presently in Harris County, determination of the number of claimants with total accuracy would require a tour of the state's courthouses to examine each case file. For the most part, these are cases that are indefinitely abated until such a time, if any, that the plaintiff's breathing ability diminishes to the point that they meet the criteria. I think everyone hopes none of them ever meet that criteria.

I have heard a number of cases a year in which I am asked to activate a case that was formerly inactive. Most of those cases, however, seek to convert an inactive asbestosis case into an active mesothelioma case. As stated above, those cases have different criteria in order for one to be allowed to go forward and initiate discovery.

Evaluation of the medical criteria

The medical criteria relevant to asbestos litigation are found in Section 90.003 of the Civil Practices and Remedies Code. *Tex. Civ. Prac. & Rem. Code § 90.003.* By its terms, it created separate procedural requirements for cases involving asbestosis from cases involving asbestos-related cancer, including but not limited to mesothelioma. Shortly after the effective date of Chapter 90's medical criteria, I heard numerous motions challenging the sufficiency of reports provided by physicians submitted to attempt to meet the requirements of the statute. Many of those objections were sustained. Many were overruled. Those rulings gave both sides of the docket definitive interpretations of how I would interpret the provisions of the statute in the context of qualifying reports.

There have been few contested hearings on Motions to Dismiss for failure to submit an adequate report since 2006. One reason for the paucity of hearings could be that the purpose of the MDL – uniformity and consistency in results of cases – has led to motions being heard once. Plaintiffs have learned which doctors' reports will pass muster, and Defendants have learned which will not.

My opinion of the "effectiveness" of the medical criteria depends on what the intent of the Legislature was in enacting the statute. The criteria make it difficult, if not impossible, for a person with no or few pulmonary problems to seek redress. That is a legitimate public policy well within the purview of the Legislature. A public policy concern that was enunciated at the time of enactment of Chapter 90 was to allow the sickest to be able to proceed in our courts. The relative ease of meeting the criteria for cancer patients and the preference given those cases certainly has aided that goal. In summary, I cannot conclude that the medical criteria have deterred many of the sickest Plaintiffs, those with cancer or serious medical problems caused by asbestos, from effective access to the courthouses of our state.

I have no way of knowing whether there are worthy cases that have not been filed in Texas, or anywhere else, that were deterred by the criteria. Judges in other states tell me that the Texas system of administration of asbestos cases is well thought of. They also tell me that the kind of cases that the medical criteria was designed to discourage—non malignant cases of asbestosis with minor pulmonary disablement—are now largely not being filed in most states. The reasons for this nationwide diminution in the number of filings are complex and disputed—and beyond the scope of this report. It is clear that the Texas statute has been effective in what it set out to do—reduce the number of non-malignant claimants in our courts. The Texas statute, together with the administrative uniformity of the MDL, has given all parties to asbestos litigation a relatively "bright line" to walk.

Other comments on the administration of the docket

I do not intend this report to become a "State of the Asbestos MDL" report. There is one matter, however, that should be addressed that relates solely to matters of administration of cases that is governed by the abatement requirements of the statue.

There are now tens of thousands of cases that have been inactive since 2005. In some of those cases, the Plaintiff may now have died of non-asbestos causes. In some of those cases, the Plaintiff may no longer want to go forward. In a few of the cases, I have allowed Plaintiff's counsel to withdraw when their clients instructed them to dismiss the case or withdraw. In no case has any discovery or motion practice been allowed, in compliance with the legislative mandate. All of this begs the question: At what point, if any, may these cases be dismissed for want of prosecution?

It would appear that at some period of time after a person dies, lack of interest in going forward on an asbestosis case filed during their lifetime could be presumed. The problem becomes that there is no way of knowing when Plaintiffs in inactive cases die. I am uncertain whether Plaintiffs' lawyers have been able to keep up with their clients' changes of addresses, or even whether the change of address is corporal or spiritual.

I do not know what the cost of maintaining inactive files is for Harris County, the locus of many of the files. I know that many more files are being kept in storage facilities around the state in other counties.[83]

I will be glad to amplify any portion of this report on request. As I have done the last two sessions, I will also be glad to serve as a resource to any member of the Legislature on any matter relating to this docket.

Respectfully submitted,

Mark Davidson

Silica multidistrict litigation court

Judge Joseph "Tad" Halbach
333rd District Court
201 Caroline, Suite 1430
Houston, Texas 77002

September 1, 2010

Re: Cause No. 2004-70000; Statewide Silica MDL; in the 333rd District Court of Harris County, Texas
Texas Civil Practice & Remedies Code Section 90.010(k) Report

Dear Governor Perry, Lt. Governor Dewhurst, and Speaker Straus,

This report is submitted to you pursuant to the provisions of Section 90.010(k) of the Texas Civil Practices and Remedies Code (the "Code"), as adopted in Senate Bill 15 of the 79th Legislature, effective September 1, 2005. The statute requires each judge appointed to serve as a multi-district litigation judge of a docket governed by Chapter 90 of the Code to submit a report to each of you on or before September 1, 2010. Since December 9, 2010, I have been the judge appointed to hear silica cases by the Multi-District Litigation Panel.[84] This report is submitted in accordance with the provisions of the statute.

The scope of the report is set forth in the statute. By its terms, the statute presents a broad range of subjects for permissible discussion, although those I am required to report on are specific and fairly narrow. I have interpreted the statute to mandate a report on the principal provision of Senate Bill 15—the creation of an inactive docket for certain silica and asbestos cases—and have focused this report on that subject. As will be explained below, the attorneys representing various parties in this litigation asked that this report be expanded to include discussion of various policy matters addressed in the statute.

Methodology

Recognizing the importance of this report to the parties to this litigation, I held extensive hearings in which both sides presented argument over various policy-based issues that they believe should be contained in this report. One group of defendants asked

that I conduct independent discovery prohibited to them under the terms of the statute as to the medical condition of each plaintiff. A group of plaintiffs asked that I recommend legislative modification of various aspects of the statute.

In each case, I have declined to present the arguments presented or express an opinion on these matters. First, to do so could be construed as a comment on matters that could come before this Court on specific cases. Second, determination of the desirability of policy-based questions is uniquely the job of the legislative branch of government, and not that of an individual MDL trial court. Despite this. I commend to you the extensive informational and statistical filings of the parties in this case. They can be found on-line at www.hcdistrictclerk.com under Cause No. 2004-70000 (the Master Silica MDL cause number). If you wish, I will provide hard copies of all such filings, as well as transcripts of the· hearings that were held in anticipation of this report.

In response to what I view the primary purpose of this report to be — a statistical review of the number of active and inactive cases on the docket — I asked the attorneys for the plaintiffs to submit very specific information to the Court, including the number of Plaintiffs in the cases they currently had on file in Texas Courts. I also had the Harris County District Court's statistical analyst compile the same data, as a way of double checking the reliability of both statistics. I enclose herewith copies of the three (3) orders I signed regarding the reporting I required of the parties. I also permitted the parties to file comments or suggestions for the Court to consider in preparation of this report. I received five (5) separate filings, copies of which I also enclose without attachments. The complete versions of these filings can all be found on-line as directed above, or I can send them if you would prefer.

Number and classification of cases on the docket

Based on the methodology described above, I can report that as of August 1, 2010, there are 667 cases within the Silica MDL. Although the statute requires me to report only on the number of "cases," I can also report that these cases represent approximately 5,839 "exposed persons," as defined by Section 90.001(8) of the Code.[85]

Of these cases, only 22 are active. By this I mean there are cases involving only 22 "exposed persons" that meet the established medical criteria and are therefore active. In the remainder of the cases on the Silica MDL docket, the claimants have not submitted a qualifying report to allow further discovery or to proceed to trial.[86] In the vast majority of these cases, no report was submitted at all, whether qualifying or not. While this might lead one to assume those "exposed persons" do not meet the criteria, there is no way for me to know this or accurately provide numbers, although the parties have provided their own reasons and/or comments on this issue.[87] As of August 1, 2010, no case has been referred back to the original court for trial.

Evaluation of the medical criteria

The statute also requires me to report on the "effectiveness of the medical criteria." Since the statute did not set out its goals in detail, that mandate requires me to examine my perception of the legislative intent in enacting the provisions of Chapter 90. The statute set out specific medical criteria that a person claiming a non-carcinogenic silica based disease must prove in order to be allowed to go forward. As to cases involving cancer related to silica, it set forth a lessened requirement a claimant must meet. To my knowledge, all cases pending as of August 1, 2010, involve claims for non-carcinogenic silica based disease. I am aware of no cases involving silica-related cancer. Thus, based on my review, I cannot conclude that claimants with cancer or severe medical problems caused by silica have been prevented access to the courts.

If the goal is to give priority to claimants who have a current physical impairment over those who do not, and at the same time preserve the claims of the unimpaired until such time as they show severe or significant pulmonary impairment, then the statute is effective. The medical criteria established by the statute have certainly divided silica claimants into two distinct categories: those who can proceed and those who cannot. And, it would not appear that "scarce judicial and litigant resources" have been "misdirected," a legislative concern stated in S.B. 15.[88]

There have been no cancer cases, only 22 cases have become active, and none have proceeded to trial. But, as to whether the criteria themselves or the minimum levels of impairment are appropriate, I am not in a position to ethically opine. This is more appropriately a matter for the lawmakers of Texas to consider based on their findings of currently existing medical science, technology and public policy considerations. I can say that the current criteria and minimum levels make it extremely difficult for

someone with low-level pulmonary problems to proceed, but that is not to say they are not appropriate. It all depends on what the lawmakers of Texas believe the definition of "impairment" should be to allow a claimant to proceed in court in these cases.

You will find in the filings of the parties extensive discussion, arguments and disagreement regarding the propriety of the criteria and whether they should be changed. I make no comment on such. As the MDL judge, with a duty to be fair and impartial to all parties, I do not feel it appropriate to do so. I will limit my comment to noting that it has been five (5) years since the effective date of the statute. During this time no silica case has proceeded to trial. The statute implicitly contemplates a review by the Legislature at this point. Since there is now five years of history to review and there have no doubt been advances in medical science and technology, a review would seem entirely proper. To that end, I commend you to the parties' filings and I would be happy to serve as an appropriate resource witness to the Texas Legislature.

Thank you for the opportunity to submit this report and to serve the people of Texas.

Respectfully submitted,

Joseph J. "Tad" Halbach Jr.

Endnotes

1 Much of the material in this section was drawn from a 2010 Rand Corporation report on asbestos bankruptcy trusts. *See* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, (Rand Corp. 2010) at 15-18, *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf.

2 493 F.2d 1076 (5th Cir. 1973).

3 Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 33 (Mar. 1991), *available at* http://www.uscourts.gov/judconf/91-Mar.pdf.

4 AmChem Products, Inc. v. Windsor, 521 U.S. 591, 597 (1997).

5 *See* Stephen J. Carroll et al., *Asbestos Litigation*, at 121-22 (Rand Corporation 2005), *available at* http://www.rand.org/pubs/monographs/MG162/.

6 *See* Dixon et al., *supra* note 1, at 25. *See also* Crowell & Moring, Chart 1: Company Name and Year of Bankruptcy Filing, *available at* http://www.crowell.com/pdf/AsbestosChart1.pdf (listing asbestos litigation-related bankruptcy filings through December 7, 2010).

7 *See* Dixon et al., *supra* note 1, at 25–29. *See also* Crowell & Moring, Chart 3: Company Name, Case No., Court, Plan Status & Published Decisions, *available at* http://www.crowell.com/pdf/AsbestosChart3.pdf (listing asbestos bankruptcy trusts).

8 *See* Charles Bates and Charles Mullin, *Having Your Tort and Eating it Too* (Mealy's Bankruptcy Report 2006), *available at* http://www.bateswhite.com/media/pnc/7/media.287.pdf. The Rand Institute for Civil Justice estimated the assets of 22 of these bankruptcy trusts at $18.2 billion as of 2008, and that *all* of the trusts had paid a total of only $10.9 billion in claims through the end of 2008. *See* Dixon et al., *supra* note 1, at 26–28, 34–36.

9 Tex. Civ. Prac. & Rem. Code § 90.010(k).

10 *See* S.B. 749, 80th Leg., R.S. (Tex. 2007).

11 Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 773 (Tex. 2007).

12 *Id.*

13 *See* Georgia-Pacific Corp. v. Stephens, 239 S.W.3d 304, 306 (Tex. App.–Houston [1st Dist.] 2007, pet. denied).

14 After completion of pretrial proceedings, the cases are remanded to the original court for trial.

15 The current members of the MDL Panel are David Peeples (Chair), a retired Bexar County district judge who currently serves as the presiding judge of the Fourth Administrative Judicial Region; Carolyn Wright, Justice, Fifth Court of Appeals (Dallas); Jeff Brown, Justice, Fourteenth Court of Appeals (Houston); Catherine Stone, Justice, Fourth Court of Appeals (San Antonio); and Ann McClure, Justice, Eighth Court of Appeals (El Paso).

16 The MDL Panel ordered consolidation of Texas asbestos cases on December 30, 2003, and ordered consolidation of Texas silica cases on November 10, 2004. To date, the MDL Panel has considered consolidation requests in 46 matters and ordered consolidation in 25 matters. Three consolidation requests filed in 2010 were unresolved at the time of publication of this paper. The other 18 consolidation requests were denied or dismissed. MDL orders *available at* http://www.supreme.courts.state.tx.us/mdl/mdlhome.asp.

17 Judge Davidson was not re-elected in 2008, but he was re-appointed by the MDL Panel to continue as the asbestos pretrial court judge.

18 *See* Tex. Civ. Prac. & Rem. Code § 90.009 ("Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial.").

19 The case management order was issued July 29, 2004, about seven months after Judge Davidson's court was designated as the asbestos MDL pretrial court. *Available at* http://www.justex.net/JustexDocuments/62/Rule%2013%20Asbestosis/Case%20Management%20Order.pdf.

20 Judge Davidson's opinion was handed down January 20, 2004. *Available at* http://www.justex.net/JustexDocuments/62/Rule%2013%20Asbestosis/Havner%20Ruling%20-%20January%2020%202005.pdf.

21 Judge Davidson's opinion was handed down September 5, 2006. *Available at* http://www.justex.net/JustexDocuments/62/Judges%20Orders/FNC%20Ruling.pdf.

22 232 S.W.3d 765 (Tex. 2007).

23 Judge Davidson's opinion was handed down July 18, 2007. *Available at* http://www.justex.net/JustexDocuments/62/Judges%20Orders/Post%20Borg%20Warner%20MFSJ.pdf. *See also* Georgia-Pacific Corp. v. Stephens, 239 S.W.3d 304 (Tex. App.–Houston [1st Dist.] 2007, pet. denied) (applying Borg-Warner to mesothelioma cases).

24 232 S.W.3d at 773.

25 Judge Jack is a judge on the United States District Court for the Southern District of Texas, Corpus Christi Division.

26 232 S.W.3d 765 (Tex. 2007).

27 509 U.S. 579 (1993).

28 923 S.W.2d 549, 550 (Tex. 1995).

29 953 S.W.2d 706, 708 (Tex. 1997).

30 *See, e.g.*, NARCO v. Easter, 988 S.W.2d 904, 909-10 (Tex. App.–Corpus Christi 1999, pet. denied); Celotex Corp. v. Tate, 797 S.W.2d 197, 203-05 (Tex. App.–Corpus Christi 1990, writ dism'd by agr.).

31 *See* Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).

32 *Id.* at 1162.

33 *Id.*

34 *Id.* at 1162-63.

35 By contrast, the Court in Borg-Warner recognized that the "frequency, regularity, proximity," or Lohrmann, standard is necessary, but not sufficient, under Texas law. Borg-Warner, 232 S.W.3d at 772 ("Proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law").

36 *See* 953 S.W.2d 706 (Tex. 1997).

37 *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995) (holding that "plaintiffs' experts would have had to testify either that Bendectin actually caused plaintiffs' injuries (which they could not say) or that Bendectin more than doubled the likelihood of limb reduction birth defects (which they did not say)") (cited with approval in Havner, 953 S.W.2d at 715).

38 Havner, 953 S.W.2d at 715 (citing Daubert, 43 F.3d at 1320 n.13).

39 Linda A. Bailey, et al., *Reference Guide on Epidemiology*, in Reference Manual on Scientific Evidence at 126 (1994), *available at* http://ftp.resource.org/courts.gov/fjc/sciam.6.epide.pdf.

40 While it is possible in many toxic tort contexts to have direct evidence of exposure, this is not the same thing as direct evidence that the exposure caused the injury. For example, the presence of asbestos fibers found in the lungs on autopsy constitutes direct evidence that the decedent was exposed to asbestos. It does not constitute evidence, however, that the observed exposure caused mesothelioma. Even absent asbestos exposure, a certain number of men will develop mesothelioma. This is known as the "background" rate of mesothelioma. While estimates vary, even most asbestos plaintiffs' experts agree that approximately ten percent of pleural mesotheliomas in men are unrelated to asbestos exposure. If ten percent of the men who also had asbestos exposure would have developed mesothelioma anyway, direct evidence of exposure such as the presence of asbestos fibers in the lungs after autopsy cannot tell us whether a particular individual would have gotten mesothelioma because of asbestos exposure. All we know is that approximately ten percent of such individuals would have gotten mesothelioma anyway, but science cannot tell us which particular individuals fall into that group.

41 *See* Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 199 (Tex. App.–Texarkana 1998, pet. denied).

42 Havner, 953 S.W.2d at 715.

43 United States v. Shonubi, 895 F. Supp. 460, 516-17 (E.D.N.Y. 1995) (citations omitted).

44 Havner, 953 S.W.2d at 718.

45 *Id.* at 720 (citations omitted, emphasis added).

46 *Id.* (citations omitted).

47 Bernard D. Goldstein and Mary Sue Henifin, *Reference Guide on Toxicology*, in Reference Manual on Scientific Evidence at 403 (2nd Ed. 2000) (noting that "even water, if consumed in large quantities, can be toxic"), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf.

48 Allen v. Pa. Eng'g. Corp., 102 F.3d 194, 199 (5th Cir. 1996) (emphasis added).

49 232 S.W.3d at 773.

50 *Id.*

51 To read the full article, A Short Explanation of Retrospective Exposure Assessment and Its Use in Toxic Tort Litigation, visit http://www.dmcpc.com/documents/EKF_article.pdf.

52 *Id.*

53 *See also* Austin v. Kerr-McGee Ref., 25 S.W.3d 280, 292 (Tex. App–Texarkana 2000, no pet.)

54 232 S.W.3d 765, 773 (Tex. 2007).

55 239 S.W.3d 304, 321 (Tex. App.–Houston [1st Dist.] 2007, pet. denied).

56 *Id.* at 317.

57 *Id.* at 321.

58 Georgia-Pacific Corp. v. Bostic, 320 S.W.3d 588, 598 (Tex. App.–Dallas 2010, pet. filed).

59 307 S.W.3d 829, 834 (Tex. App.–Ft. Worth 2010, no pet.).

60 *Id.* at 839 (emphasis added) (quoting Stephens, 239 S.W.3d at 321).

61 Havner, 953 S.W.2d at 728 (citations omitted).

62 493 F.2d 1076 (5th Cir. 1973).

63 *Id.* at 1094.

64 *Id.*

65 *See, e.g.*, Celotex Corp. v. Tate, 797 S.W.2d 197, 200 (Tex. App.–Corpus Christi 1990, writ dism'd).

66 J.T. Hodgson and A. Darnton, *The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure*, in Annals of Occupational Hygiene, Vol. 44, No. 8 (2000) at 565-601, available at http://annhyg.oxfordjournals.org/content/44/8/565.abstract.

67 The information in the preceding paragraphs was drawn from a 2010 Rand Corporation report on asbestos bankruptcy trusts. *See* Dixon et al., *supra* note 1, at 25.

68 These examples are from Mark D. Plevin, et al., *Where are They Now, Part Four: A Continuing History of the Companies that have Sought Bankruptcy Protection Due to Asbestos Claims*, in Mealy's Asbestos Bankruptcy Report, Vol. 6, No. 7 (Feb. 2007), *available at* http://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_592.pdf.

69 *See* Dixon et al., *supra* note 1, at 25-29. *See also* Crowell & Moring, Chart 1: Company Name and Year of Bankruptcy Filing, *supra* note 6.

70 *See* Dixon et al., *supra* note 1, at 25-29. *See also* Crowell & Moring, Chart 3: Company Name, Case No., Court, Plan Status & Published Decisions, *supra* note 7.

71 *See supra* note 8.

72 Much of the material in this section was drawn from a 2010 Rand Corporation report on asbestos bankruptcy trusts. *See* Dixon et al., *supra* note 1, at 15-18.

73 Testimony of Charles Siegel at Texas House of Representatives Committee on Judiciary and Civil Jurisprudence Interim Committee Hearing, May 26, 2010, *available at* http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/player/?session=81&committee=330&ram=00526a20 (Mr. Siegel's testimony occurred near the end of the hearing).

74 *Id.*

75 *See* Tex. Civ. Prac. & Rem. Code § 33.012(b).

76 *See* Tex. Civ. Prac. & Rem. Code § 33.004.

77 *See* Tex. Civ. Prac. & Rem. Code § 33.003.

78 *See* Tex. Civ. Prac. & Rem. Code § 33.011(6).

79 Judge Davidson's opinion is available at http://www.justex.net/JustexDocuments/62/Rule%2013%20Asbestosis/RTP.pdf.

80 *See* Tex. Disc. Rule of Prof. Conduct 1.04(b)(8).

81 The Rand Institute for Civil Justice cited knowledgeable sources as saying that attorneys typically are paid 25 percent of a claimant's recovery from bankruptcy trusts. *See* Dixon et al., *supra* note 1, at 22.

82 There are two categories of cases contained with Chapter 90 of the CPRC: asbestos and silica. The MDL judge appointed to hear silica is Judge James Joseph "Tad" Halbach of the 333rd District Court.

83 The Supreme Court adopted Rule 13.11(h) of the Rules of Judicial Administration, which prohibited district clerks around the state from sending files to the clerk of the pretrial courts except on order of the MDL court. To date, no such orders have been signed.

84 I am the second judge to be assigned the silica docket by the MDL Panel. The first was the Honorable Tracy Christopher. She presided over all cases on this docket from its creation until her appointment to the Fourteenth Court of Appeals in December of 2009.

85 Many cases were filed with multiple plaintiffs. For example, two cases have approximately 600 plaintiffs, nine cases have more than 100 plaintiffs, and 53 cases have 20 or more plaintiffs. Of course, not all of these plaintiffs are "exposed persons," as defined under Tex. Civ. Prac. & Rem. Code §90.001(8). Many plaintiffs are family members of the alleged injured party. An example might be a wrongful death beneficiary, often a surviving spouse. The total number of plaintiffs (including "exposed persons") is therefore approximately 7,066, as of August 1, 2010.

86 As of August 1, 2010, a total of only 54 medical reports have been filed. As indicated above, 22 of those are active. The Court sustained objections to three (3); and, with the exception of one additional case in which a report has been filed to which no objections have yet been filed, the remainder of the reports have either not been presented for ruling, or have been withdrawn.

87 Please note that the Court's order of May 27, 2010, required Plaintiffs' counsel to provide a list of the various reasons why medical reports were not submitted. In addition, various defense counsel have offered their own opinions as to why such reports were not filed. These filings and opinions can be viewed in the records of this Court.

88 Tex. S.B. 15, 79th Leg., R.S., 2005 Tex. Gen. Laws 15. at § 1 (n).

Texas Civil Justice League

Twenty-five years of landmark legal reform

For twenty-five years, the Texas Civil Justice League has worked to restore balance and stability to the state's legal system. Lawsuit abuse hurts the state's ability to attract new business, create jobs, and remain competitive in a global economy. The League was founded to advocate the passage of civil justice reforms recommended by the Texas Legislature's 1987 Joint Committee on Liability Insurance and Tort Law and Procedure and to be a counterweight to the plaintiffs' bar.

Two and a half decades of hard work has paid off. The Texas economy has weathered the worst of the economic downturn because of a legal, regulatory, and tax environment that encourages business expansion and investment. The results are evident: Texas is the best state for business.

The Texas Civil Justice League pushed through the first comprehensive tort reform bill in the state's history in 1987. That breakthrough made important advances in proportionate responsibility, venue, punitive damages, and product liability. In 1993, the League passed significant reform legislation that vastly improved product liability laws and restored the doctrine of *forum non conveniens,* which had been abolished by a plaintiff-oriented Texas Supreme Court.

Two years later, with then-Governor George W. Bush in office, the Texas Civil Justice League pushed for further enactment of the 1987 agenda with limits on punitive damages, an overhaul of the state's venue laws to reduce forum shopping, and additional steps toward eliminating joint and several liability. Between 1995 and 2003, improvements were made in *forum non conveniens* and other areas, such as summary judgment reform. New threats also emerged from plaintiffs' lawyers, including aggressive efforts to undermine the 1995 reforms, abolish statutes of limitations in oil and gas and other actions, and take away the authority of the Texas Supreme Court to adopt fair and balanced rules of procedure.

In 2003, with a crisis in medical liability, progress on the broad 1987 tort reform agenda was possible. House Bill 4 embodied the key elements of that agenda: a constitutional amendment clarifying the Texas Legislature's authority to limit non-economic damages and other aspects of civil actions, a cap on non-economic damages in medical cases, submission of all responsible third parties to the jury for allocation of fault, prejudgment interest reform, and a restoration of volunteer and charitable immunities lost through decades of expansive court decisions. House Bill 4 also reformed class actions, a measure supported by the League since the 1999 session.

Ordinarily, the session following a comprehensive reform initiative such as House Bill 4 would be devoted to "clean up" items and "playing defense" against efforts to roll back reforms. While some of those things were done in 2005, the Texas Civil Justice League also established the Texas Asbestos Consumers Coalition to advocate the nation's most far-reaching reform of mass asbestos and silica litigation. Because of new techniques of mass screenings, case recruiting, and favorable venues in certain parts of the state, by the late 1990s Texas had become the forum of choice for asbestos lawyers nationwide. Senate Bill 15 effectively shut down unimpaired asbestos and silica claims in state courts.

In 2007, the Texas Civil Justice League helped defeat anti-indemnity, "paid or incurred," and qui tam proposals. Two years later, the League and a statewide business coalition defeated bills seeking to eliminate evidence standards in asbestos-related mesothelioma cases and invalidate a Texas Supreme Court decision recognizing that premises owners can act as their own general contractors and provide workers' compensation coverage for job-site employees.

The landmark legal reform of recent years would never have happened without the advances of the early 1990s. Indeed, without the Texas Civil Justice League and its broad base of support for the 1987 joint committee report, lawsuit reform might never have happened at all.

Success requires vigilance. The state will once again be the "world's courtroom" without the Texas Civil Justice League and its members standing up for fair and equal justice for plaintiffs and defendants.

Join the Texas Civil Justice League

Established in 1986, the Texas Civil Justice League:

- is a non-partisan, statewide business coalition committed to legal reform and public policy research.
- helped thwart efforts to roll back business liability and legal reform during the 2009 legislative session. Not a single trial lawyer bill passed both houses, and most stalled in committee. Lawmakers agreed that economic recovery and job creation depend upon a legal and regulatory environment that encourages business expansion and investment.
- is already laying the groundwork for the 2011 legislative session. Policy committees have made recommendations in vital issue areas, such as construction liability, courts, general business liability, mass torts, and products liability. In addition, the Texas Civil Justice League's grassroots and political outreach efforts impacted legislative and judicial races by keeping business issues in the forefront of last year's campaigns.
- cost-effectively extends the benefits of corporate legal departments by monitoring court rulings and legislation and alerting members to challenges that threaten the state's judicial system.
- is the state's oldest legal reform organization. Business leaders and former legislators founded the Texas Civil Justice League to enact recommendations issued by the 1987 House/Senate Joint Committee on Liability insurance and Tort Law Procedure.
- takes fiscal responsibility seriously, leveraging membership dues into meaningful, long-term reform.
- is the only statewide legal reform coalition governed by a board of directors composed of business leaders and association representatives.
- works closely with business and professional trade associations to achieve mutual public policy objectives.
- actively seeks and incorporates members' input into legislative proposals.
- is a national leader in the lawsuit reform movement and has assisted in the organization of similar state groups in Georgia, Illinois, New York and Pennsylvania.
- is a charter member of the American Tort Reform Association and collaborates with other national groups, including the American Justice Partnership, Civil Justice Reform Group, and the U.S. Chamber of Commerce's Institute for Legal Reform.

For membership information, please contact Kate Doner (512-476-4403 or kate@tcjl.com).

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