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## COMMENTARY

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

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

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REUTERS/Robin van Lonkhuijzen

**Joanne E. Schultz alleges that benzene in paints made by AkzoNobel caused her husband Donald to develop a fatal form of cancer from working as a painter in automobile manufacturing plants. The company's headquarters are shown here.**

## BENZENE EXPOSURE

## Paint manufacturer must face benzene death suit

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

***Schultz v. Glidden Co., No. 08-C-919, 2013 WL 4959007 (E.D. Wis. Sept. 13, 2013).***

U.S. District Judge Rudolph T. Randa of the Eastern District of Wisconsin declined to disturb the 7th U.S. Circuit Court of Appeals' finding

that an industrial hygienist's calculations of Donald W. Schultz's total benzene exposure, which formed the basis of the oncologist's testimony, were scientifically reliable.

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## Westlaw Journal Toxic Torts

Published since June 1983

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### Westlaw Journal Toxic Torts

(ISSN 2155-093X) is published biweekly by Thomson Reuters.

### Thomson Reuters

175 Strafford Avenue, Suite 140

Wayne, PA 19087

877-595-0449

Fax: 800-220-1640

www.westlaw.com

Customer service: 800-328-4880

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

By **Eric G. Lasker Esq., and Richard O. Faulk Esq.**  
**Hollingsworth LLP**

In one of the most infamous, and remarkably honest, statements in American legal history, plaintiffs’ counsel Richard “Dickie” Scruggs once described asbestos litigation as an “endless search for a solvent bystander.”<sup>1</sup> When the statement was made, the asbestos litigation behemoth was plainly running amok and, even years later most courts, including the state courts in Texas, had done little to resolve the “elephantine mass” of asbestos litigation clogging the nation’s judicial system.<sup>2</sup>

Company after company turned to the federal bankruptcy courts to solve a problem that the state courts could not, or would not, address.<sup>3</sup>

Asbestos litigation increasingly became a “cold war” where armies of lawyers prepared for trials that seldom occurred and hundreds of millions of dollars changed hands in settlements that left every major liability issue unresolved.<sup>4</sup> The system was marvelously self-perpetuating. Without judicial intervention regarding controlling legal issues, the system seemed to be an inexhaustible source of litigation and revenue for lawyers on both sides of the controversy.

After decades of expanding liability to increasingly broader categories of defendants, some courts finally recognized rational ways to use the common law as

a means of containment. They drew the line against claims that any exposure to asbestos was capable of causing illnesses and required proof that the exposures to each defendant’s product were, in fact, sufficient to cause asbestos-related diseases, including mesothelioma.<sup>5</sup> Texas was among the first states to recognize this common-law requirement.

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

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In *Borg Warner v. Flores*,<sup>6</sup> the Texas Supreme Court required proof that the exposure was a “substantial factor” in causing the illness and held that standard “[d]efendant-specific evidence relating to the approximate dose to which plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease will suffice.”<sup>7</sup> This essential endorsement of “but for” causation was consistent with decades of Texas law that had been applied to virtually every type of tort, including product liability, but that had never before been applied in Texas asbestos litigation.<sup>8</sup>

In light of *Flores*, Texas asbestos cases are treated like other toxic-tort cases, that is, before a case can be sent to the jury there must be real proof of specific causation — proof that ties the particular defendant’s product to the particular plaintiff’s illness.<sup>9</sup>

Coupled with the salutary asbestos reforms the Texas Legislature enacted, the *Flores* decision and its progeny precipitated a

remarkable decline in asbestos litigation in Texas courts.<sup>10</sup> Although Texas authorized and implemented a statewide multidistrict litigation for asbestos suits, the volume of cases rapidly decreased to the point where supervision by a full-time judge was unnecessary. Although there was an attempt to abrogate *Flores* by statute in the Texas Legislature, the initiative failed. As a result, *Flores* remains controlling in Texas — for now — but lightning can be seen on the horizon.

In *Georgia-Pacific Corp. v. Bostic*,<sup>11</sup> the state’s Court of Appeals in Dallas followed *Flores* and held as a matter of law that asbestos plaintiffs failed to demonstrate that “but for” exposure to the defendant Georgia Pacific’s product, the decedent’s mesothelioma would not have occurred.<sup>12</sup> The plaintiffs appealed to the Texas Supreme Court, which initially denied review without comment. When the plaintiffs moved for rehearing, however, the court changed course and granted review of the lower court’s decision. The decision to grant review is especially odd because the jury in the trial court was given the “but for” instruction without objection.<sup>13</sup> It is therefore questionable whether the issue has been preserved for review. Nevertheless, the parties and numerous *amicus curiae* have filed briefs on the rehearing, including one the authors of this article wrote.<sup>14</sup>



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The arguments the *Bostic* plaintiffs raised to challenge the *Flores* rule are creative but unavailing. For example, they argue that alternative liability cases like *Summers v. Tice* control *Bostic*.<sup>15</sup> But those cases rest on the necessary predicate that the actions of each defendant alone would have been sufficient to cause injury.<sup>16</sup> In *Bostic*, the plaintiffs failed to show that Timothy Bostic's exposure to Georgia Pacific's products alone was sufficient to cause or contribute to his injury. So, the *Summers* rule cannot apply.

Of equal importance, the *Bostic* plaintiffs also failed to appreciate that the Texas Supreme Court rejected the alternative liability rule in asbestos personal injury cases already. In *Gaulding v. Celotex Corp.*,<sup>17</sup> the plaintiffs sought to hold the defendants liable even though they could not prove that any particular defendant manufactured the product that actually caused the decedent's mesothelioma.<sup>18</sup>

court,<sup>24</sup> and the plaintiffs cannot negate the possibility that idiopathic causes unrelated to any workplace or bystander asbestos exposures caused Bostic's mesothelioma.<sup>25</sup> Under these circumstances, alternative liability is completely inapposite.

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

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

Will the court carve a special "exception" to those principles in asbestos litigation, particularly mesothelioma cases? Is the

<sup>3</sup> See Faulk, *supra* note 2, at 945-956.

<sup>4</sup> *Id.* at 954-956.

<sup>5</sup> See, e.g., *Bartel v. John Crane Inc.*, 316 F. Supp. 2d 603, 607-08 (N.D. Ohio 2004), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); see generally, Mark A. Behrens & William L. Anderson, *The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation & Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008).

<sup>6</sup> *Borg Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007). Since *Flores*, other jurisdictions have used similar reasoning and rejected the "any exposure" approach to causation. See, e.g., *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 733 (Va. 2013); *Betz ex rel. Simikian v. Pneumo Abex LLC*, 44 A.3d 27, 56-57 (Pa. 2012); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537 (Ga. Ct. App. 2011).

<sup>7</sup> *Flores*, 232 S.W.3d at 773.

<sup>8</sup> See Faulk, *supra* note 2, at 963 discussing cause-in-fact requirement under Texas law). Although the *Flores* court did not specifically refer to the "but for" test as a component of "substantial factor" causation, it relied on earlier cases that expressly defined "substantial factor" as incorporating "cause in fact." Those cases defined "cause in fact" as a "substantial factor in bringing about the injury which would not otherwise have occurred." See, e.g., *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995). Moreover, the court has stressed "but for" causation in cases decided since *Flores*. See *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 225 (Tex. 2010) (holding that a jury instruction on causation that lacks the but-for component is reversible error).

<sup>9</sup> As such, *Flores* manifests the continuing intent of the Texas Supreme Court to apply, in asbestos cases, the "fundamental principle of traditional products liability law ... that the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989).

<sup>10</sup> *Flores* was ultimately extended to all asbestos-related diseases. See *Smith v. Kelly-Moore Paint Co.*, 307 S.W.3d 829, 834 (Tex. App., Forth Worth 2010) (*Flores* cannot be read "so narrowly as to apply only to asbestosis or asbestos exposure cases other than mesothelioma.>").

<sup>11</sup> 320 S.W.3d 588 (Tex. App., Dallas 2010). The authors of this article are counsel in the Texas Supreme Court for *amicus curiae* for the American Coating Association, American Chemistry Council and International Association of Defense Counsel. A copy of the *amicus* brief can be found at <http://www.hollingsworthllp.com/news.php?NewsID=524>. *Bostic et al. v. Georgia-Pacific Corp.*, No. 10-0775, *amicus* brief filed (Tex. Aug. 22, 2013).

<sup>12</sup> *Id.* at 601.

<sup>13</sup> The charge defined "proximate cause" as "that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred." (emphasis added). See *Ford Motor Co. v. Ledesma*,

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

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As in *Bostic*, the *Gaulding* plaintiffs relied on *Summers* and other authorities, such as *Landers v. East Texas Salt Water Disposal Co.*,<sup>19</sup> to excuse their lack of proof.<sup>20</sup> The court rejected the plaintiffs' attempt to escape their causation burden for two reasons.

First, the court explained that the issue in *Landers* was not causation, that is, whether each of the defendants' actions were "but for" causes of injury to the plaintiff. The *Landers* court was reviewing a dismissal on the pleadings, and it was unequivocally alleged that each of the two defendants released large volumes of salt water that contaminated the plaintiffs' land and contributed to the overall injury.<sup>21</sup>

The issue in *Landers* was proof of damages: whether the defendants could escape liability because the plaintiff could not prove each defendant's allocated share of damages.<sup>22</sup>

Second, the *Gaulding* court stressed that "[a] crucial element to alternative liability is that all possible wrongdoers must be brought before the court."<sup>23</sup> In *Bostic*, there are numerous possible defendants not before the

court prepared to renew Texas as a "magnet" jurisdiction for asbestos litigation, much like West Virginia and California, states with far more liberal views of causation requirements?

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

WJ

## NOTES

<sup>1</sup> *Medical Monitoring & Asbestos Litigation: A Discussion with Richard Scruggs & Victor Schwartz*, 17:3 MEALEY'S ASBESTOS LITIG. REP. 5 (Mar. 1, 2002) (quoting Scruggs); see also Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 512 (2008).

<sup>2</sup> See generally, Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945 (2003); Hon. Griffin B. Bell, *Asbestos Litigation & Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6 (June 2002), at 7 (Nat'l Legal Ctr. For the Pub. Interest monograph).

242 S.W.3d 32, 46 (Tex. 2007) (“but-for cause” is “one without which the event would not have occurred”).

<sup>14</sup> See *Bostic*, brief of amici curiae, *supra* note 11.

<sup>15</sup> *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

<sup>16</sup> See *id.* at 5 (“If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress.”) (emphasis added). See also *Corey v. Havener*, 65 N.E. 69, 69 (Mass. 1902) (“If each contributed to the injury, that is enough to bind both.”) (emphasis added); *Anderson v. Minneapolis*, instructed that defendant could not be liable unless fires caused defendant’s rail cars reached plaintiff’s land), overruled in part by *Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921).

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

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

<sup>19</sup> 248 S.W.2d 731 (Tex. 1952).

<sup>20</sup> See *Gaulding*, 772 S.W.2d at 68-69.

<sup>21</sup> *Id.* at 68; see *Landers*, 248 S.W.2d at 731-32.

<sup>22</sup> See *Landers*, 248 S.W.2d at 734.

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

<sup>24</sup> See *Bostic*, 320 S.W.3d at 594-95.

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

## RECENT COURT FILINGS

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

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

***Hill v. Suresource LLC et al.*, No. BC520498, complaint filed (Cal. Super. Ct., L.A. County Sept. 6, 2013).**

### TEXAS SEEKS CIVIL PENALTIES FOR CHEMICAL PLANT EMISSIONS

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

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

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

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

***Shefa LMV LLC v. CVS Pharmacy Inc. et al.*, No. BC520411, complaint filed (Cal. Super. Ct., L.A. County Sept. 4, 2013).**