

APPELLATE ISSUES IN MASS TORTS

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APPELLATE ISSUES IN MASS TORTS

I. INTRODUCTION

“The mass tort litigation that has proliferated over the last two decades has caused departures from traditional ways in which cases have been filed, discovery has proceeded, and trials have been set.” *In re Ethyl Corp.*, 975 S.W.2d 606, 609 (Tex. 1998). Indeed, a new type of products liability mass tort litigation seemingly presents itself almost every year. And with the unique challenges (pitfalls as well as advantages) endemic to mass tort litigation, many opportunities arise for the enhanced involvement of an appellate attorney in the litigation. This paper will discuss some appellate-related issues posed by mass tort litigation.

II. THE “EXTRAORDINARY CIRCUMSTANCE” EXCEPTION FOR MANDAMUS REVIEW — IS IT A “MASS TORT” EXCEPTION?

By its very nature, mass tort litigation will introduce recurring themes and issues requiring resolution throughout the litigation. While legal issues, discovery and privilege matters might be raised in a particular case, their general relevance to the entire litigation serves only to enhance the importance of the matter to plaintiffs and defendants alike for, once decided, subsequent judges will be more likely to decide the issues in the same manner. Moreover, if cases in the particular mass tort have been assigned to a pretrial judge for pretrial coordination of pretrial matters, a matter that will be discussed in Section V of this paper, the pretrial judge could be making the determination in many cases or even for the entire litigation. Thus, the nature of mass tort litigation greatly amplifies the importance of many pretrial decisions, thereby creating an incentive to review certain critical pretrial issues by mandamus.

The “mass tort” nature of a ruling may have a particular bearing on whether the ruling is appropriate for mandamus review. A writ of mandamus will issue to correct a clear abuse of discretion, or the violation of a duty imposed by law, when there is no other adequate remedy by law. *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding). While the circumstances in which a remedy is inadequate have been found to be very narrow, the Texas Supreme Court has issued a trilogy of opinions suggesting that the “adequate remedy by law” requirement may have a different meaning when mass tort litigation is involved. The Texas Supreme Court has held that the “problems inherent in many, if not all, mass tort cases” may present “extraordinary circumstances” in which an abuse of discretion cannot be adequately remedied on

appeal, even though ordinarily mandamus relief would not be available. See *CSR Ltd. v. Link*, 925 S.W.2d 591, 596-97 (Tex. 1996); *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999); *In re E.I. de Pont de Nemours and Co.*, 92 S.W.3d 517, 523-24 (Tex. 2002). In each of these three cases, the Court granted mandamus relief in situations where relief may not have been granted had mass tort litigation not been involved.

A. CSR v. Link

The mass tort “extraordinary circumstances” exception was first developed in *CSR v. Link*, 925 S.W.2d 591 (Tex. 1996). CSR was an Australian company sued throughout the asbestos litigation for its role as a sales agent for raw asbestos. The focus of the claims against CSR was its sale of 363 tons of raw asbestos, which eventually made its way to Texas. Because this was the extent of CSR’s contact with Texas, it challenged the personal jurisdiction of Texas courts. The Texas Supreme Court found that the shipment of asbestos was not purposefully directed at Texas, and that CSR did not have systematic and continuous contacts with Texas sufficient to support general jurisdiction.

The real question of the case, however, was whether review via mandamus was appropriate. With respect to the requirement that there be no adequate remedy by appeal, the Court acknowledged that mandamus typically will not lie from the denial of a special appearance, but also noted that it had previously held there may be “extraordinary circumstances” in which the denial of a special appearance cannot be adequately remedied on appeal. *Id.* at 596.

In *CSR*, the Court found that “[t]he extraordinary circumstances present in this case stem from the problems inherent in many, if not all, mass tort cases.” *Id.* While CSR had been sued by only five plaintiffs in the underlying case from which a petition for writ of mandamus was taken, the Texas Supreme Court was keenly aware of the number of cases in Texas to which CSR was actually and potentially exposed. As of 1996, CSR had already been sued by approximately 1610 plaintiffs in at least 12 different lawsuits. 925 S.W.2d at 596 & n.2. The Court also noted that “thousands of potential claimants exist based on possible exposure to transite pipes containing CSR asbestos since 1957.” *Id.* at 596. Thus, the Court was willing to consider the full scope of the litigation in which this issue might arise repeatedly.

The Court recognized that mass tort litigation “places significant strain on a defendant’s resources and creates considerable pressure to settle the case, regardless of the underlying merits.” *Id.* at 596. Therefore, the “large number of lawsuits to which [a defendant] could potentially be exposed is significant” in determining whether ordinary appeal is an adequate

remedy. *Id.* In addition, the Court in *CSR* held that the “most efficient use of the state’s judicial resources is another factor” to be considered in determining whether an appeal would provide an adequate remedy. *Id.* The Court found:

[A]sbestos litigation in Texas is complicated, involves a multitude of parties, and is usually quite lengthy . . . [a]s a result, the state expends a large amount of its limited judicial resources resolving these massive controversies. Under these circumstances, a trial on the merits and appeal would further overtax the state’s judicial resources . . . Because of the size and complexity of the asbestos litigation, the most prudent use of judicial resources in this case is to permit a preliminary resolution of the fundamental issue of personal jurisdiction by writ of mandamus.

Id. at 596-597.

Thus, in *CSR*, while the question of personal jurisdiction that was at issue was normally remediable by appeal, the Court held that under the circumstances of the case, “the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant [made] ordinary appeal inadequate.” *Id.* at 597. At the same time, the Court emphasized that it was not “relaxing or retreating” from the requirement that a relator must show an inadequate remedy by appeal.

While the Texas Legislature subsequently made determinations of special appearances subject to interlocutory appeal, the *CSR* opinion decision remains excellent guidance for seeking mandamus review of pretrial issues in mass tort litigation.

B. In re Masonite

With its decision in *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999), the Court again found “exceptional circumstances” in mass tort litigation. Masonite Corporation was one of the defendants sued by hundreds of homeowners in one county and hundreds more homeowners in another county, alleging defects in building materials. Because not all of the homeowner plaintiffs were residents of the respective counties of suit, Masonite filed motions to transfer venue of the non-resident homeowners’ claims. Despite the plaintiffs’ concession that venue was improper, the trial court denied the motion to transfer venue, and on its own motion transferred hundreds of claims to fourteen other counties not requested in the venue motion. *Id.* at 195, 199. The Court found the transfers an abuse of discretion, and

agreed with Masonite that the case presented “exceptional circumstances” that made appeal an inadequate remedy.

In finding that exceptional circumstances existed, the Court relied on the fact that “the claims of hundreds of plaintiffs, instead of being tried in a proper forum, are now being tried in multiple improper forums — all trials with automatic reversible error.” *Id.* at 198. The Court found “no reason for the resources of Texas courts and the parties to be so strained,” and cited *CSR* for the proposition that the most efficient use of the state’s judicial resources is a factor to be considered in determining whether an ordinary appeal would provide an adequate remedy. *Id.* at 198 n.26. The majority took issue with the dissent’s charge that it was retreating from the requirement that there be no adequate appellate remedy before mandamus will lie:

Walker [v. Packer] does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue . . . here the trial court has wrongfully burdened fourteen other courts in fourteen other counties, hundreds of potential jurors in those counties, and thousands of taxpayer dollars in those counties. These are “exceptional circumstances” warranting mandamus relief.”

Id. at 199. The circumstances that supported mandamus review in the *Masonite* case are concerns that are not unusual in large mass tort litigations.

C. In re E.I. duPont de Nemours

In 2002, the Court once more found exceptional circumstances, again in asbestos mass litigation. See *In re E.I. duPont de Nemours and Co.*, 92 S.W.3d 517 (Tex. 2002). DuPont, a manufacturer of asbestos products, was sued by 8,000 plaintiffs in five related cases pending in two different courts. *Id.* at 519. DuPont moved to dismiss the claims of out-of-state asbestos plaintiffs who failed to elect between an exemplary damages cap or a 180-day abatement to allow re-filing of the case in another state, as required by section 71.052(c) of the Texas Civil Practice and Remedies Code. *Id.* at 521. The Court concluded that the trial courts clearly abused their discretion in refusing to apply section 71.052 — which is mandatory and leaves the trial courts no discretion — to the plaintiffs’ claims against DuPont. *Id.* at 523.

The Court agreed with DuPont that its situation was analogous to that of the defendant in *CSR* and that DuPont had no adequate remedy by appeal. The Court noted that while the defendant in *CSR* faced thousands of potential claimants, DuPont had already been sued by over 8,000 plaintiffs in litigation that had already been pending for more than eight years. The Court also cited the trial court's intent to try one group of trial plaintiffs at a time until the cases were resolved, and found the burden of the litigation on DuPont and on the judicial resources of the state to be no lighter than that in *CSR*. *Id.* at 524. Thus, the Court found that repetitive nature of issue in mass tort litigation warranted the use of mandamus to review critical issues in the litigation.¹

D. What Constitutes "Exceptional Circumstances?"

CSR, *Masonite*, and *DuPont* clearly support the notion that a mass tort exception exists allowing for mandamus review in circumstances where the Court itself recognized that mandamus relief might not ordinarily be available. However, there is no bright-line rule as to what type of burden on the defendant will warrant an exceptional circumstances finding. In *CSR*, the defendant was sued by five plaintiffs, but thousands of potential claimants existed. In *Masonite*, the defendant was sued by hundreds of homeowners in one county and hundreds of homeowners in another county, and the venue transfer wrongly burdened fourteen different counties. In *DuPont*, the defendant was sued by 8,000 plaintiffs in five different cases. Whether the Supreme Court will find "exceptional circumstances" in situations that involve a mass tort smaller than those in *CSR*, *Masonite*, and *DuPont* remains to be seen.

Aside from the sheer number of claims potentially affected by the decision, the type or nature of the decision to be reviewed may also have some bearing on the matter. If the issue is of a dispositive nature, then mandamus review may prevent the needless waste of the court's or parties' resources. Indeed, *CSR*

involved personal jurisdiction and *DuPont* involved forum non conveniens — both dispositive types of issues that could short-circuit judicial involvement and conserve judicial resources.

But the "extraordinary circumstances" exception in *CSR* was not limited to dispositive issues but rather discussed fundamental issues in the litigation. 925 S.W.2d at 597. *CSR* and its progeny do not attempt to characterize the type of "fundamental" issue that could warrant mandamus review on a mass tort basis. Clearly, however, the fundamental nature of the decision must be tied to an eventual conservation of judicial resources. For example, in the *Masonite* case, the venue question at issue would have resulted in per se reversible error; addressing the issue by mandamus would save numerous trials from being tainted by reversible error.

One controlling factor also mentioned in the *Masonite* decision was the extent to which the ruling potentially burdened other courts. While an erroneous venue ruling is problematic enough, the court's ruling in *Masonite*, by transferring cases to 14 other counties, forced those other courts to waste judicial resources adjudicating cases that were already tainted by error. Thus, although the courts have not clearly articulated the types of decisions that could qualify for the extraordinary circumstances exception, a potential relator should take care to couch the issue in such a way as to demonstrate a saving of judicial resources, and conversely, a real party in interest should attempt to demonstrate the contrary.

III. MULTI-PLAINTIFF TRIALS: CONSOLIDATION AND SEVERANCE, SEPARATE TRIALS, AND INTERVENTION

Mass tort litigation not only presents problems with joint resolution of *pretrial* issues, but also poses threats of joint trials of multiple, independent claims. The Texas Supreme Court stated in *Ethyl* that "[t]he advent of mass torts necessitates that our courts devise systematic means of resolving large numbers of cases that have issues in common." *Ethyl*, 975 S.W.2d at 610. However, the Court has also stated that "We must resolve such claims in a timely manner while ensuring that justice is dispensed to each individual plaintiff and defendant in the process. The rights of the parties to a fair trial cannot be compromised in the name of judicial economy." *Id.* The tension between resolving large numbers of cases while at the same time ensuring the parties receive a fair trial is an issue with which mass tort litigants often grapple.

Plaintiffs may wish to litigate a case as a multi-plaintiff case for a variety of reasons: economies of scale, settlement value, pressure on a defendant, etc. And plaintiffs have several avenues available to accomplish this goal — multiple plaintiffs can be joined in one case from the outset; plaintiffs can

¹ In addition, a strong case could have been made that the type of issue involved in the *DuPont* litigation — denial of *forum non conveniens* — was an appropriate basis for mandamus review. Mandamus review may lie when the right to be reviewed will be rendered illusory or impaired pending normal appellate review following trial on the merits. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656 (Tex. 1996). *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992). The doctrine of *forum non conveniens* is meant to avoid the undue burden and prejudice of trial in an inconvenient forum. *Piper Aircraft v. Reyno*, 454 U.S.235 (1981). Thus, by its very nature, much of the benefit of a *forum non conveniens* claim will be impaired if a trial occurs prior to review, arguably rendering appellate review an inadequate remedy.

intervene into or otherwise be joined in a case after it is filed; and plaintiffs can move to consolidate separate cases after they are filed.

When faced with a multi-plaintiff case, a defendant has several choices. It can move to sever the claims into individual cases from the outset of the case; it can proceed with the multi-plaintiff case through the discovery phase and move to sever the cases as the trial date approaches; it can move for separate trials; or it can choose to discover and try the case as a multi-plaintiff case. Issues surrounding multi-plaintiff cases will be discussed below.

A. Joinder/Misjoinder

The Rules of Civil Procedure recognize that, in certain situations, multiple claims may be joined in a single lawsuit. Rule 40 provides the requirements for permissive joinder:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

TEX. R. CIV. P. 40. The rule does not define the requirement that the claims arise out of the “same transaction” or “occurrence.” However, courts have concluded that the Texas permissive joinder rule is equivalent to the federal rule, which applies the “logical relationship test” in determining if joinder is appropriate. *Blalock Prescription Center, Inc. v. Lopez Guerra*, 986 S.W.2d 658, 663 (Tex. App.—Corpus Christi 1998, no pet.). Under this test, a transaction is flexible — comprehending a series of many occurrences logically related to one another. *Id.* To arise from the same transaction, at least some of the significant facts must be relevant to both claims. *Id.*; see, e.g., *Jack H. Brown & Co. v. Northwest Sign Co.*, 718 S.W.2d 397, 400 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

This is but one of two requirements for joinder, however. Even though a claim arises out of the same transaction or occurrence as another claim, joinder is not permitted unless it is also shown that a question of law or fact common to all of the claims will arise in the action. See *In re Levi Strauss & Co.*, 959 S.W.2d 700, 703 (Tex. App.—El Paso 1998, orig. proceeding) (noting that Rule 40 contains two conjunctively stated requirements, “same transaction” and “any question of law or fact common to all of [the claims]). Moreover, joinder may still not be appropriate if the potential prejudice resulting from joinder outweighs judicial economy and convenience. *Id.* Rule 40(b) allows the

trial court to enter other orders to prevent delay or prejudice.

B. Severance

A defendant may move to sever claims that have been improperly joined. Rule 41 of the Texas Rules of Civil procedure provides:

[A]ctions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

TEX. R. CIV. P. 41. This rule refers to a claim that is a severable part of a controversy that involves more than one cause of action. *McGuire v. Commerical Union Ins. Co. of N.Y.*, 431 S.W.2d 347, 351 (Tex. 1968). Rule 41 grants the trial court broad discretion in the matter of consolidation and severance of causes. *Guaranty Federal Bank vs. Horsehoe Operating Co.*, 793 S.W.2d at 658 (Tex. 1990); *McGuire*, 431 S.W.2d at 351. A claim is properly severable if:

- (1) the controversy involves more than one cause of action.;
- (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and
- (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.

Id. The controlling reasons for a severance are: to do justice, to avoid prejudice, and to further convenience. *Guaranty Federal*, 693 S.W.2d at 658.

There is a substantial overlap between Rules 40 and 41. Essentially, a court is required to determine whether judicial economy and convenience are substantially outweighed by the potential for prejudice if the claims remained joined in the same action. *In re Jobe Concrete Products*, 2001 WL 1555656 *7 (Tex. App.—El Paso 2001, no pet.) (not designated for publication).

C. Separate Trials

A defendant may also ask that the claims be tried separately as opposed to severing the claims into a

brand new case file. Separate trials are governed by Texas Rule of Civil Procedure 174(b), which provides:

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

The express purpose of Rule 174(b) is to further convenience and avoid prejudice, and thus promote the ends of justice. *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 683 (1956), *reaffirmed by In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998). Through the use of the word “may,” Rule 174(b) indicates that the trial court has discretion, but the *Womack* court held that such discretion is not unlimited:

When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion.

Id. In those circumstances, “[t]he rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.” *Id.* As will be seen in Subsection E, these *Womack* principles extend to all procedural types of multi-plaintiff cases, whether through joinder, intervention, or separate trials.

Review of a trial court’s decision on a separate trial issue is available either by mandamus or by appeal after a trial on the merits. *See In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998) (mandamus review); *North American Refractories Co. v. Easter*, 988 S.W.2d 904 (Tex. App.—Corpus Christi 199, pet. filed) (review on appeal after trial). Regardless of the method of review, the standard of review is the same — abuse of discretion. *In re Ethyl*, 975 S.W.2d at 608; *Easter*, 988 S.W.2d at 916-17.

D. Intervention

Intervention into a lawsuit is governed by Texas Rule of Civil Procedure 60, which provides that “[a]ny party may intervene by filing a pleading, subject to being stricken by the court for sufficient cause on the motion of any party.” TEX. R. CIV. P. 60.

A person or entity is given the right to intervene if it could have brought the same action or any part thereof on its own. *Guaranty Federal Savs. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). An intervenor is not required to secure the

court’s permission to intervene; any party who opposes the intervention has the burden to challenge it by a motion to strike. *Guaranty Federal*, 793 S.W.2d at 657. Once a motion to strike has been filed, the burden then shifts to the intervenor to show a justiciable interest in the lawsuit. *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982). The interest asserted by the intervenor may be legal or equitable in nature, but it must be greater than a mere contingent or remote interest. *Intermarque Automotive Products, Inc. v. Feldman*, 21 S.W.3d 544, 549 (Tex. App.—Texarkana 2000, no pet.) A party has a justiciable interest, and thus, a right to intervene, when his interests will be affected by the litigation. *Id.* The intervening party must also assert a claim that arises from the same transaction or occurrence and that has a common question of law or fact with the original claim. TEX. R. CIV. P. 40.

E. Application of These Rules in a Mass Tort Context

In two cases decided the same day in 1998, the Texas Supreme Court applied Rule 174(b) and the principles espoused in *Womack* to mass tort litigation. *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998); *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601 (Tex. 1998). In *Ethyl*, the defendant complained of the trial court’s aggregation of 25 separate asbestos claims for trial purposes. (The mandamus did not concern consolidation, because the plaintiffs and defendants were already parties to the same suit.) In *Bristol-Myers*, the defendant objected to the consolidation of the claims of nine plaintiffs for trial. Whether the issue is consolidation or the refusal to order separate trials, both *Ethyl* and *Bristol-Myers* are instructive on the question of what evidence a defendant must present in order to complain on mandamus. In both cases, the Court refused mandamus relief because it found that evidence had not been provided as to several factors relating to commonality or dissimilarity of the claims, *Ethyl*, 975 S.W.2d at 608, and in the case of *Bristol-Myers*, found evidence lacking to demonstrate that trial of multiple claims would result in prejudice and confusion. 975 S.W.2d at 604.

1. In re Ethyl Corp.

a. The Facts.

The underlying suit was a single suit encompassing the claims of 459 workers or their families against premises owners for injuries or deaths of workers allegedly exposed to asbestos products at industrial sites. 975 S.W.2d at 609. The trial court grouped for trial the premises liability claims of twenty-two workers against five defendants. *Id.* at 608-09. The length of exposure ranged from one year to thirty-eight years, and the nature of the injuries

differed in severity. *Id.* at 609. Seven workers were deceased. *Id.*

b. The Defendants' Evidence.

The defendants presented evidence from their expert, a psychologist and a jury consultant. The expert identified nine differences in plaintiffs' claims that would make it difficult for jurors to separate the evidence as to each plaintiff. The expert testified that joining so many plaintiffs in a single trial would influence jurors to find liability and award damages to all plaintiffs when they would not do so otherwise. The defendants also submitted exhibits detailing plaintiffs' different work histories and exposures to asbestos. The defendants asserted in motions and hearings that such differences prevented a fair and impartial trial of the twenty-two consolidated claims. *Id.* at 619 (Hecht, J., Dissenting).

c. The Court's Analysis.

Asbestos litigation is a mature mass tort.

The Court recognized that mass torts have a life cycle and that a mass tort reaches maturity when:

there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' [contentions]. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least only full cycle of trial strategies has been exhausted.

Id. at 610, quoting McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843 (1995). Using these criteria, the Court opined that "[a]sbestos litigation, particularly asbestos products cases, has achieved maturity." *Id.* There is now a "track record on which to base decisions about consolidation and separate trials." *Id.* at 611. The Court said it is now clear that it is possible to try more than one asbestos-related claim in a single trial, and the only issue in asbestos cases is how many additional claims can be tried together. *Id.* Thus, the joinder analysis in other cases may hinge on whether that particular type of mass tort litigation has been fully developed.

The Maryland factors should be applied in asbestos cases to determine whether separate trials are appropriate.

In determining whether consolidation in asbestos cases is proper, the Court articulated several factors, known as the Maryland factors: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same

counsel; (8) type of cancer alleged. *Id.* at 611. The Court added one additional factor: the type of asbestos-containing product to which the worker was exposed. *Id.* at 617. These factors are designed to assist courts in determining if consolidation of claims is likely to prejudice or confuse the jury. *Id.* at 614. As the number of Maryland factors that different cases have in common increases, the number of those claims that can be tried together can increase. *Id.* at 611. However, the Court warned that there is no mathematical formula, and that "[i]n the final analysis, the dominant consideration in every case is whether the trial will be fair and impartial to all parties." *Id.* at 611, 614. The Court also "caution[ed] that [the Maryland factors] are not exclusive and may not be the best indicia in other types of mass tort litigation." *Id.* at 615. Although the Maryland factors are geared for asbestos claims, they may be easily adapted for other types of mass torts.

The Court found that evidence of many of the Maryland factors was lacking.

In applying the Maryland factors to the facts of the case, the Court said it was "a close call," but was unable to hold that the trial court abused its discretion in consolidating the claims for trial because "the record is silent with regard to many aspects of the Maryland factors." *Id.* at 615. The Court found that the worksite factor, the status of discovery factor, and the same counsel factor weighed in favor of a single trial. However, the Court noted that the defendants failed to present evidence of the following: whether the plaintiffs' various occupations resulted in differing exposure levels; why the varying dates and degrees of exposure were significant; whether evidence regarding the various diseases suffered by the plaintiffs would vary significantly; whether the prognosis for the living claimants differs, and if so, whether there is any dispute about the prognosis; and the types of asbestos products that the workers encountered. *Id.* at 615-17. Based on the evidence presented to the trial court, the Court was unable to conclude that "a party's ability to present a viable claim or defense will be vitiated or severely compromised." *Id.* at 617. Combined, these factors typically reflect the extent to which a party has been actually harmed by the improper consolidation. In contesting multi-plaintiff cases, defendants should take care to demonstrate the potential causal effect of the joinder on the defendant's ability to defend the case.

The Dissent.

Justice Hecht filed a dissenting opinion, which was joined by Justice Raul Gonzalez. It was the dissent's view that defendants demonstrated that some prejudice from consolidation was likely, and "[r]equiring additional evidence of confusion and

prejudice in mature mass-tort litigation like this is unnecessary.” *Id.* at 617. “The exhibits to defendants’ motion in this case detailing the plaintiffs’ various occupations, work sites, times of exposure, and diseases make the likelihood of prejudice, in light of the Maryland factors, apparent.” *Id.* at 620.

The dissent noted that the plaintiffs presented no competent evidence that trial of the consolidated claims would be fair and impartial, and took issue with the majority’s presumption that consolidated trials are more efficient and non-prejudicial. *Id.* at 617-619. The dissent also noted that nothing in the record indicated that the trial court assessed the risk of wasted time and money to the parties in the event the trial proved to be prejudicial and unfair, or that the trial court considered the benefits of trying fewer or more similar claims with less risk of prejudice. *Id.* at 619.

The dissent cautioned that “[d]espite the Court’s denial of relief in this case, it should be clear from the Court’s application of the Maryland factors that when defendants adduce the evidence the Court finds lacking, the prejudice in trying the twenty-two claims together will be established.” *Id.* at 620.

2. In re Bristol-Myers.

a. The Facts.

The trial court set four breast implant cases, encompassing the claims of nine separate plaintiffs against three groups of manufacturers, for a single trial. 975 S.W.2d at 602.

b. The Defendants’ Evidence.

The defendants based their argument of prejudice on extensive discovery showing the age of each plaintiff, the date or dates she received the implants, the reason for the implants, the type of implants, who manufactured the implants, the physician who performed the implant surgery, whether the implants ever ruptured, whether there were multiple implant surgeries, whether the implants had been removed, and the various injuries claimed. *Id.* at 605-06 (Hecht, J., Dissenting).

c. The Court’s Analysis.

Breast implant litigation is not a mature mass tort.

The Court stated that “[a] court confronted with the task of setting cases for trial should assess the developmental stage of the mass tort.” *Id.* at 603. There have only been a handful of breast implant trials altogether. *Id.* at 605 (Hecht, J., dissenting). The Court noted that courts do not have extensive experience with the diverse classes of claims that have been asserted. *Id.* at 603. Unlike the asbestos litigation in *In re Ethyl*, “breast implant litigation is not a mature tort.” The Court warned that “[u]ntil enough trials have occurred so that the contours of various types of claims within the breast implant litigation are

known, courts should proceed with extreme caution in consolidating claims.” *Id.* at 603. However, the Court did not grant relief on the basis that the mass tort was an immature tort.

For breast implant litigation, the Court identified criteria comparable to the Maryland factors.

The Court recognized that all the Maryland factors do not fit breast implant litigation, but that the factors do provide some guidance as to the criteria that should be considered. *Id.* at 603. Some of the analogous factors identified by the Court were: (1) the warnings and information given to learned intermediaries; (2) whether a given plaintiff was implanted with a particular manufacturer’s product; (3) differences in the characteristics of the implants, among the same manufacturer, as well as among different manufacturers; (4) whether the implants ruptured, and if so, the cause of the rupture; (5) whether the types of injuries differ and whether the injuries have related or similar etiologies; (6) whether the cause of the injuries could be something other than the implants; and (7) whether “state of the art” evidence would differ from case to case.

The Court found that Defendants failed to establish how the differences among the claims would materially affect the fairness of the trial.

After articulating the separate trial factors to be considered in a breast implant case, the Court held that there was no evidence from which it could determine whether separate trials were required to prevent injustice or confusion. *Id.* at 604.

For example, the Court found the defendants presented no evidence regarding the warnings given to the various physicians and how those warnings might differ from case to case. *Id.* at 604. Thus, the defendants had not demonstrated how application of the learned intermediary doctrine would vary from case to case, providing different threshold standards for liability. In addition, after discussing the potential differences in the characteristics of the implants, the Court states it “cannot conclude with any certainty from this record that those differences are material and would result in prejudice or confuse the jury. There is no evidence explaining what a jury is likely to hear about some but not other implants that would substantially prejudice the trial of these claims.” *Id.* There was also no evidence in the record that the testimony regarding causation with regard to each product and each ailment would substantially and materially differ. *Id.* The Court held that:

In sum, if the defendants had demonstrated that the disparities among the claims would actually affect the trial of the case and the evidence that the jury would consider, we

would be inclined to agree with the manufacturers that a jury would be confused and that the parties would be prejudiced by a single trial of these nine claims. But evidence has not been provided to support the claims of prejudice and confusion.

Id.

The Dissent.

Justice Hecht filed a dissenting opinion, which was joined by Justice Raul Gonzalez. The dissent disagreed with the majority that the defendants should be required to offer more evidence of prejudice, particularly when the plaintiffs conceded at oral argument that the trial court's selection process was "arbitrary." *Id.* at 605. The dissent also noted that again there was no showing that the claims could be tried together without prejudice, and there was no evidence of economy to be achieved from a consolidated trial. *Id.* The dissent felt that "[to] put defendants to further proof is makework." *Id.* at 606. In addition, the dissent again pointed out that the additional time that would be required to keep separate the various claims, and the risk of reversal on appeal, were not factored into the determination. *Id.*

3. In re Jobe

In 2001, the El Paso court of appeals issued an unpublished opinion that addressed intervention, trial group plaintiffs, joinder and severance in the context of mass tort litigation. *In re Jobe Concrete Prods., Inc.*, 2001 WL 1555656 (Tex. App.—El Paso 2001, no pet.) (orig. proceeding) (not designated for publication). The *Jobe* opinion, while unpublished, is a good look at the interplay between intervention, severance and consolidation rules. In *Jobe*, three plaintiff originally filed suit claiming nuisance and negligence arising from the operation of Jobe's rock crushing and concrete facility. Subsequently, plaintiffs filed an amended petition adding 522 additional plaintiffs by merely attaching a list of the new plaintiffs to the amended petition as an exhibit, and failed to state any basis for the 522 plaintiffs' claims. Plaintiffs later filed another amended petition adding another 325 plaintiffs, for a total of 847 new plaintiffs. *Id.* at *1, *3.

The defendant moved to strike the intervention for failure to file a petition in intervention and for failure to demonstrate that intervention was proper under Texas Rule of Civil Procedure 60. Defendants also moved to abate discovery sent by the additional plaintiffs pending a ruling on the motion to strike the intervention, and moved for severance and alternatively for separate trials. *Id.* at *1. The trial court denied the motion to strike the intervention and denied the motion to sever. The trial court also entered a "Lone Pine" case management order, which required

plaintiffs to designate the first group of 12 trial plaintiffs, and defendants to designate the second group of 12 trial plaintiffs. The order also contained numerous other provisions concerning required proof for plaintiffs' claims.

On mandamus, the court of appeals found the plaintiffs' method of adding new plaintiffs to the case to be "unorthodox," and found that had the motion to strike been heard after the filing of the amended petition that added the first group of additional plaintiffs, the trial court would have been required to strike the petition. However, because plaintiffs filed another amended petition before the hearing, and that petition alleged a justiciable interest in the suit and alleged facts relating the additional plaintiffs' claims, the court refused to find an abuse of discretion: the trial court "could well have determined that any problems caused by the intervention could be managed through the use of a carefully drafted case management order." *Id.* at *5.

As an initial matter, the court of appeals rejected plaintiffs' argument that *Ethyl* and *Polaris Investment Mgmt. Corp. v. Abascal*, 892 S.W.2d 860 (Tex. 1995), stand for the proposition that joinder is never improper in a mass tort case. *Id.* at *6. Rather, the correct analysis was to apply Rules 40 and 41 to the facts of each claim, notwithstanding the mass tort nature of the claims.

First, the court found that the claims of the additional plaintiffs did not arise out of the same transaction or occurrence within the meaning of Rule 40 because the exposure to the substances, the timing of the exposure, the type of injury, causation and damages would vary from plaintiff to plaintiff. Given this conclusion, the court held that the trial court lacked discretion to permit joinder under Rule 40. *Id.* at *8. In addition, the court found that the trial court abused its discretion in refusing to sever the claims of the 847 plaintiffs who were added by an amended petition. *Id.* at *8. The appellate court granted mandamus relief "from the trial court's failure to sever the claims of the additional plaintiffs not only from the claims of the [original Plaintiffs] but from one another." *Id.* at *9. The court based its decision on the fact that the mass tort at issue was not mature, the sheer number of plaintiffs would not promote judicial economy or convenience, and any advantages to consolidation were outweighed by prejudice to the parties. *Id.* at 8. For example, the court found prejudice to the defendant in that although the claims were consolidated in a single case, the consolidation prompted the trial court's Lone Pine case management order, and that order delayed discovery to all claims except the 12 cases set for trial — which left open the possibility that evidence relevant to those other claims would be destroyed or would disappear.

Ethyl, Bristol-Myers and their progeny all beg the question of when multi-plaintiff trials are appropriate and what evidence can be presented in order to prevent trial consolidation of personal injury plaintiffs or prevail on a consolidation attempt. While the Texas Supreme Court in *Ethyl* and *Bristol-Myers* allowed multi-plaintiff trials to proceed, it did so while cautioning of the dangers of multi-plaintiff trials. Indeed, it is difficult to reconcile the *Ethyl* and *Bristol-Myers* opinions with some of the language in the Texas Supreme Court's *Bernal* opinion, in which they denied class certification of 904 plaintiffs for alleged personal injuries arising from a refinery tank fire. *Southwestern Refining, Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). There, the Court stated that “[p]ersonal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve.” *Id.* at 436. The Court also stated that while the answers to whether the defendant is legally responsible for the event and issues of general causation are necessary in considering the defendant's liability, those answers

. . . will not establish whether and to what extent each class member was exposed, whether that exposure was the proximate cause of harm to each class member, whether and to what extent other factors contributed to the alleged harm, and the damage amount that should compensate each class member's harm. As for these latter issues, highly individualistic variables including each class member's dosage, location, activity, age, medical history, sensitivity, and credibility will all be essential to establishing causation and damages.

Id. at 436-437. In *Bernal*, the Court concluded that “the causation and damages issues are uniquely individual to each class member.” *Id.* at 436. While *Bernal* is a class action case, these statements are applicable to multi-plaintiff mass tort trial issues – *i.e.*, the issue of whether the cases involve “thorny causation and damage issues that a court or jury must individually resolve.” *Id.* at 436. Decisions post-*Bernal* may thus foretell an additional layer of hurdles for the prospect of multi-plaintiff litigation.

IV. MULTI-PLAINTIFF CASES: VENUE AND JOINDER ISSUES

A recurring issue in mass tort cases filed in Texas state courts involves venue — the extent to which multiple plaintiffs can join in, or a new plaintiff can intervene into, one lawsuit when the county of suit would not be a proper venue for all of the plaintiffs' and intervenors' claims. The Texas legislature has

addressed this issue in section 15.003 of the Texas Civil Practice & Remedies Code.

A. CPRC Section 15.003 – 1995 Version

Section 15.003 of the Texas Civil Practice & Remedies Code was originally enacted in 1995. It was designed to prevent the sort of forum-shopping that was present in *Polaris Investment Management Corp. v. Abascal*, 892 S.W.2d 860 (Tex. 1995). The original version of section 15.003 provided as follows:

(a) In a suit where more than one plaintiff is joined each plaintiff must, independently of any other plaintiff, establish proper venue. Any person who is unable to establish proper venue may not join or maintain venue for the suit as a plaintiff unless the person, independently of any other plaintiff, establishes that:

(1) joinder or intervention in the suit is proper under the Texas Rules of Civil Procedure;

(2) maintaining venue in the county of suit does not unfairly prejudice another party to the suit;

(3) there is an essential need to have the person's claim tried in the county in which the suit is pending; and

(4) the county in which the suit is pending is a fair and convenient venue for the person seeking to join in or maintain venue for the suit and the persons against whom the suit is brought.

(b) A person may not intervene or join in a pending suit as a plaintiff unless the person, independently of any other plaintiff:

(1) establishes proper venue for the county in which the suit is pending; or

(2) satisfies the requirements of Subdivisions (1) through (4) of Subsection (a);

(c) Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of a such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is

located under the procedures established for interlocutory appeals. The appeal must be perfected not later than the 20th day after the date the trial court signs the order denying or allowing the intervention or joinder. The court of appeals shall:

- (1) determine whether the joinder or intervention is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard; and
- (2) render its decision not later than the 120th day after the date the appeal is perfected by the complaining party.

TEX. CIV. PRAC. & REM. CODE § 15.003 (1995 version).

Thus, section 15.003, as originally enacted, required each plaintiff in a multi-plaintiff lawsuit, and each person seeking to intervene in an existing lawsuit, to establish — independently of every other plaintiff — either (a) that venue as to the claims of that particular plaintiff is proper in the county of suit or (b) that the “joinder elements” of 15.003(a)(1)-(4) could be met with respect to that particular plaintiff. Moreover, on its face, section 15.003(c) granted a right of interlocutory appeal to any party who sought to “contest the decision of the trial court allowing or denying intervention or joinder” of any plaintiff or would-be intervenor.

B. Key Supreme Court Decisions Construing the 1995 Version of Section 15.003.

1. *Surgitek v. Abel*

In *Surgitek v. Abel*, 997 S.W.2d 598 (1999), the Supreme Court of Texas addressed several important questions regarding section 15.003, including how a court of appeals should go about determining whether it has appellate jurisdiction over a joinder appeal brought pursuant to section 15.003(c). The Supreme Court in *Surgitek* instructed the courts of appeal to take a “functional approach” to determining whether they have appellate jurisdiction — and specifically, whether the trial court made a joinder determination (which is immediately appealable) or instead made a venue determination (which is not reviewable by interlocutory appeal). 997 S.W.2d at 601. Under this functional approach, it does not matter that “the order appealed was a venue transfer order following a motion to transfer venue.” *Id.* Rather, it is the substance of the relief requested and the order itself that should control the jurisdictional inquiry. “When a trial court’s order necessarily determines the propriety of a plaintiff’s joinder under section 15.003(a), section

15.003(c) plainly allows for either party to ‘contest th[at] decision . . . by taking an interlocutory appeal.’” *Id.*

Another question addressed by the Supreme Court in *Surgitek* was: What burden of proof applies to a plaintiff seeking to establish the joinder elements under section 15.003(a)(1)-(4)? In answering this question, the Supreme Court rejected the argument, advanced by the plaintiffs, that once they established a “prima facie” case of the section 15.003(a) joinder elements, joinder was proper. Instead, the Court in *Surgitek* held that, although section 15.003(a) “places the burden on the plaintiff in the first instance to offer prima facie proof of the four [joinder] elements, . . . it contemplates the admission, in some instances, of a broader range of evidence than would be admissible in a venue hearing.” 997 S.W.2d at 602. In other words, whereas a defendant in a venue hearing cannot contradict the plaintiff’s prima facie proof establishing venue, in a joinder hearing, “the defendant must be afforded the opportunity to rebut the plaintiff’s prima facie proof” relating to the joinder elements. Accordingly, the Court in *Surgitek* concluded that “the trial court has discretion to allow a broader range of proof in making a section 15.003(a) joinder determination than it would in a venue hearing,” and that “[t]o the extent that a defendant’s joinder evidence rebuts the plaintiff’s prima facie proof on any of the joinder elements, a trial court has discretion to consider all available evidence to resolve any disputes that the parties’ proof creates.” *Id.*

The Supreme Court in *Surgitek* also addressed the scope and standard of review to be applied by the appellate courts in reviewing a trial court’s joinder determination. Construing the plain language of section 15.003(c)(1), the Supreme Court held that “a court of appeals should conduct a de novo review of the entire record to determine whether a trial court’s section 15.003(a) joinder determination was proper.” 997 S.W.2d at 603. The Supreme Court also made clear that, in reviewing the record de novo, the court of appeals “is not constrained solely to review the pleadings and affidavits, but should consider the entire record, including any evidence presented at the hearing.” *Id.*

Finally, the Supreme Court in *Surgitek* examined the third joinder element under section 15.003(a), *i.e.*, the “essential need” requirement. To establish “essential need,” it is not sufficient, the Supreme Court explained, that the plaintiff prove the need to “pool resources” with other plaintiffs. 997 S.W.2d at 604. Rather, relying on dictionary definitions of “essential,” the Supreme Court held that a plaintiff seeking to prove “essential need” must establish that it is “indispensably necessary” to try their claims in the county of suit. *Id.* The Court recognized that “this

burden is very high,” but noted that “the language of the statute makes it so.” *Id.*

2. American Home Products v. Clark

Another key decision from the Texas Supreme Court construing the right to interlocutory appeal under section 15.003(c) is *American Home Products Corp. v. Clark*, 38 S.W.3d 92 (Tex. 2000). In this case, eleven plaintiffs who had consumed diet drugs sued ten defendants in Johnson County, Texas. Only one of the plaintiffs resided in Johnson County. However, all eleven of the plaintiffs purported to assert claims against one of the ten defendants, a Johnson County physician who had treated only the Johnson County plaintiff. One of the defendants moved to transfer venue and to strike or sever the plaintiffs who did not reside in Johnson County. The district court denied the motion without specifying the grounds.

When the defendant attempted to take an interlocutory appeal to the Waco Court of Appeals, the appellate court abated so that the trial court could specify the basis for its ruling. In its revised order, the trial court ruled that (1) each of the plaintiffs had established venue as to all defendants pursuant to sections 15.002(a)(2) and 15.005, and (2) the court did not have to “decide the issues presented by the motions, evidence and arguments” concerning section 15.003. *See American Home Products Corp. v. Clark*, 999 S.W.2d 908, 910 (Tex. App.—Waco 1999), *aff’d*, 38 S.W.3d 92 (Tex. 2000). The Waco court of appeals dismissed the appeal on the basis of the revised order, and the Texas Supreme Court affirmed.

In holding that dismissal of the appeal was proper, the Texas Supreme Court rejected the argument, advanced by the defendant, that to determine whether it has appellate jurisdiction under section 15.003(c), the appellate court must first determine whether the plaintiff is one who can independently establish venue. The Court instead held that only joinder decisions are reviewable and that “if the trial court determines that venue is proper under section 15.002, the inquiry is over” — *i.e.*, there is no interlocutory appeal. 38 S.W.3d at 96. The Court in *Clark* further explained that, even where a trial court makes an erroneous venue determination under section 15.002, an interlocutory appeal under section 15.003(c) is unavailable. *Id.* The reason for this rule, according to the Court in *Clark*, is that “[n]either the court of appeals nor this Court can review the propriety of the trial court’s venue decision.” 38 S.W.3d at 96.

The concurring justices in *Clark*, Justice Enoch and Chief Justice Phillips, agreed with the result reached by the majority, but wrote separately to express concerns about the trial court’s order concluding that venue was established independently as to each plaintiff. It was “evident” from the record in *Clark* “that only one plaintiff had a claim against the

one resident defendant, the doctor,” and that therefore “venue [was] independently appropriate in Johnson County only as to that one plaintiff.” 38 S.W.3d at 98. Thus, even though they were compelled to agree with the decision to dismiss the appeal, the concurring justices noted that “potential mischief” is abundant in venue joinder cases. As the concurring justices explained, “a trial court, actually addressing joinder, can insulate its order from appellate scrutiny simply by holding that each plaintiff has independently established venue, even though such a holding on the record presented is clearly wrong.” *Id.* at 97.

The dissenting justices in *Clark*, Justice Owen and Justice Hecht, were even more critical of the trial judge, writing “[t]he Court today sanctions a sham and a fraud on the legal system. The trial court did not have even a colorable basis for finding that each plaintiff in this multi-plaintiff suit established venue ‘independently of any other plaintiff.’” 38 S.W.3d at 98. The dissenting justices disagreed with the dismissal of the appeal and would have held that, in “a multi-plaintiff suit, appellate courts are to determine in an interlocutory appeal whether each plaintiff has established venue independently of any other plaintiff as required by section 15.003.” *Id.* at 99. The dissenting justices reasoned that an appellate court is entitled to determine if a party bringing an interlocutory appeal is a person “who may contest the decision of the trial court.” [TEX. CIV. PRAC. & REM. CODE] § 15.003(c). Nothing in the statute suggests that a trial court decides if an appealing party is properly before an appellate court . . . Courts of appeals are entitled under section 15.003(c) to decide whether a plaintiff is “a person who is unable to independently establish proper venue” and whether a defendant is opposing the intervention or joinder of “a person who is unable to independently establish proper venue.” *Id.* If a plaintiff in actuality is unable to establish venue independently, then a defendant has a right to an interlocutory appeal under section 15.003 even if the trial court held that the plaintiff did independently establish venue. *Id.* at 101 (Owen, J., joined by Hecht, J., dissenting). In other words, the dissenting justices would have held, contrary to the majority opinion in *Clark*, that a trial court’s erroneous venue ruling in a multi-plaintiff case would not deprive the court of appeals of jurisdiction over an interlocutory appeal taken under section 15.003(c).

C. The Legislature’s response to Clark – and the New Version of Section 15.003

In the recently-passed 2003 tort reform package, and in response to the Supreme Court’s *Clark* decision, the Texas Legislature made some key revisions to section 15.003 of the Texas Civil Practice and Remedies Code. See TEX. H.B. 4, § 3.03, 78th Leg.,

R.S. (2003). The new version of section 15.003 provides as follows:

(a) In a suit in which there is more than one plaintiff, whether the plaintiffs are included by joinder, by intervention, because the lawsuit was begun by more than one plaintiff, or otherwise, each plaintiff must, independently of every other plaintiff, establish proper venue. If a plaintiff cannot independently establish proper venue, that plaintiff's part of the suit, including all of that plaintiff's claims and causes of action, must be transferred to a county of proper venue or dismissed, as is appropriate, unless that plaintiff, independently of every other plaintiff, establishes that:

(1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure;

(2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit;

(3) there is an essential need to have that plaintiff's claim tried in the county in which the suit is pending; and

(4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought.

(b) An interlocutory appeal may be taken of a trial court's determination under Subsection (a) that:

(1) a plaintiff did or did not independently establish proper venue;

(2) a plaintiff that did not independently establish proper venue did or did not establish the items prescribed by Subsections (a)(1)-(4).

(c) An interlocutory appeal permitted by Subsection (b) must be taken to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals. The appeal may be taken by a party that is affected by the trial court's determination under Subsection (a). The court of appeals shall:

(1) determine whether the trial court's order is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard;

(2) render judgment not later than the 120th day after the date the appeal is perfected.

(d) An interlocutory appeal under Subsection (b) has the effect of staying the commencement of trial in the trial court pending resolution of the appeal.

TEX. CIV. PRAC. & REM. CODE § 15.003 (2003 version).

The new version of section 15.003 makes several important clarifications and changes to the 1995 version of section 15.003. In Subsection (a), the legislature made clear that section 15.003 applies to all multi-plaintiff cases, regardless of whether the case starts as a multiple-plaintiff case or whether new plaintiffs are later added or attempt to intervene. Subsection (a) also now affirmatively provides that, where all plaintiffs cannot independently establish venue or meet the section 15.003(a)(1)-(4) joinder elements, the claims of the misjoined plaintiff must be either "transferred to a county of proper venue or dismissed, as is appropriate." Although some defendants raising joinder objections under the 1995 version of section 15.003 had asked for dismissal in the alternative, dismissal was not expressly provided for in the 1995 version. Now a court can dismiss the claims of misjoined plaintiffs "if appropriate." The statute itself does not provide when dismissal, as opposed to transfer, is appropriate. Nor does the statute address any implications of a defense of limitations stemming from such a dismissal.

The most striking change to the new version of section 15.003 is in Subsection (b), which effectively abrogates *Clark* and instead adopts the position taken by the dissenting justices in *Clark* with regard to whether an intermediate appellate court can review a trial court's decision, in a multi-plaintiff case, that each plaintiff has independently established venue. Under the new version of section 15.003, in every multiple plaintiff case where venue-joinder objections are raised, the party "aggrieved" by the trial court's decision (whether it be to deny the motion to transfer venue or to grant it) will be able to challenge, via interlocutory appeal, whether a particular plaintiff "did or did not independently establish proper venue" and whether a particular plaintiff "did or did not" establish the joinder elements set forth by section 15.003(a)(1)-(4).

Subsection (c) of the new version of section 15.003 also differs from Subsection (c) of the 1995 version. Subsection (c)(1) of the new version provides that the court of appeals shall “determine whether the trial court’s order is proper based on an independent determination from the record and not under either an abuse of discretion standard or substantial evidence standard.” TEX. CIV. PRAC. & REM. CODE §15.003(c)(1) (2003 version). The 1995 version, by contrast, said only that the court of appeals had to determine whether “joinder or intervention is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard.” Given that the language in the new version of Subsection (c)(1) is broader – and applies to the trial court’s “order” and not just to a joinder determination – it may be construed to allow an appellate court to make a de novo determination, based on all of the evidence (and not just based on the plaintiff’s prima facie proof) as to whether a plaintiff independently established venue in the county of suit. In other words, the burdens of proof and standards of review articulated by the Supreme Court of Texas in *Surgitek* may now be held to apply, in an interlocutory appeal under section 15.003, not just to the trial court’s joinder determination, but also to the trial court’s venue determination with respect to a plaintiff’s claim.

The new version of section 15.003(c)(2) retains the 120-day time limit for the court of appeals to decide a venue-joinder appeal. However, the language has changed slightly, in that it now says the court of appeals must “render judgment” (as opposed to “render its decision”) within 120 days after the appeal is perfected. Compare TEX. CIV. PRAC. & REM. CODE § 15.003(c)(2) (2003 version) with TEX. CIV. PRAC. & REM. CODE § 15.003(c)(2) (1995 version).

Finally, the new version of section 15.003 includes a subsection (d), which now expressly provides that an interlocutory appeal taken pursuant to Subsection (b) has the effect of staying the commencement of trial in the trial court pending resolution of the appeal.

Important note: Even though the new version of section 15.003 makes significant changes to the 1995 version, the new version of section 15.003 takes effect on September 1, 2003 and applies “only to an action filed on or after the effective date” of September 1, 2003. See TEX. H.B. 4, § 23.02(a), (d) (2003). Therefore, for all multi-plaintiff cases filed before September 1, 2003, the 1995 version of section 15.003 will continue to apply.

V. Coordination of Pretrial Proceedings

Mass tort litigation often involves large numbers of individual cases pending in different courts across the state, and duplicative and uncoordinated discovery,

the possibility of multiple judges ruling on issues in a single case, and the possibility of conflicting rulings on legal issues among multiple cases in the same litigation. One procedural mechanism that can be utilized to address these issues is pretrial coordination of the litigation. This can take several different forms, from coordination under Rule 11 of the Texas Rules of Judicial Procedure, to coordination pursuant to local county rule, to the new state court MDL procedure created in the 78th legislative session.

A. Rule 11 Pretrial Coordination

1. What is Rule 11 coordination?

Rule 11, which was adopted in 1997, allows for one or more active district judges to be appointed to conduct all pretrial proceedings and decide all pretrial matters for cases involving common questions of fact and law (“related cases”), when such coordination would be judicially efficient.

2. Cases eligible for Rule 11 coordination.

Rule 11 applies to any case that involves material questions of fact and law in common with another case pending in another court in another county on or after October 1, 1997.

3. How to obtain Rule 11 pretrial coordination.

a. Procedure.

Texas has nine administrative regions. The presiding judge of an administrative region may assign a pretrial judge to related cases only on the motion of a party to a case or at the request of the regular judge of the court in which the case is pending.

b. Motion.

File a motion for Rule 11 pretrial coordination with the Presiding Judge of the Administrative Region in which coordination is sought, as well as in all cases that are the subject of the motion. The motion must contain the number and style of the case; the number and style of the related case, and the court and county in which it is pending; the material questions of fact and law common to the cases; the reasons why the assignment would promote the just and efficient conduct of the action; and whether all parties agree to the motion.

c. Response.

A response may be filed by any other party to the case; the regular judge of the court in which the case is pending; the regular judge of the court in which the related case is pending, if no pretrial judge has already been assigned in that case; the pretrial judge assigned to the related case, if a pretrial judge has already been assigned; or any party to the related case.

d. Hearing.

Unless all parties in the case agree to a motion or request, the presiding judge may not grant the motion without conducting an oral hearing. The hearing may be held in any county within the region or in Travis County. The presiding judge must give notice of the time and place for the hearing to all parties and the regular or pretrial judges in the related cases.

e. Evidence.

In ruling on the motion or request, the presiding judge may consider all documents filed in the case or the related case, all discovery conducted in the case or the related case, any stipulations filed by the parties in the case or the related case, affidavits filed in connection with the motion, request, or response, and oral testimony.

f. Decision.

The presiding judge must grant the motion or request if the judge determines that the case involves material questions of fact and law common to a case in another court and county, and that assignment of a pretrial judge would promote the just and efficient conduct of the cases. Otherwise, the presiding judge must deny the motion or request. The presiding judge must issue an order deciding the motion or request.

g. Service and notice.

Any paper filed under Rule 11 must be served on all parties to the cases and on the regular judges for those cases. The order of assignment must be filed in the related cases.

4. Judges Eligible for Assignment As a Rule 11 Pretrial Judge.

(A) Assignment of a Rule 11 Pretrial Judge is made by the Presiding Judge of a particular administrative region. Upon a motion by a party to a case or upon the request of a regular judge, a Presiding Judge may assign an active district judge, including himself or herself, to a case to conduct all pretrial proceedings and decide all pretrial matters.

(B) The same pretrial judge need not be assigned to all related cases. If more than one pretrial judge is assigned to related cases, either in the same region or in different regions, the pretrial judges must consult with each other in conducting pretrial proceedings and deciding pretrial matters.

(C) A district judge may be assigned outside the region in which he or she sits. The Chief Justice of the Supreme Court may assign an active district judge to other administrative regions to allow the judge to be assigned as a pretrial judge under this rule.

(D) A Pretrial Judge assigned under Rule 11 is not subject to an objection under section 74.053 of the Government Code.

5. Authority of Rule 11 Pretrial Judge.

The pretrial judge will preside over all pretrial proceedings in the case in place of the regular judge. The pretrial judge will decide all pretrial motions, including motions to transfer venue and motions for summary judgment. The pretrial judge and the regular judge must consult on setting a trial date.

6. Challenging Rule 11 pretrial coordination.

A presiding judge's order granting or denying a motion or request for appointment of a pretrial judge may be reviewed only by the Supreme Court in an original mandamus proceeding.

7. Termination of Rule 11 pretrial coordination.

An assignment under this rule terminates when (1) all pretrial proceedings in a case have been completed; (2) the pretrial judge ceases to be an active district judge; (3) the presiding judge in the exercise of discretion terminates the assignment.

8. Benefits of Rule 11 pretrial coordination.

(A) A single pretrial judge to hear all pretrial matters in cases with common issues of fact and law will promote judicial efficiency. In mass torts, the same issues are likely to arise again and again, including, among others, venue; joinder and severance; scope and sequencing of discovery; applicability of trade secret and other privileges; production of documents; corporate representative depositions; motions for summary judgment; trial consolidation; and trial scheduling. Management by a single pretrial judge familiar with the issues will conserve judicial resources, promote consistency, and prevent conflicting rulings and trial settings.

(B) Pretrial coordination also makes efficient use of the parties' resources by eliminating the need for duplicative attorney briefing and argument before different courts regarding the same issues.

(C) Rule 11 coordination can ultimately lead to the quick and fair resolution of all disputes.

B. Pretrial Coordination Pursuant to Local County Rule.

Pretrial coordination of cases may also occur pursuant to local county rules. For example, Harris County local rule 3.2.3(c), entitled "Consolidation to Special Dockets," provides that "[s]pecial dockets for the management of multi-court cases may be created by order of the Administrative Judge of the Civil Trial Division according to policies approved by the judges of the Civil Trial Division." In addition, in connection with at least one mass tort, Harris County created pursuant to other administrative authority a three-judge panel to address litigation-wide issues. In Dallas County, local rule 1.06 allows for the transfer of

“related cases” to the court in which the earlier-filed related case was pending, including cases arising out of the same transaction or occurrence. DALLAS LOCAL RULE 1.06, 1.07(a). Other counties may make similar provisions for pretrial coordination of cases on a county-wide basis.

C. HB 4: New State MDL Procedure

1. Mechanics of the New Rule

As a part of the tort reform package passed during the 78th Legislative Session, a new procedure was created for addressing pretrial issues in mass tort litigation. It appears that this new procedure, which provides for a judicial panel on multidistrict litigation with authority to transfer civil actions to one or more courts for coordinated pretrial proceedings, will function similarly to the federal MDL procedure.

The Judicial Panel on Multidistrict Litigation will consist of five members designated from time to time by the Chief Justice of the Supreme Court. TEX. GOV. CODE § 74.061 et seq. (eff. Sept. 1, 2003). The members of the panel must be active court of appeals justices or administrative judges. Chief Justice Thomas R. Phillips has appointed the following judges to the Judicial Panel on Multidistrict Litigation:

Chief Justice Scott Brister, of the First District Court of Appeals in Houston

Justice Errlinda Castillo, of the 13th District Court of Appeals in Corpus Christi

Justice Mack Kidd, of the Third District Court of Appeals in Austin

Justice Douglas S. Lang, of the Fifth District Court of Appeals in Dallas

Judge David Peeples, Presiding Judge of the Fourth Administrative Region in San Antonio

Texas Supreme Court Advisory 7.1.03 (July 1, 2003).

Section 74.262, “Transfer of Cases by Panel,” provides as follows:

Notwithstanding any other law to the contrary, the judicial panel on multidistrict litigation may transfer civil actions involving one or more common questions of fact pending in the same or different constitutional courts, county courts at law, probate courts, or district courts to any district court for consolidated or coordinated pretrial proceedings, including summary judgment or other dispositive motions, but not for trial on the merits.

A transfer may be made by the Judicial Panel on Multidistrict Litigation on its determination that the transfer will (1) be for the convenience of the parties and witnesses; and (2) promote the just and efficient conduct of the actions. The concurrence of three panel members is necessary to any action by the panel. TEX. GOV. CODE § 74.061(b).

Notwithstanding any other law to the contrary, a judge who is qualified and authorized by law to preside in the court to which an action is transferred under this statute may preside over the transferred action as if the transferred action were originally filed in the transferor court. TEX. GOV. CODE § 74.164.

HB 4 requires that the Texas Supreme Court adopt rules of practice and procedure that will:

(1) allow the panel to transfer related civil actions for consolidated or coordinated pretrial proceedings;

(2) allow transfer of civil actions only on the panel’s written finding that transfer is for the convenience of the parties and witnesses and will promote the just and efficient conduct of the actions;

(3) require the remand of transferred actions to the transferor court for trial on the merits; and

(4) provide for appellate review of certain or all panel orders by extraordinary writ.

TEX. GOV. CODE § 74.024. The Supreme Court Rules Advisory Committee is currently drafting rules governing the operation of the panel for the Supreme Court’s consideration. Texas Supreme Court Advisory 7.1.03 (July 1, 2003).

The MDL panel must operate according to the rules adopted by the Supreme Court, and may also prescribe additional rules for the conduct of its business not inconsistent with the law or rules adopted by the Supreme Court. TEX. GOV. CODE § 74.163.

2. Differences Between the MDL Procedure and Rule 11 Coordination

One major difference between the MDL procedure and the Rule 11 procedure is that the MDL procedure provides for one central panel to decide whether coordination is appropriate and whether additional cases should be added to coordination once it has begun. This will presumably provide consistency in these decisions across the state. The MDL procedure also provides for something lacking in the Rule 11 scheme: the possibility for true statewide coordination of mass torts.

The other major difference is that the MDL procedure places no restrictions on which court the cases may be transferred to, which leaves open the possibility for true statewide coordination of mass

litigation. Not all Rule 11 litigation is truly “coordinated.” It is common in Rule 11 litigation to see only some regions of the state coordinated and to see each pretrial judge implementing his own case management order and ruling on litigation-wide issues without consulting the other pretrial judges, despite Rule 11’s mandate that pretrial judges “must consult with each other in conducting pretrial proceedings and deciding pretrial matters.” TEX. R. JUD. ADMIN. 11.3(d). While statewide coordination was theoretically possible under Rule 11 — through a provision that allows the Chief Justice to assign an active district judge to other regions to allow the judge to be assigned as a pretrial judge by Presiding Judges in other regions — it was not widely used.

D. Preservation of Error Issues in Cases Coordinated for Pretrial Purposes

In the context of Rule 11 coordinated litigation, several error preservation issues have arisen, occasioned by the fact that the litigation involved different judges making rulings in the same cases, involved portions of case files residing in different courts, and involved some similar legal issues in the cases ruled on by different judges. We raise these issues for your consideration when dealing with coordinated litigation.

When some pretrial rulings are made by one judge, and another judge tries the case, must a party ask the trial judge to reconsider the pretrial judge’s rulings in order to preserve error? For example, some judges engage in the practice of “preadmitting” exhibits for use at trial — *i.e.*, exhibits are offered and objections made in a pretrial proceeding, and rulings on admission are made prior to trial. If these rulings are made by a pretrial judge, must those rulings be revisited in the trial court?

What about a situation where multiple pretrial judges rule on a pretrial issue in consultation with each other, and a party wants to challenge the rulings via mandamus. Can a single mandamus be filed challenging the collective ruling, and if so, in which court of appeals? Or does a mandamus petition need to be filed in each applicable court of appeals? This issue may become moot if, under the new state court MDL procedure, there is only a single statewide judge making pretrial rulings.

By definition, a mass tort will involve common issues of law. If a legal issue arises that may affect more than one case, either a litigant or the court itself may wish to conduct a single hearing for multiple cases. First determine whether the particular proceeding is objectionable; some issues may not lend themselves to simultaneous hearing. For example, unless a summary judgment involves a pure question of law, the factual differences between cases may well not be conducive to a consolidated hearing. However,

if a combined hearing does occur, take steps to ensure that the record is protected for each of the individual cases that are the subject of the hearing. For example, make sure the motions and exhibits filed in connection with the hearing are filed in each individual case, and that it is clear on the record at the hearing to which cases the evidence and argument apply. And, while coordination among judges addressing legal issues is desirable, parties should be on guard against arguments that one court should blindly adopt the rulings of another court, particularly when the issue involves fact-specific issues.

When the pretrial proceedings and trial itself have concluded, designating the record for appeal in a coordinated proceeding may be quite cumbersome. Compiling a complete record will require designating documents from two separate court files, and if pretrial transcripts are needed as well, those will likely reside with two or more court reporters. This task will be complicated by the fact that the file kept by the pretrial judge (whether it be a Rule 11 or MDL judge) will involve a multitude of paper that may have nothing to do with your individual case. One way that this issue has been addressed in past Rule 11 litigation is to require that all documents filed with the pretrial judge also be filed in the trial court’s file as well, so that presumably the trial court file is a complete file, while the Rule 11 “master” file only contains documents needed for rulings by the pretrial judge. However, even if such a system is in place, there will be no guarantee that all parties complied with this order, necessitating a review of the master file in any event. Under the new state MDL procedure, it remains to be seen whether this will be an issue — if the entire case file is transferred from the district court to the MDL judge, then presumably the file will remain one intact, complete file.