Gauging the Toxic Tort Landscape After ‘Bostic’

BY MARYANN B. ZAKI

It has been one year since the Texas Supreme Court’s July 11, 2014, opinion in Bostic v. Georgia-Pacific Corp., which outlined the test required for plaintiffs to succeed in asbestos litigation. Although only cited a few times over the past year, Bostic has gained some traction in other states, including New York, and could possibly be applied in non-asbestos toxic tort litigation.

In the Bostic decision, the Texas Supreme Court applied its reasoning from an asbestos case, Borg-Warner Corp. v. Flores, in which the court held that a plaintiff must prove that exposure to a particular defendant’s asbestos was a substantial factor in the plaintiff’s development of asbestosis. The court in Bostic extended this reasoning to the mesothelioma context, holding that proof of “some” or “any” exposure to asbestos is legally insufficient. Rather, plaintiffs are required to prove that their exposure to a defendant’s product was a “substantial factor” in bringing about their harm or disease. The court explained that if “any exposure” to asbestos were sufficient to establish liability, companies would be held to an “absolute liability” standard if their product happened to cross paths with the plaintiff at any point during the plaintiff’s lifetime.

The court defined “substantial factor” to mean that the defendant’s conduct had such an effect in producing the harm as to lead reasonable people to regard it as the cause for the plaintiff’s harm. The court held that in the absence of direct evidence of causation, the court’s holding from Merrell Dow Pharmaceuticals v. Havner applied so that plaintiffs may prove with scientifically reliable expert testimony that their exposure to a defendant’s product more than doubled the plaintiff’s risk of contracting the disease.

**Bostic’s Impact**

Although Bostic has not drastically changed the toxic tort litigation landscape in Texas since it was decided a year ago, its decision may have been necessary for asbestos litigation to survive at all in the state. Before review, the Dallas Court of Appeals opinion in Bostic could have been interpreted to mean that plaintiffs were required to prove that “but for” their exposure to a specific defendant’s product, they would not have contracted the disease. However, the Texas Supreme Court expressly disagreed with this holding, finding that because diseases can develop over decades and involve multiple sources of exposure, establishing
Although *Bostic* has not drastically changed the toxic tort litigation landscape in Texas since it was decided a year ago, its decision may have been necessary for asbestos litigation to survive at all in the state.

Recently, a New York court set aside an $11 million asbestos verdict against Ford, citing *Bostic* and opinions from other jurisdictions that have also rejected the "any exposure" theory for causation. In *In re New York City Asbestos Litigation*, the wife of a deceased mechanic and his estate brought suit alleging that the asbestos from the products manufactured or used on Ford’s premises caused the mechanic to develop fatal mesothelioma. The court held that the plaintiffs were required to prove that the mechanic was exposed to sufficient levels of asbestos to cause his mesothelioma as a result of his work on the brakes, clutches, or gaskets sold or distributed by Ford. The court cited *Bostic*, as well as opinions decided by the Louisiana, Virginia, Pennsylvania, Nevada, and Georgia courts, which likewise have rejected the "any exposure" theory. The court noted that while it may be difficult to quantify a plaintiff's exposure to a toxin, some qualification is nonetheless necessary. Because the evidence was legally insufficient, the judgment against Ford was set aside. Other states including Illinois, Wisconsin, and Utah follow a similar approach.

Also recently, in *Green v. CertainTeed Corporation*, a California appellate court cited *Bostic*, acknowledging that Texas and California have materially different standards to determine causation, noting that the Texas standard has long been stricter than California’s. While both states now follow the “substantial factor” standard, the California court recently held that Texas still requires more than California in cases where there is an absence of direct evidence of causation. California and Iowa are among the states that have a more lenient standard than Texas.

In other states, the standard required to prove causation is still unsettled. In *Bobo v. Tennessee Valley Authority*, a federal court recently advised certification to the Alabama Supreme Court so that the court could determine whether Alabama courts should apply the "but-for" or "substantial factor" test in cases where there have been multiple exposures to a toxic agent. Whether Alabama will follow the Texas approach remains to be seen.

**The Future**

The court in *Bostic* primarily evaluated the level of proof required when the plaintiff has suffered toxic exposure from multiple sources. Because individuals are exposed to multiple chemicals and toxins on a daily basis, many times from several different manufacturers, the standard applied in *Bostic* may apply in non-asbestos toxic tort cases.

If the application of *Flores* to non-asbestos cases is any telling of the future, *Flores* has been cited in cases evaluating exposure to chemicals from a wood treatment facility, hydrogen sulfide emanating from a natural gas treating plant, wrongful exposure to benzene and manganese products, and exposure to toxic epoxy paints. Thus, it’s at least plausible that the causation principles enunciated in *Bostic* may extend to non-asbestos cases. Only time will tell.

Maryann B. Zaki is an associate with Sutherland Asbill & Brennan in Houston. She handles various aspects of business and commercial litigation, and has experience handling toxic tort and products liability matters.