



TEXAS PUBLIC POLICY FOUNDATION  
LEGISLATORS' GUIDE TO THE ISSUES

## Mesothelioma

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### THE ISSUE

In 1973, the standard for causation in asbestos-related cases was lowered and Texas became the number one state for asbestos related litigation. Eventually, the Texas Legislature responded by enacting litigation reform legislation that established medical criteria for filing asbestos and silica cases. The result was to help restore fairness to the system.

In its 2007 *Borg-Warner* decision, the Texas Supreme Court established that plaintiffs claiming an asbestos-related injury must provide scientifically reliable evidence regarding the dose—or amount—of the product that allegedly caused his or her disease. The Court noted that “substantial factor” tests alone were insufficient to eliminate guesswork in court rooms showing that different courts have come to wildly different conclusions when dose is not the determining factor. The *Borg-Warner* test merely clarifies the “substantial factor” test just like it is used in other Texas tort cases, and provides guidance about what is necessary to fulfill existing evidence standards.

Scientific studies agree that mesothelioma is a dose-responsive disease and that not every dose causes disease. Without requiring a dose standard, any exposure to asbestos will be sufficient for liability. Asbestos is in the air. We all breathe it every day. If the standard for causation of mesothelioma was simply any exposure, the number of asbestos-related cases would rise again, and our court rooms would be as full and unpredictable as they were prior to Texas' 2003 tort reform laws.

The implications of including defendants who do not belong in litigation reach farther than the immediate parties involved—when businesses are financially burdened by multi-million dollar verdicts, employees are

affected in the form of job losses, and consumers are affected by higher prices. There is no sound reason for exempting asbestos-related claims from the same standard of causation and exposure thresholds required in every other toxic exposure case in Texas.

### THE FACTS

- ★ Asbestos inhalation has been linked to mesothelioma, a form of malignant cancer that develops, over time, in the tissue surrounding the lungs.
- ★ The amount of asbestos exposure determines whether the defendant's product caused the disease.
- ★ In 1973, the standard for causation in asbestos-related cases was lowered.
- ★ By the 1990s, plaintiff's attorneys were beginning to re-tool the asbestos litigation practice in response to growing efforts by Congress to stem the tide of costly judgments.
- ★ Asbestos litigation has remained a profitable venture for many plaintiff's attorneys, costing the United States more than \$800 billion annually, or greater than 2 percent of our GDP.
- ★ From 1988 to 2000, Texas was home to more asbestos-related claims than any other state.
- ★ In *Borg-Warner Corp. v. Flores*, the Texas Supreme Court established the evidentiary standard plaintiffs must meet in asbestos-related claims. Plaintiffs must show that the defendant's asbestos-related product was a “substantial factor” in their illness, and that mere exposure to asbestos should not be enough to establish a valid claim for awards.

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- ★ The *Borg-Warner* test does not require mathematical precision. A plaintiff merely needs to show defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, and evidence that the dose was a substantial factor in causing the asbestos-related disease.
- ★ Asbestos and related fibers are among the most studied toxins worldwide. Scientists have reported extensively on the dosage necessary to cause asbestos-related disease, including mesothelioma.
- ★ Legislation was introduced in the 81st Legislature lowering the causation threshold in asbestos-related litigation so that more defendants could be held civilly liable for enormous sums without plaintiffs firmly linking their illness to the defendant's product.
- ★ Implications of including defendants who do not belong in litigation reach farther than the immediate parties involved; when businesses are financially burdened by multi-million dollar verdicts, employees are affected in the form of job losses and consumers are affected by higher prices.

## RECOMMENDATIONS

- ★ The current causation standards for asbestos-related claims should remain at the same level as all other toxic exposure claims.
- ★ A measurable standard for how plaintiffs prove negligence is key to preventing needless strain on our economy.

## RESOURCES

*Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) [http://scholar.google.com/scholar\\_case?case=10469427978676917319&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=10469427978676917319&hl=en&as_sdt=2&as_vis=1&oi=scholarr).

*Borg-Warner Corp. v. Flores*, 232 S.W. 3d 765 (Tex. 2007) [http://scholar.google.com/scholar\\_case?case=1916862315179507557&q=borg-warner+v.+flores&hl=en&as\\_sdt=10000000000002&as\\_vis=1](http://scholar.google.com/scholar_case?case=1916862315179507557&q=borg-warner+v.+flores&hl=en&as_sdt=10000000000002&as_vis=1).

Agency for Toxic Substances and Disease Registry, "Asbestos: Health Effects," WebMD (10 Apr. 2009).

*Asbestos Exposure and Cancer Risk*, National Cancer Institute Fact Sheet, <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos>. ★

