

proceeded to trial against the remaining defendant, a relatively small company. The verdict was \$3,000,000. If the ruling in Borel is followed, the plaintiff would recover \$2,600,000 from the litigating defendant, but if the pro rata rule is followed, he would recover only 1/14 of the verdict or \$214,285 or about 2.4 million less. At the moment of this writing no decision has been made by the Trial Court. I personally am firmly of the opinion that the pro rata rule should be applied.^{19/}

I cannot close without some comments on the true nature of the so-called "sales defect" case, or warning case. As I have indicated, there are a number of decisions from the appellate courts holding that a defendant may not defend on the basis of the State of the Art at the time the product was manufactured. This might be justified in a case involving a manufacturing defect, or even a design defect.^{20/} I do not see how this can be justified in a warning case, which actually is a case involving a sales defect. In an asbestosis case, we are not dealing with

^{19/} Palentine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. Sup. Ct., 1964). See too Petco Corporation v. Plummer, 292 S.W.2d 163 (Civ. App.--Dallas, 1965). See 25 American University Law Review 236 (1975).

^{20/} A recent Texas case has held that State of the Art is no defense in a design case. Bailey v. Bootland of Houston, Inc., 585 S.W.2d 805 (Civ. App.--Houston, 1979). Application for Writ of Error has been granted by the Supreme Court of Texas, and we can expect a ruling by the Supreme Court late this fall. See too Cunningham v. MacNeal Memorial Hospital, 266 NE (2d) 8976 (Ill., 1970).