CMA TORT LITIGATION GROUP MEETING
July 13 - 15, 1988 Chicago, Illinois

AGENDA

July 13, 1988

Afternoon	Meeting of Joint Defense Groups	(To Be Arranged On Your Own)

July 14, 1988

8:00 - 10:00 AM:	Meeting of Joint Defense Groups	(CMA Tort Litigation Meeting Room Available Until 10:00 AM)
10:00 - 10:15 AM:	Welcoming Remarks	Howard Sobczak
10:15 - 11:15 AM:	Preparation of Medical Evidence in a Mass Toxic Tort Case	William Newbold
11:15 - 12:30 PM:	ADR/Summary Jury Trial in a Toxic Tort Case	Michael Marcus Clifford Zatz
12:30 - 2:00 PM:	Lunch (Catered)	
2:00 - 2:30 PM:	Update on the Industrial Defense Library	~~James Evans~~ Burt Ballanfant
2:30 - 3:15 PM:	Expert Testimony From a Judicial Perspective	Judge Frank McGarr
3:15 - 3:45 PM:	Break	
3:45 - 4:30 PM:	A Trial Lawyer's View in Regard to the Relationship with Experts in a Toxic Tort Case	Michael Pope
4:30 - 5:00 PM:	Point Counter Point and Group Discussion in re: Experts	Judge Frank McGarr Michael Pope Group

July 15, 1988

7:30 - 8:25 AM:	Continental Breakfast (Catered)	
8:25 - 8:30 AM:	Greeting	
8:30 - 8:45 AM:	Update on CMA Bulletin Board	Patricia McGrath
8:45 - 9:15 AM:	Update on Skeen and Sturgeon Dioxin Case	William Newbold
9:15 - 10:00 AM:	Crisis Response From an Outside Counsel's Perspective	Carl Henlein
10:00 - 10:45 AM:	Crisis Response From an In-House Counsel's Viewpoint	Carla Bishop
10:45 - 11:15 AM:	Break	
11:15 - 12:00 PM:	Crisis Response From the Perspective of In-House Counsel and Outside Consultant's Perspective	Steve Poltorzycki
12:00 - 12:30 PM:	Open Forum For Exchange of Ideas	Group
	ADJOURN	

PRINCIPLES TO USE IN INTERPRETING EPIDEMIOLOGICAL STUDIES

1. The study must be an actual epidemiological study; otherwise it cannot support a causal association between the chemical and the disease.

2. An increased incidence of disease does not establish causation if it is not statistically significant.

Statistically significant: p less than .05

Highly statistically significant: p less than .01

Not statistically significant (and cannot establish an association): p greater than .05

3. Even a result that is statistically significant might be due entirely to chance, or it might be due to factors other than the chemical.

4. To establish an inference of causality, the finding should follow the principle of dose-response.

5. To establish an inference of causality, the finding should be consistent with other studies.

6. To establish an inference of causality, the statistically significant finding must be consistent with other findings in the same study.

7. To establish an inference of causality, factors other than exposure to the chemical must be ruled out as causative agents.

8. To establish an inference of causality, the methods of the study must be sufficient to keep out bias.

9. To establish an inference of causality, the methods used in examining the subjects must stand up to medical scrutiny.

10. To prove that the chemical could have caused effects in the plaintiffs, the exposure and illnesses of the people in the epidemiological studies must be comparable to the plaintiffs and alternative causes for the plaintiffs' conditions must be eliminated.

Preparation of Medical Witness for Cross-Examination on Epidemiology

When you select your medical experts in a toxic tort case, you will obviously select them because of their expertise in their medical fields. You may not even consider whether they are knowledgeable in epidemiology. This fact will not be lost on the plaintiff's lawyer. He will assume that your doctors know a lot more about their areas of specialty than he does. As a result, he may cross-examine them very little about medicine.

Instead he may decide that these doctors are just the people to cross-examine about epidemiological studies. By doing this, the lawyer will hope to prove, through your doctors, how harmful the chemical is. Therefore, your medical experts must be prepared to respond to that line of cross-examination. They must be thoroughly familiar with the epidemiological studies. They must be able to deny that the studies prove that the chemical causes headaches, muscle pains, liver damage or whatever.

I recently participated in the dioxin trial of Kemner v. Monsanto. In that case, which was the longest jury trial ever, 65 plaintiffs claimed to have been poisoned by dioxin. It was tried in a place you may have heard of -- St. Clair County, Illinois. That county has been called a plaintiffs' paradise. For the reasons I just mentioned, the plaintiffs' lawyer concentrated on epidemiology in cross-examining our doctors.

There are lots of epidemiological studies on dioxin -- and when you first read them, most of them seem to be very bad from a defense point of view. The people exposed to dioxin in those studies got cancer, heart disease, liver disease, brain damage, and so forth. Many of the conditions were the very things the plaintiffs claimed were wrong with them. However, this St. Clair County jury gave the plaintiffs a verdict of $1 apiece for their medical injuries. So you can see that I happen to think that our doctors handled the epidemiological cross-examination very well.

How do you prepare your doctors to handle this area of cross-examination? Obviously, the first step is to become familiar with the studies yourself. Since none of us learned how to read epidemiological studies in law school, the studies may at first seem confusing. But they are really not difficult once you read them carefully. What is even more encouraging is that, at least in my experience, the studies will not support the plaintiffs' contentions -- no matter how unfavorable they seem at first. The reason for this is that plaintiffs and their experts invariably go way beyond what is scientifically supportable in making their medical claims. So what you and your doctors need to do is look at the studies from the point of view of a skeptical scientist, not someone who will rush to believe the worst of every chemical.

Let me tell you about 10 principles that we and our doctors used in analyzing these epidemiological studies when we

prepared them for their cross-examination.

1. The study must be an actual epidemiological study; otherwise it cannot support a causal association between the chemical and the disease.

This means the study must have a control group which is matched to the study group as closely as possible. There may be published articles or even letters to the editor of a journal reporting on individuals exposed to your chemical without comparing them to a control group. These are not epidemiological studies. They are called "case reports," and they cannot prove a causal relationship. Their purpose is simply to call the attention of the scientific community to the possibility of a problem. Hopefully, they will spur other scientists to conduct more formal epidemiological work. But by themselves, they prove nothing. For example, in 1981, there was a series of letters to the editor of a medical journal called the Lancet. The plaintiffs' lawyers loved them. These letters reported on a few chemical workers presumably exposed to dioxin who then developed a form of cancer called soft tissue sarcoma. But all that these case reports established was a hypothesis. Their value was in helping to instigate formal epidemiological studies. When these epidemiological studies were done, they failed to show any association between dioxin and this kind of cancer. The hypothesis could not be proved.

2. An increased incidence of disease does not establish causation if it is not statistically significant.

Your opponent may claim that simply because the exposed group had a greater number of people with a particular disease than the control group, the disease was caused by the chemical. For example, he may claim that twice the number of exposed individuals had cancer than members of the control group. However, only where the increase is found to be statistically significant, can it be regarded as meaning anything. The authors of the study will have done statistical calculations to determine this, and you should make sure your expert is familiar with them. The result of these calculations is called a "p" value. The "p" value indicates the percentage of times in which a certain result would be expected, under the conditions of the study, to occur simply as a result of chance. A "p" value of .05 is commonly regarded as the threshold for statistical significance. This means that the result would be expected simply on the basis of chance five times out of 100. The remaining 95 times, it would result from a genuine association. A "p" value of less than .01 is regarded as "highly statistically significant." This kind of result means that it would occur less than one time out of 100 on the basis of chance alone. A "p" value of greater than .05, on the other hand, is not statistically significant and does not establish an association.

3. Even a result that is statistically significant might be due entirely to chance, or it might be due to factors other than the chemical.

In other words a statistically significant result does not necessarily establish causality. By definition there is a 5% or less possibility that the finding was due to chance. A "p" value of .05 means that for every 20 comparisons between the two groups, on the average one will have a statistically significant "p" value simply because of chance. Some epidemiological studies make dozens of comparisons between the study group and control group. Some of these comparisons are bound to have statistical significance simply on the basis of chance alone.

The rest of the principles give an idea of how to tell which statistically significant results do support an inference of a causal connection with the chemical, which are probably the result of chance, and which are the result of entirely different causes.

4. To establish an inference of causality, the finding should follow the principle of dose-response.

Dose-response is the most fundamental principle of toxicology. Therefore, the authors of the study should have looked to see whether the subjects who were most heavily exposed showed the greatest incidence or severity of disease. If they did not look at this aspect or if they did and their findings did not show a dose-response relationship, the

likelihood of a causal relationship is substantially lessened. It makes no sense if the people with the least exposure showed more disease than the people with the heavy exposure. Think of it this way. Take a toxic chemical with which many of us have personal experience: alcohol. If you were to take two identical groups and you had the members of one group drink a single beer apiece and the other group drink a six-pack apiece, which group would have more trouble walking a straight line? Industrial chemicals have that same dose-response effect. Yet in the federal government's study of the Times Beach residents some abnormalities were greater in the low exposure group than in the high exposure group.

5. <u>To establish an inference of causality, the finding should be consistent with other studies.</u>

Obtain all the epidemiological studies in the literature on your chemical. If your chemical causes a certain disease, it will cause that disease not just one place, but every place. But what if your chemical was associated with an increased cholesterol in one study but not in any others? That kind of isolated finding is probably not due to the chemical. You may even find that your chemical was associated with an increased cholesterol in one study but with a <u>decreased</u> cholesterol in another. That's actually the case with dioxin. In Czeckoslavakia, people had high cholesterol levels, but in Missouri the levels were reduced. These are logically inconsistent results if they were due to the chemical.

There is one important aspect to keep in mind, however. Even if the chemical does cause a certain effect, there may not be a statistically significant result in each and every study. If the study group is small, it may not have the statistical power to pick up the association. A false negative may result. Also, in some studies the dose may be too small to cause the effect. However, an isolated finding in one study that is not repeated anywhere else is probably not due to the chemical.

6. To establish an inference of causality, the statistically significant finding must be consistent with other findings in the same study.

Compare the subjects' symptoms with their physical examination findings and laboratory results to see whether they paint a consistent picture of damage. For example, there may be laboratory findings indicating possible damage to the immune system. Did those people have a greater number or severity of infections? If not, the finding is probably meaningless.

7. To establish an inference of causality, factors other than exposure to the chemical must be ruled out as causative agents.

Epidemiologists refer to these as "confounding factors." The authors should have attempted to eliminate or control for them, but sometimes they don't. These factors might be age, cigarette smoking, diet, alcohol use, and so forth. One very important confounding factor might be exposure to other toxic

chemicals. Many epidemiological studies take place in chemical plants where workers have exposure to many chemicals. Some epidemiologists refer to these situations as "chemical soups." Where a chemical soup is involved, it may be impossible to tell whether the effect was caused by your chemical or by the other chemicals. This is an area where comparison to other studies may be very important. For years, people thought dioxin caused a disease called porphyria cutanea tarda. This was because in two early studies, exposed workers were found to have this condition. However, as additional studies were conducted, this finding was never repeated. So epidemiologists went back to the original studies and found that those workers had also been exposed to hexachlorobenzene. Hexachlorobenzene happens to be a well-known cause of this disease. The disease had clearly been caused not by dioxin but by hexachlorobenzene. Yet plaintiffs' lawyers still trot out the early studies to support their claims.

8. <u>To establish an inference of causality, the methods of the study must be sufficient to keep out bias.</u>

The element of bias does not necessarily mean that the authors were prejudiced or that they purposely tried to find results to fit their preconceived opinions. In this context, it simply means an error in the methodology that might distort the results. You and your witnesses should therefore review the methods used by the authors very carefully.

One common error has to do with what's called "blindedness." The determination of exposure must be done in a blind fashion -- that is, it must be made without knowledge of whether the individual had a disease. By the same token, the determination of whether a subject is sick must be made without knowledge of whether he was exposed. Otherwise, the results may be subject to bias -- and the conclusions of the article may not be valid.

Another type of bias comes up in the context of case-control studies. These are studies in which a group with a disease is compared to a group without it to see if they have differing chemical exposures. For example, a group with lung cancer might be compared to a healthy group to see if they have differing exposures to environmental tobacco smoke. If so, there might be a causal link between that exposure and lung cancer. In these studies, it is very difficult to keep out what is called "recall bias." That refers to the fact that people with serious diseases often reflect on their life history to try to figure out what caused their illness. Healthy people don't have the same reason to try to remember what chemicals they have been exposed to.

The effect of recall bias can be seen in two studies by Hardell on the relationship between soft tissue sarcomas and herbicides that contained dioxin in Sweden. These were published around the time of the case reports I mentioned earlier. Hardell compared a group with soft tissue sarcomas to

a control group to see whether the sarcoma patients had had a greater exposure to herbicides. He found that they did. In fact, he claimed that exposure to herbicides increased the risk of getting a soft tissue sarcoma by six times. That's a pretty bad result if you're defending dioxin. But the problem was that at the time the study was done, a lot of people in Sweden were already claiming that the chemicals caused this cancer. Their claims were widely publicized in the Swedish media. People who had cancer had undoubtedly heard or read about them. As a result, they may have thought about their possible herbicide exposure long before they were contacted in the study. And they would have been more likely to tell an interviewer that they had exposure than somebody without the cancer, who had never thought about it before. Another bias in these studies was that the interviewer who asked about exposure was not blinded. Then these chemicals were studied in other countries where there had not been this enormous publicity and where the investigators <u>were</u> blinded. Sure enough, those later studies were negative. The effect of bias in the Swedish studies is obvious.

9. <u>To establish an inference of causality, the methods used in examining the subjects must stand up to medical scrutiny</u>.

Your team of medical experts will help you here. The diagnostic methods in the study must be proper. Unfortunately, this does not always occur. For example, plaintiffs' lawyers

use a study by Poland at a New Jersey chemical plant to support a claim that dioxin causes hearing loss. Poland reported hearing loss in 10 of 71 workers. It's the only study where hearing loss was found on examination. However, he based his finding on a simple watch tick test -- i.e., on whether they could hear the watch at one centimeter. He didn't perform audiograms or any of the other tests that audiologists use to diagnose hearing loss. His finding is simply without good medical support.

10. To prove that the chemical could have caused effects in the plaintiffs, the exposure and illnesses of the people in the epidemiological studies must be comparable to the plaintiffs and alternative causes for the plaintiffs' conditions must be eliminated.

An epidemiological study cannot prove by itself that a chemical caused a particular illness in a particular person such as a plaintiff. The most it can do is establish a causal association between a particular chemical and a particular illness in a population. Therefore, you should compare your plaintiffs to the subjects of the study. The people studied in the article may have received a dose many times what your plaintiffs received. They may have been exposed for a period of time much longer than your plaintiffs' exposure. The illnesses they suffered may have been different from the illnesses of your plaintiffs. Thus, what occurred to the individuals in the study may not be comparable to what could

have happened to the plaintiffs. To cite just one example, a finding of acute injury in the literature does not support a plaintiffs' claim of the same injury if the plaintiff claims to have sustained the injury on a chronic basis. Furthermore, before causation can be established in the case of a plaintiff, alternative, more likely, causes must be eliminated. Not every person exposed to a chemical experiences every possible effect. The corollary of this is that a person might be exposed to a chemical but develop an illness because of an unrelated reason.

Animal Studies

Now I would like to talk a little about animal studies. Animal studies are not epidemiological studies. Epidemiological studies deal with human beings. Nevertheless, plaintiffs' lawyers love to use them to cross-examine experts. If your expert tries to dismiss an article as "simply an animal study," the lawyer will respond, "They are not studying rats because they care about rats, are they?" Or he may say, "If animal studies don't mean anything, why are they doing them?" These are good questions -- but they have equally good answers. Your expert must be prepared to deal with them. So I would like to say a few words about animal studies.

Earlier I mentioned that when it comes to dioxin, there are some apparently unfavorable epidemiological studies. But, if the epidemiological studies on dioxin seem bad, the animal studies are even worse. There must be hundreds of animal

studies on dioxin, and it seemed that the plaintiffs' lawyer in Kemner introduced every one of them into evidence. The animals in these studies ended up with cancer, or got liver disease, kidney disease, or neurological disease, or their immune systems were ruined. The studies were terrible for us. However, when the trial ended and we talked to the jurors, they said that they paid very little attention to these animal studies. I don't think this was an accident. Once again, I think our doctors did an excellent job of explaining why these studies were not applicable to the plaintiffs. So how do you prepare your doctors to do this?

The plaintiffs' lawyer will argue that scientists study animals because if a chemical affects animals they assume it will have the same effect in humans. THIS IS NOT TRUE. Scientists study animals for many reasons -- because it is unethical to experiment on human beings, because the circumstances of the experiment can be controlled in animals, because animal studies can be used to study the mechanism of toxicity. However, they do not conclude that an effect in animals will invariably be duplicated in humans. The best evidence of human toxicity comes from well-done human epidemiological studies. An increase in cholesterol in animals probably does not mean anything if it has never been found in a human study. Even with cancer, most scientists recognize that chemicals that cause cancer in animals do not necessarily do so in human beings.

In fact, the finding in one species may not have even been duplicated in another species. This fact can be very persuasive to a jury. If a particular effect, which has been seen in rats, has not occurred in mice, rabbits or hamsters, it seems more likely that it will not occur in humans.

Furthermore, the jury should be made aware of the many chemicals that cause cancer in animals and which the government allows humans to be exposed to. Bacon, peanut butter and mushrooms all contain chemicals that cause cancer in rats or mice. A drug called griseofulvin is prescribed for fungal infections of the feet, even though it causes cancer in mice and rats. Clofibrate, a drug used for high cholesterol, causes cancer in rats. The list could go on.

Another point to keep in mind with animal studies is the amount of exposure they received. They may have been dosed with an amount that proportionally is much greater than humans, especially your plaintiffs, might expect. Your toxicologist should be able to convert the animal dose into the human equivalent, and you should let your medical expert know the result of that calculation.

CONCLUSION

Unfortunately, in the time I have had, I have been unable to do anything other than hit the highlights of both epidemiological and animal studies. But this should give you an idea of how to prepare your doctors for their cross-examination. The most important principle to remember is

that you and your doctors should carefully -- and skeptically -- review every one of these studies.

CMA Tort Litigation Group Meeting
July 14, 1988

STRATEGIES AND TACTICS TO GAIN CONTROL OVER PLAINTIFF'S EXPERT WITNESSES

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STRATEGIES AND TACTICS TO GAIN CONTROL OVER PLAINTIFF'S EXPERT WITNESSES

I. INTRODUCTION

A. Products Liability and Toxic Tort Litigation in the 1980's.

Products liability law is no longer a novel concept. Rather it has evolved over the years to involve complex questions of law and science. Toxic tort litigation is one area in particular which, in recent years, has forced courts to confront extremely difficult scientific issues and questions of legal causation. Much of the toxic tort litigation centers around the question of causation, i.e., will plaintiff be able to prove by a preponderance of the evidence a causal link between the injuries and exposure to the substance in question. In order to prove this element of the case, plaintiff will resort to expert testimony. The defense attorney, to successfully defend these cases, must evaluate the case from its inception, carefully planning strategies and tactics to gain control over plaintiff's expert witnesses.

B. Overview of Discussion -- Defense Attorneys Must Plan Procedural and Substantive Strategies to Gain Control Over Plaintiff's Expert Witnesses.

The defense attorney must attack the plaintiff's expert on two different levels. First, the defense must plan procedural tactics, including extensive pretrial discovery. Second, the defense must plan to attack the expert's substantive opinions. In Part I we will discuss procedural techniques and the ways in which the Federal Rules of Civil Procedure can be used to gain control over the expert witness. In Part II we will discuss substantive law and the ways in which the Federal Rules of Evidence can be used to minimize the impact of the expert witnesses testimony or perhaps exclude it altogether.

II. PROCEDURAL TECHNIQUES TO GAIN CONTROL OVER THE PLAINTIFF'S EXPERT WITNESSES

A. The Defense Attorney Must Use the Federal Rules of Civil Procedure in an Aggressive, Offensive Manner.

Defense attorneys must plan their theories and methods of attack against plaintiff's expert witnesses from the very outset. The attorney cannot act defensively; rather, he must take control over the case immediately and use the Federal Rules of Civil Procedure to force

plaintiffs to prove their causation link and name experts early in the case. The following are methods which can be used to attain this result:

B. Rule 16 Pretrial Conferences.

One of the little-used recent revisions to the Federal Rules of Civil Procedure is Rule 16. While it is not universally utilized, it is very useful in a toxic tort case to force the plaintiff to disclose its discovery plan, to identify the witnesses who will support the allegations in the complaint, and to agree to a binding discovery schedule. Rule 16 provides that the judge, after consulting with the parties "... shall ... enter a scheduling order that limits the time:

1. to join other parties and to amend the pleadings;

2. to file and hear motions; and

3. to complete discovery.

Initially, it may appear that the plaintiff, who has had ample opportunity to investigate the case before notice to the defendants, is aided by a prompt, firm scheduling order. Experience has clearly shown, however, that delay is always beneficial to the plaintiff's attorney. Not only is the defense usually able to bring to bear greater resources, but further advances in medical research, substantive case law or the amount of jury verdicts seem to assist plaintiffs more than defendants. In any event, prompt discovery and trial setting tend to put severe pressure on the plaintiffs' bar, and should be rigorously pursued in toxic tort cases.

C. Interrogatories and Request to Produce

1. Rule 33 of the Federal Rules of Civil Procedure sets forth the procedural guidelines for filing interrogatories. It allows a party to file interrogatories on the plaintiff without leave of court, immediately after plaintiff has filed suit.

2. Similarly, Rule 34 of the Federal Rules of Civil Procedure sets forth the procedural guidelines for filing request to produce documents. Like interrogatories, request to produce can be filed without leave of court, immediately after the plaintiff has filed its suit.

3. Interrogatories and requests to produce should be used to ask the plaintiff specific and detailed questions surrounding causation. In chemical exposure cases, force the plaintiffs to identify exactly what chemicals they were exposed to; exactly what injuries were suffered; and what scientific, medical, or other proof they have that the chemicals in question caused plaintiff's injuries.

4. Plaintiff's response to defendant's discovery will more likely than not consist of vague responses, without any scientific or medical proof of causation. Defense attorneys should not let plaintiffs get away with such diversionary tactics. Rather, if they receive no response, or incomplete answers, they should immediately file motions to compel discovery.

5. Rule 26 of the Federal Rules of Civil Procedure sets forth the guidelines and the scope of discovery. This rule was developed to allow liberal discovery.

Wright & Miller describe the breadth of permissible discovery in federal court:

> ...[I]t is not too strong to say that a request for discovery should be considered relevant <u>if there is any possibility that the information sought may be relevant to the subject matter of the action</u>.

Wright & Miller, Federal Practice and Procedure: Civil § 2008 at 45 (1970 and supp. 1987).

Plaintiff will not be able to seriously contend that the defendant is not entitled to discovery of plaintiff's theories of causation. However, plaintiff will most likely attempt to argue that more discovery is necessary before it can respond to questions regarding causation.

Two methods, in particular, have been found useful in dealing with plaintiff's who refuse to identify scientific evidence supporting their claim:

1. Request to Admit Facts;
2. Case Management Order

D. Request to Admit

1. Rule 36 of the Federal Rules of Civil Procedure sets forth the specific guidelines which must be followed in filing Request to Admit.

2. Request to admit may be served on plaintiff, without leave of court, immediately after plaintiff has filed its action.

3. The request to admit should focus on the scientific evidence which contradicts the plaintiff's position.

4. An example, successful use of this procedure can be seen in O'Dell v. Hercules, Inc., and Bridges v. Hercules, Inc., 2 TXLR 1120 (D.C. Ark. 1988).

5. O'Dell v. Hercules, Inc. and Bridges v. Hercules, Inc. were consolidated for purposes of trial. These cases involved claims by over 90 plaintiffs who resided near two closed city landfills in Jacksonville, Arkansas. Plaintiffs in both cases claimed that Hercules had been negligent and had conducted ultrahazardous activities. Plaintiffs further alleged that their exposure to dioxin contamination caused a wide range of injuries including cancer and birth defects.

6. Hercules was having a difficult time, through the use of normal discovery channels, interrogatories, request to produce, and depositions, getting plaintiffs' to identify scientific evidence which supported their claims. Therefore, they decided to serve plaintiffs with request to admit. Since the cases at this time had not yet been consolidated, Hercules served both sets of plaintiffs with request to admit.

7. Each request to admit included interrogatories demanding that plaintiffs set forth the specific facts supporting denial of any request. This pleading asked plaintiff to admit:

    1. Scientific evidence which contradicted plaintiff's claim and were styled in such a fashion to be undeniable;

2. Indisputable and elementary scientific facts; and

3. The conclusions reached in certain scientific studies.

In O'Dell, plaintiffs in attempting to respond to the request to admit hired an expert consultant. Thus, by filing the request to admit defense attorney's forced the O'Dell plaintiffs' to hire an expert and confront to the scientific evidence contrary to their position.

In Bridges, the plaintiffs responded to the request to admit claiming that they could not admit or deny most of the requests because they had not yet hired an expert in toxicology. Such responses by plaintiffs allowed the defense to file motions for summary judgment. The filing of the motion for summary judgment forced the plaintiffs to hire an expert and confront the scientific issues raised by defendant in the request to admit.

For a more comprehensive discussion of these two cases and the strategies used by the defense attorneys to successfully defend Hercules in these cases see, A Defendant's Verdict in a Dioxin Expose Case: O'Dell v. Hercules, Inc., by Eugene G. Partain, W. Gordon Hamlin, Jr., and Lee Ann Jones, Toxic Reporter 5/18/88 pp. 1402-1409.

8. This case is an excellent example of how defense attorneys by acting offensively can force plaintiff attorneys to confront early on in their case questions of causation. The benefits from such action include:

1. Forcing the plaintiff to hire experts which might pose an economic strain on plaintiff's case;

2. Forcing the plaintiff to identify the evidence they have to prove causation. (This will enable the defense attorney to evaluate the strength of plaintiff's case); and

3. Locking plaintiff into its theories of the case from the onset, thereby, making

it rather hard for plaintiff to change its position as the case proceeds.

E. Case Management Order

1. Another technique which can be used to force plaintiff to prove that it has scientific evidence to support its claim is a Case Management Order.

2. In Lore v. Lone Pipe Corp., 1 TXLR 726, (N.J. Super. Ct., Law Div., Monmouth County No. L-033706-85, 11/18/86):

   1. Plaintiffs filed complaints alleging that they had suffered personal injuries and/or property devaluation resulting from exposure to toxic substances at Lone Pine Landfill.

   2. Because of doubt whether plaintiffs would be able to prove a prima facie case, the court, pursuant to a case management order, required plaintiffs to provide reports of physicians or experts to show the cause of their injuries.

   3. The court found that the documents filed by plaintiffs pursuant to the case management order were insufficient to prove the casual link between plaintiffs injuries and exposure to the toxins in question.

   4. Therefore, the court dismissed the suit for plaintiffs failure to comply with its order.

3. Similarly, in Renaud v. Martin Marietta Corp., (D.C. Colo., No. 87-Z-42 10/16/87), 2 TXLR 639, plaintiff/residents filed suit against Martin Marietta Corp. for wrongful death and various other injuries. Plaintiffs claimed that their injuries resulted from ground water contamination at one of Martin Marietta's Colorado plants. Martin Marietta claimed plaintiffs could not prove a prima facie case. Consequently, it requested the court to enforce a Lore type case management order staying all discovery until plaintiffs show a causal link and thus make out a prima facie case.

Martin Marietta argued that before it should be required to expend substantial sums of money defending these cases plaintiffs should be required to come forward with at least some facts to prove that such an undertaking is necessary.

4. In April of 1988 the Magistrate decided to impose a case management order giving plaintiffs two months to submit evidence that they can prove a causal link. See 2 TXLR 1361 (5/11/88).

5. The requesting of a Case Management Order requiring plaintiff to prove "causation" at the onset of its case is an excellent vehicle for use by defense attorney's in ferreting out frivolous claims. Although courts most likely would not even consider such orders unless confronted with an extremely weak case such as Renaud and Lore, if defense counsel is confronted which such a case asking a court to provide such an order might prove fruitful.

F. Pre-trial Hearing on Admissibility of Expert Testimony

1. After the defense attorney has completed discovery, i.e., the filing of interrogatories, request to produce, request to admit, and the taking of depositions, the attorney should seek a pre-trial hearing on the admissibility of the expert's testimony.

2. The benefits of such a pre-trial motion hearing include:

   a. If successful, it would result in the exclusion of plaintiff's expert's testimony at trial;

   b. This in turn could result in the dismissal of plaintiffs' case altogether; and

   c. Even if the motion were not successful it will educate the judge on the complex scientific and legal questions which will arise at trial. Thus, at trial the judge's rulings on evidentiary matters should be more informed.

3. Procedural basis for pretrial motions on the

admissibility of expert testimony include Rule 104 of the Federal Rules of Evidence (which pertains to preliminary questions of admissibility of evidence), a motion in limine, or a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

a. Rule 104(a) has been held by some judges to require a court to make a preliminary inquiry into the admissibility of expert testimony. See e.g., In Re Agent Orange Product Liability Lit., 611 F. Supp. 1223 (D.C. N.Y. 1985).

b. A motion in limine is another procedural device which can be used to obtain a pre-trial hearing on the admissibility of expert testimony. The motion in limine has been recognized as an appropriate procedural device for a determination as to the admissibility of an expert opinion. See Blumenkof, "The Motion In Limine: An Effective Procedural Device With No Material Downside Risk." 16 N. Eng. L. Rev. 17 (1980-1981).

c. A motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure can also be used as a pretrial device to determine the admissibility of expert testimony.

   i) Such use of summary judgment has been successful in toxic tort litigation. See, e.g., In Re Agent Orange Prod. Liab. Lit., 611 F. Supp. 1223 (E.D. N.Y. 1985); Viterbo v. Dow Chemical Co., 826 F.2d 420 (5th Cir. 1987); Washington v. Armstrong World Industries Inc., No. 87-4774, 3/16/88.

   ii) In light of the United States Supreme Court's recent decisions encouraging courts to grant motions for summary judgments, if the facts of a case warrant such a determination, summary judgment could be a very effective tool for defense attorneys. See, Celotex Corp. v. Calrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby Inc., 106 S.Ct. 2505 (1986).

G. Admissibility of Expert Testimony at Trial

1. If the defense attorney is unsuccessful in obtaining a pre-trial order excluding expert witness testimony there still are various procedural techniques which can be used by the defense attorney to exclude or minimize the impact of the defense attorney's testimony.

   a) VOIR DIRE
   The defense attorney may attempt to exclude the testimony of an expert witness by challenging the expert's qualifications and the admissibility of his testimony during Voir Dire.

   b) CROSS EXAMINATION
   The defense attorney can use cross examination to attack the substance of the expert's testimony and, in rare circumstances, to also attack the expert's qualifications for rendering such an opinion.

   c) MOTION TO STRIKE
   Additionally, if the expert does not lay the proper foundations or if the expert's opinion is not supported by the evidence, the defense attorney may move to have it stricken.

   d) JNOV OR NEW TRIAL
   If by the close of trial the plaintiff has not proven a "causal" link then the defense attorney can move for judgment notwithstanding the verdict or a new trial since plaintiff has failed to prove its prima facia case.

2. Examples of cases which have gone to trial and the court has either found for the defense, granted a judgment notwithstanding the verdict, or ordered a new trial because the plaintiff was unable to prove a 'causal link' through use of its expert testimony include Perry v. United States, 755 F.2d 888 (11th Cir. 1985); Eyre v. McDough Power Equipment, Inc., 755 F.2d 416 (5th Cir. 1985); and Brown v. Syntex Laboratories Inc., 755 F.2d 668 (8th Cir. 1985).

III. SUBSTANTIVE BASIS FOR EXCLUDING EXPERT TESTIMONY AT A PRE-TRIAL MOTION OR AT TRIAL

A. Introduction

Not only must defense attorneys concern themselves with the procedural aspects of excluding expert testimony, but they must also play close attention to the rules of evidence which explain when expert testimony is inadmissible. The Federal Rules of Evidence which pertain to the admissibility of expert testimony are Rule 702, 701, 402, 403, and 703.

B. Rule 702 of the Federal Rules of Evidence

1. Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

2. Under this rule a court must first determine whether the proffered evidence would assist the trier of fact. In the context of toxic tort litigation, the testimony of experts may always be necessary in order to understand the complex scientific and medical questions surrounding causation.

3. Additionally, the court must determine whether the expert is "qualified" to testify as an expert. Courts liberally interpret this requirement and it is only in the rarest of circumstances that a court will find that an expert is not qualified. In determining whether the expert is qualified to testify, the court will look to the expert's education, training, whether formal or informal, and the expert's specialized knowledge beyond that of a layman.

4. Under this rule an expert's specialized knowledge must enable him to testify to the subject matter at hand. Defense attorneys should scrutinize the expert's qualifications

in this regard. Due to the ever increasing number of specializations and the complex nature of scientific questions which must be dealt with in toxic tort litigation it is possible that although the expert is qualified the expert might not be qualified to testify to the subject matter in question.

C. Rule 401 of the Federal Rules of Evidence

1. Rule 401 of the Federal Rules of Evidence provides: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

2. Under this rule a court must first determine whether the expert has a basis for his opinion. If the expert's opinion is found to be based on conjecture, speculation, or mere conclusions it will be inadmissible.

3. Defense attorneys have had success in toxic tort litigation where plaintiffs have failed to prove that their injuries were caused by exposure to a chemical, but were only able to show a temporal relationship. See, e.g., Gicas v. United States, 508 F. Supp. 217 (E.D. Wisc. 1981), (two experts testified that the injuries complained of by the plaintiff were caused by a swine flu vaccination. The judge held that the expert opinions were not credible evidence at all because they were based on nothing more than a temporal relationship between the date of the swine flu inoculation and the onset of the plaintiff's injuries); Stoleson v. United States, 708 F.2d 1217 (7th Cir. 1983) (In dismissing plaintiff's expert's theory that the plaintiff's hypochondria was caused by her continued exposure to nitroglycerin at a federal ammunitions plant that court stated: "There is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic"); In Re Swine Flue Immunization Products Liability Litigation, 508 F. Supp. 798 (Colo. 1981) (various medical opinions linking the swine flu vaccine to Guillain - Barre Syndrome rejected by district court because the opinions were either

unsupported by current medical literature, too general and speculative or based on unreliable test studies or inadmissible hearsay); and Heyman v. United States, 506 F. Supp. 1145, 1149 (S.D. Fla. 1981), (The court stated, "A mere temporal relation between an event and an illness does not demonstrate any causal connection between the two events. To demonstrate such a connection, statistical studies must be conducted; otherwise the temporal relationship may be simply the result of chance. Given the general inability of a physician to make accurate predictions of causation without at least some reference to epidemiological studies, plaintiff's position that her illness was caused by the swine flu shot amounts to nothing more than speculation.")

4. Under Rule 401 and Rule 703, a court must also determine if an expert's opinion is based upon novel principles which have no scientific validity. Such opinions will be inadmissible under this rule since they are not legally probative. Thus, especially, in the field of toxic tort litigation, the defense attorney should always scrutinize the basis of the expert's opinion to determine if it is based on novel concepts not yet recognized in their field of study.

D. Rule 403 of the Federal Rules of Evidence

1. Rule 403 of the Federal Rules of Evidence provides: although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

2. Under this rule, defense counsel can argue that even if an expert's testimony is admissible it should be excluded on the grounds that the evidence is prejudicial, confusing, or a waste of time.

3. Exclusion of evidence under Rule 403 is particularly appropriate in complex toxic tort litigation when there is a false aura of scientific infallibility surrounding the

evidence coupled with a low probative value, since admission of such evidence increases the possibility of misleading the jury.

4. See, e.g., Viterbo v. Dow, 826 F.2d 420 (5th Cir. 1987) (court held that expert's testimony was inadmissible under Federal Rule of Evidence 403 and 703 because the physicians testimony lacked foundation and reliability necessary to support expert testimony.), and In Re Agent Orange Prod. Liab. Lit., 611 F. Supp. 1223 (D.C. N.Y. 1985) (where the court found that the expert testimony of two doctors inadmissible under the Federal Rules of Evidence 403 and 703.)

E. Rule 703 of the Federal Rules of Evidence

1. Rule 703 of the Federal rules of evidence provides in pertinent part: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

2. Defense attorney's, pursuant to this rule, should scrutinize the expert's testimony to determine if it is the type of evidence which is "reasonably relied upon by experts in the field."

3. See e.g., Viterbo v. Dow, 826 F.2d 420 (5th Cir. 1987) (court held that expert's testimony was inadmissible under Federal Rule of Evidence 403 and 703 because the physician's testimony lacked foundation and reliability necessary to support expert testimony.), and In Re Agent Orange Prod. Liab. Lit., 611 F. Supp. 1223 (D.C. N.Y. 1985) (where the court found that the expert evidence of two doctors inadmissible under the Federal Rules of Evidence 403 and 703.)

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"An Effective Medical Defense: The Key to Toxic Tort Success"

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AN EFFECTIVE MEDICAL DEFENSE: THE KEY TO TOXIC TORT SUCCESS

I. INTRODUCTION

The magnitude and complexity of toxic tort medical claims can easily overwhelm defense counsel. In cases involving chemicals such as dioxin, PCBs, chlordane, and other chlorinated hydrocarbons, plaintiffs typically allege a vast array of injuries to a variety of different organ systems. These may include the central and peripheral nervous systems, the immune system, the genitourinary system, the hematopoietic (blood-forming) system, the skin, and others. The plaintiffs may complain of symptoms so varied that they seem to run the entire gamut of ills that can befall human beings. They may range from the trivial (e.g., infected mosquito bites) to the personally embarrassing (e.g., episodes of urinary incontinence) to the seemingly disabling (e.g., severe fatigue or weakness) to the contradictory (e.g., weight gain in one plaintiff and weight loss in another). In between those extremes, complaints are likely to include headaches, aches and pains, allergies, infections, skin rashes, high blood pressure, memory loss, depression, fainting, and menstrual disorders. The list could go on and on. The complaints attributed to toxic exposure may at times seem limited only by the ingenuity of opposing counsel and their expert witnesses.

To demonstrate the existence of the alleged injury the plaintiffs' experts rely on a wide variety of physical examination and laboratory results. These results may stem from tests which are well-accepted in the medical community or from others which are known only to a very few specialists. In addition, where the law allows recovery for risk of future harm[1] or for future medical monitoring,[2] the experts also typically testify that the plaintiffs' test results demonstrate increased risk for the development of such problems as cancer, infectious diseases, infertility and/or birth defects.

We have all learned in school about the effectiveness of "The Big Lie" when used by a skilled propagandist. As a toxic tort defense lawyer, you may feel that "The Big Lie" is just what you are facing. Your experts will assure you that the plaintiffs' claims are medical nonsense. Yet you will understandably worry that if the jurors repeatedly hear these medical and scientific untruths from apparently qualified witnesses, they may come to believe them. True, the very technical and sophisticated expert testimony may seem beyond the jurors' real comprehension. However, many plaintiffs' lawyers do not care whether the jury actually understands the testimony of their experts. It is sufficient for them if their witnesses <u>appear</u> to be authorities and if their testimony <u>appears</u> to be scientific. These attorneys apparently believe that the jurors' pro-plaintiff sympathies will then carry them to victory.

The job of the defense is therefore much greater. Its

experts must not only appear to be authorities and their testimony must not only appear to be scientific -- its evidence must be understandable and persuasive. In our experience, this calls for a two-fold approach. The first, of course, is a complete refutation of the plaintiffs' technical medical claims. You should not rely solely on technical medical evidence, however, to persuade the jury of the lack of merit of the plaintiffs' claims. Your success will not necessarily come from brilliant scientific testimony alone, no matter how articulate and well-qualified your experts. Your scientific testimony, it is hoped, will neutralize the plaintiffs', but your success will come from the second aspect of your medical defense, namely the vast amount of "common-sense" evidence you present regarding the plaintiffs' medical conditions.

That completely understandable common-sense evidence will help the jury decide the less understandable scientific controversy in your favor. This is not to say that the plaintiffs may not have genuine medical problems. Everyone does, including toxic tort plaintiffs. In almost every instance, however, evidence can be found to show that there are more logical causes for those problems, that they are trivial or common problems, that many pre-existed the toxic exposure, or that they are not really problems at all.

Neither aspect of your defense should be omitted. Omit the common-sense evidence and you are left with a pure battle of experts, one which you may lose depending on jury prejudice. Omit the scientific evidence and the jury may conclude that

although the plaintiffs do not appear sick now, their "abnormal" laboratory and examination results indicate that they may get sick in the future; as a result, the jury may award damages for future medical monitoring. Put both aspects of this defense together and it can persuade a jury that, despite its natural sympathy for the plaintiffs, and despite the scientific aura which plaintiffs' counsel and their experts have given to their claims, notions of common sense require a defendant's verdict.

In this article, we discuss the defense strategy we have used in defending toxic tort cases. The authors of this article participated in the defense of the medical issues in Kemner v. Monsanto Co.,[3] the longest jury trial in American history. The trial lasted three-and-one-half years and included 33 medical experts in a variety of specialties. The plaintiffs' attorney's asked the jury to award more than $35 million in actual damages for medical injuries, half of which was to be for future medical monitoring costs; the jury responded by awarding each of the 65 plaintiffs only one dollar. The strategy we have used in this and other toxic tort cases is by no means the only one possible, but we believe it is worth considering by other attorneys faced with similar cases.

II. GATHERING AND ANALYZING THE PLAINTIFFS' RECORDS

One of the first efforts a defendant must make is a

comprehensive search for the plaintiffs' medical, employment, school and military records, even back to childhood. These records can be a potential gold mine of information contradicting the plaintiffs' claims -- i.e., providing the "common-sense" element of the defense. For example, the plaintiff's pre-exposure school records might refute the plaintiff's claim of brain damage by providing a basis for a comparison of his intellectual functioning before and after the exposure. In the case of children, school records might contain information concerning the child's attendance, academic performance or athletic achievements which contradict plaintiffs' claim of frequent illnesses or brain or muscle damage. Employment records often contain performance evaluations which show that, despite the plaintiff's claim of a personality change causing irritability, he gets along well with his co-workers. Evaluations of the quality or quantity of his work might contradict other claims. Military records may contain evidence that a condition pre-existed the exposure.

In terms of quantity, the largest number of records will come from the plaintiffs' treating physicians and hospitals. These records will be invaluable. They will frequently show physician visits before the exposure for the same problems that are alleged to have resulted from the exposure. They may also contain outright denial of problems, attribution of complaints to other causes (e.g., medications or injuries) or the absence of doctor visits for problems for which one would expect a person to seek medical attention. For example, the plaintiffs'

expert may claim that the plaintiff complained to him of frequent urinary difficulty, such as burning or urgency. One would certainly expect a person to voice such a complaint to her personal treating physician -- especially her gynecologist. The absence of such records is strong evidence that the complaint was minimal, if it existed at all.

There may also be outright contradictions of the expert's opinion in the treating physicians' records. For example, the treating doctor's physical exam findings may be dramatically different from those of the expert witness. A treating doctor may have considered isolated laboratory findings, which the expert witness claims are significant evidence of disease, to be inconsequential because of the absence of any related symptoms or findings. The doctor may also have concluded that there was no organic basis to a complaint or may have attributed it to a non-toxic cause such as an injury.

Do not simply rely on the plaintiffs to supply the records or to provide the names of their doctors in answers to interrogatories or deposition testimony. The plaintiffs may well forget to list some of them. Review of medical and employment records may reveal the identity of additional treating physicians. If the plaintiffs come from a small town or rural area, it may be feasible, after obtaining medical authorizations, to send letters to all physicians in that area inquiring if they have treated the plaintiffs. If plaintiffs have lived in more than one area, physicians near their former residences should be contacted as well.

Finding the contradictions in the records requires a meticulous review. Helpful records may be located in unlikely places. For example, in the Kemner case the plaintiffs' expert testified that, during the psychological testing, the plaintiff had written a backwards "u" and that this was evidence of brain damage. Review of his records revealed that he had written the same kind of backwards "u" in his college registration form many years before his alleged exposure. In another instance where weight loss was one of the claimed injuries, a nurse had noted during a hospitalization that the plaintiff was dieting and was proud of her weight loss. In another case involving a claim of debilitating fatigue, the plaintiff's wife complained to a marriage counselor that the plaintiff played softball six nights a week.

The initial review and summarization of the records should not be done by attorneys. Instead, medical students, nurses or medical librarians can be hired on a part-time basis. Not only will they do a better job than attorneys, but they will be more economical to the client. A medical summary format we have found helpful is set forth in the Appendix. This medical summary should be periodically updated and will be a constant resource throughout the case.

III. DEPOSING PLAINTIFFS AND THEIR EXPERTS

One can expect the plaintiffs' medical expert to examine the plaintiffs at least twice prior to trial, once in the early

stages of trial preparation and once just before the trial begins. The plaintiffs' counsel will try to schedule the final medical examinations after the plaintiffs' depositions and after their examinations by the defendant's experts. Although the defendant may try to conduct its medical examination last, practicalities involved in scheduling will make it difficult to do so if the plaintiffs' counsel desires his expert's examination to occur last.

The question then becomes when to schedule the plaintiffs' deposition. In most circumstances, the most advantageous time is shortly before the plaintiffs' first examination by their medical experts. The reason for this is that the medical report of the defendant's expert frequently lists complaints that the plaintiff has never made before. You may suspect that the medical expert has suggested these complaints to the plaintiffs, you may even try to discover evidence to prove it -- but you will probably be unable to do so. A deposition of the plaintiffs shortly before the examination in which they fail to make, or even deny, complaints they later make to the expert may lead the jury to make a similar inference about the effect of the expert's examination.

Experienced attorneys do not need a detailed discussion of how to take a thorough personal injury plaintiff's deposition. An extensive discussion of the plaintiffs' deposition in a toxic tort case appeared in a recent DRI monograph.[4] We wish to make a few additional comments. The plaintiff should be asked to enumerate every medical, physical, mental and

emotional problem he has experienced since his exposure, whether or not he attributes that problem to the exposure. He should be asked detailed questions about each problem, such as date of onset, duration, nature of the problem, beneficial and aggravating factors, treatment received, and severity. In this sense, the deposition will be a kind of medical history, given under oath. You should therefore consult one of your physicians concerning what to ask. If your medical team is from a medical school, a junior faculty member can perhaps be used for such consultations.

If the plaintiff lists only a few problems, his failure to mention any other problems can be used effectively to impeach him if he complains about them at trial. If, on the other hand, the plaintiff gives a long list of complaints, impeachment by his failure to list other complaints will be somewhat less effective. To impeach him you will have to re-read, and thereby highlight, his long list of deposition complaints. Also, the plaintiff may claim that he had so many things bothering him, he simply forgot a few. In such cases, you may want to direct specific questions to possible complaints, such as: "Have you had any problems with your stomach or with digestion?" The risk is that the mention of such problems may lead to affirmative responses. Therefore, such directed questions should be used sparingly.

Another question concerning the timing of depositions pertains to the depositions of the plaintiffs' medical experts. If their medical reports fail to contain diagnoses,

they should be deposed before the examination of the plaintiffs by the defendant's physicians so that the physicians can adequately plan their examinations. If they re-examine the plaintiffs shortly before trial, they should be redeposed, if local procedural rules allow.[5]

As with the plaintiff's deposition, you should consult your medical experts for possible areas of inquiry at the depositions of the plaintiffs' experts. One possible area is whether the expert has enough information to support a diagnosis. His medical reports are likely to be very cursory. Because he had his mind made up about the cause of the plaintiffs' problems before he ever saw them, he does not need to conduct a thorough examination. For example, the report might simply record a complaint of frequent nausea without any other information about it. In taking a history concerning nausea, a competent physician will inquire about its frequency and severity, its temporal relationship to meals and to particular kinds of food, and whether it is associated with other symptoms. When you ask the expert in the abstract, early in the deposition, how he took his history, he will undoubtedly tell you he asked all these questions. If you later ask him if he knows the answer to any of the questions regarding the particular plaintiff, he may say he does not know.

The expert should also be asked general questions to probe his medical knowledge in areas relevant to the plaintiffs' conditions. The medical knowledge of some plaintiffs' experts is startlingly weak. Early and thorough preparation will make

you much more knowledgeable. When you ask the witness such general medical questions, he might make serious mistakes which can be used at trial in cross-examining him and in the direct testimony of your own experts. Furthermore, the more respect the expert has for your knowledge, the less likely he is to give you rambling, evasive, complicated answers that are utterly useless at trial.

You should also depose other personnel involved in the plaintiffs' examinations, even if they are not expected to testify. For example, an issue may arise concerning whether the results of certain laboratory tests may have been due to the method of specimen handling. Therefore, depose the individuals who handled the specimens. There may be examining physicians who are not part of the testifying team -- such as physicians performing physical examinations or taking histories which are then used by the chief witness as the basis for his testimony. Depose them to establish how they conducted their examinations. Once again, your medical consultants should be helpful in directing you to appropriate areas of inquiry.

IV. SELECTING THE DEFENDANTS' MEDICAL EXPERTS AND THE TESTS TO BE PERFORMED

One of the most important strategic decisions a defendant will make is the selection of its team of medical examining experts. The plaintiffs will attempt to refer to the defendant's medical experts by terms such as the "Defendant's Doctors" or the "Chemical Company Medical Team." The

defendant, on the other hand, must try to dispel the notion that its experts are in fact hand-picked "Defendant's Doctors." One way to do this is to select them from a respected medical school or hospital. You will then have the reputation of that institution on your side. You may then also refer to the experts by the name of their institution (e.g., "The State University Medical Team"), and this name will create an impression of objectivity and independence.

The next decision concerns the specialties to include on the team. One individual, preferably an internist, should be the head and major spokesman of the team. That individual will give the general diagnosis regarding each plaintiff based on his own examination, the reports of the other members of the team, and the records of the plaintiffs' treating physicians. If there are children among the plaintiffs, the principal spokesman with regard to them should be a pediatrician, since most internists have no experience in examining children.

Experienced trial lawyers know what kind of qualifications and personality to seek in an expert witness. There is an additional factor to consider in important and lengthy toxic tort cases -- the element of tenacity and commitment. The chief witness will probably testify for a long time, particularly in a case involving multiple plaintiffs. He will be required to work very hard. In addition, he will be viewed by the plaintiffs' lawyer as the one witness he must destroy. Therefore, the cross-examination will very likely be difficult and hostile -- and probably unlike any professional experience

your expert has ever had. Nevertheless, he must be unyielding to the onslaught he will receive.

The other specialists on the team cannot be selected until after the plaintiffs identify their own medical witnesses and, if possible, until after the defendant has learned of the plaintiffs' experts' opinions. The defendant should probably include a specialist in every field represented on the plaintiffs' medical team. However, there may be additional specialties which need to be included as well. Many plaintiffs' experts offer opinions in an incredible variety of fields -- from gynecology to audiology to male fertility. One of the criticisms you may wish to direct at the plaintiffs' chief expert is that he could not possibly be an expert in all these fields. Your chief medical witness, on the other hand, should rely on consultations from specialists in the same fashion as in his regular medical practice.

Another question concerns the type of laboratory tests and specialty examinations to perform. You may be tempted simply to duplicate the tests performed by the plaintiffs' experts, but that may not be the best strategy. The plaintiffs are very likely to perform unusual, esoteric tests that lend themselves to "creative interpretation." The more tests that are done, the more "abnormalities" will be found that need to be explained on a basis other than toxic exposure. Whether to perform these tests depends on whether your experts believe, in view of their examinations of the plaintiffs and review of the plaintiffs' experts' opinions, that such tests are necessary.

For example, in Kemner v. Monsanto, the plaintiffs' expert performed electromyographic and nerve conduction velocity studies on each of the plaintiffs. These tests are measurements of the electrical pattern of the nerves and muscles. They can be useful in the diagnosis of nerve and muscle disorders in patients with a clinical indication of such a condition. The plaintiffs' expert, however, performed the same battery of tests on every plaintiff -- regardless of the particular plaintiff's complaints or examination findings. Furthermore, the expert used the same protocol on every plaintiff -- testing the dominant arm and the non-dominant leg -- regardless of the location of any complaints. Thus, a plaintiff might have had a complaint in the left arm but only have had the right arm tested. The defendant's neurologist, on the other hand, testified that these tests were not needed in the plaintiffs and that the "abnormalities" the plaintiffs' experts found were meaningless. Although the plaintiffs' attorney criticized the neurologist's decision not to perform such tests, interviews with the jurors after the verdict indicated that they were not bothered by it at all. Instead, they disregarded the results of the plaintiffs' tests because of their opinion that the plaintiffs' expert had repeatedly "tested the wrong arm."

On the other hand, the defendant's doctors should not omit a test for a particular plaintiff simply because the plaintiffs' expert found the result to be normal after the first examination. The plaintiffs' expert may change his

diagnosis after his second examination and claim that a newly found abnormality was due to a delayed effect of the chemical. If the defendant does not perform that test, it will have no affirmative evidence to counter the plaintiffs' evidence.

Another important question is whether each member of the team will testify. Under Fed.R.Evid. 703 and 705, and under the evidentiary rules of some states,[6] every member of the team need not testify. Instead, the chief spokesman may rely on, and testify about, the findings and conclusions of his consultants, so long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." If he does so, however, he must be able to defend the conclusions of the consultants. If the internist lacks expertise in the interpretation of allergy tests, for example, it is probably wise to have the allergist testify himself.

V. CROSS-EXAMINATION OF THE PLAINTIFFS AT TRIAL

The cross-examination of the plaintiffs should be used to establish a foundation for the "common-sense" contentions that the complaints have other, more logical causes, that they pre-existed the exposure, or that they are trivial, "everyday" types of complaints. Support for these contentions will likely be found in the plaintiffs' medical, school, employment and military records. Unless the plaintiff has been thoroughly

prepared on his extensive records, you may be able to elicit testimony, before showing him the records, that contradicts the facts they contain -- e.g., testimony denying that he had the complaint before the exposure. This is the most effective use of the records. If confronted with the records before his position is pinned down, the plaintiff will try to explain them away -- for example, by conceding that he made the complaint and then contending that it worsened after the exposure.

Cross examination of the plaintiffs can also be used to show that their own actions belie their contentions in court. This can be characterized as "actions-speak-louder-than-words" evidence. For example, the plaintiffs' medical expert may well have given the plaintiffs advice on how to change their lifestyles to protect them against further effects of their alleged toxic exposure. Some of these changes may be as simple as a change in diet or the use of sunscreen. If the plaintiffs failed to follow this advice, their request that the jury believe the testimony of the plaintiffs' expert may sound hollow. In Kemner v. Monsanto, the plaintiffs' immunologist testified that a 5-year-old plaintiff was in a pre-leukemic condition and recommended that a $40.00 blood test be repeated every three months. The plaintiff's parents, however, had not had the test repeated. To decide whether this evidence is powerful, just ask yourself: If you were told, by someone you believed, that your child was likely to develop leukemia and needed to have his condition monitored, would you do it? If, by your actions, you showed that you didn't believe that

person, would you expect a jury to believe him?

VI. CROSS-EXAMINATION OF PLAINTIFFS' EXPERTS

The plaintiffs' expert is likely to contradict the most fundamental of medical principles. The expert will vigorously and even convincingly deny everything that your expert says is basic medical knowledge. For example, the expert is likely to testify that every laboratory result that falls outside the laboratory's reference range is an "abnormality" indicative of disease. In fact, laboratory reference ranges are set to encompass approximately 95% of the healthy population. Approximately 5% of the healthy population will fall outside the reference range. Looked at another way, the average person who is given a battery of multiple laboratory tests would be expected to have 5% of the results fall outside the reference range. In some people it may be more than 5% and in some less, but the more tests that are done, the greater the chance of finding at least one "abnormality."

This principle means that laboratory tests are not diagnostic standing alone. The art of diagnosis involves correlation of these results with symptoms, exam findings, and other laboratory tests to determine whether they indicate a genuine "abnormality" or a "statistical outlier." Furthermore, some laboratory results may be significant if they fall outside the reference range in only one direction but not in the other, a principle the expert may ignore. For example, he might

diagnose a depressed cholesterol, which is synthesized in the liver, as an indication of liver disease. In fact, your expert will tell you that such a result indicates good health.

Do not expect the expert witness to concede on cross-examination any principle, like these, that undercuts his testimony. It does not matter how fundamental your expert tells you the principle is. You must be prepared for the possibility -- with some experts, even the likelihood -- that he will deny it. The goal of cross-examination is therefore not to obtain admissions but to show that the expert's opinion is contrary to the vast weight of reliable evidence. Unfortunately, the jury is ill-equipped by itself to determine which side of a complex medical question is correct. Does a jury have any idea whether a depressed cholesterol indicates liver disease or whether an "abnormal" lab result by itself indicates pathology? Of course not. It needs more than just conflicting expert testimony to decide these questions in your favor. After all, the laboratory called the result "abnormal," didn't it? Therefore, defendant's counsel should seek supporting evidence -- medical records, medical literature, or testimony by another plaintiffs' witness -- to support every question he asks the expert on cross-examination. The supporting evidence must be clear and unequivocal. Otherwise, the expert will invariably choose the interpretation, no matter how strained, that supports his case. In such instances, defense counsel might be better off either not asking the question or simply staking out the expert's position and

relying on his own experts to point out the contradictory evidence.

The types of materials useful in cross-examination of the experts include the following:

Medical Literature

The expert will invariably be testifying contrary to principles set forth in medical textbooks and articles. Obtain as many general and specialty medical books as possible since they will be a continuing resource throughout the pre-trial preparation and the trial.[7] Cross-examine the expert with the literature, but do not expect him to agree with anything that undercuts his testimony. He will either disagree or distinguish it by claiming it does not apply to the plaintiff. Therefore, in your cross-examination, use as many books and articles as you can, and begin with the ones that provide the clearest contradiction. You want the expert to disagree with the literature, not distinguish it. You want to overwhelm him with the weight of the literature that is on your side. Let the books pile up on counsel table as you use them.

One example of literature that might contradict the expert's testimony pertains to the example of the low cholesterol value mentioned above. A book often considered the "bible" of laboratory medicine, Todd, Sanford & Davidsohn's Clinical Diagnosis and Management by Laboratory Methods, (17th ed. 1984), states at p. 58:

> A common error occurring when such [a reference range] interval is being used is the practice of using the

> lower and upper limits of the interval as rigid boundaries within which the patient is considered "normal" and beyond which the patient is termed "abnormal" and thought to be suffering from some pathologic process. This approach may be very misleading for many reasons. For one thing, having a value outside the stated interval might be a sign of <u>good</u> health rather than a cause for concern, e.g., a patient having a serum cholesterol value <u>below</u> the lower reference limit.

(Emphasis in original).

<u>Medical, School and Employment Records</u>

For all of the reasons set forth above, the plaintiffs' records are a very fertile source of cross-examination of the plaintiffs' expert. One additional point should be added. The plaintiffs' experts will likely claim to have reviewed those records and to have incorporated them as part of the bases for their conclusions. Undoubtedly, this will be an exaggeration at best. They will not be familiar with the voluminous records on each plaintiff. Therefore, it will be more effective to ask about the medical records, initially, in an open-ended fashion. If you ask a leading question such as: "Isn't it a fact that the plaintiff complained of headaches three times in the two years before his alleged exposure to the chemical?," the expert will assume you have the records to back up your question and will likely agree, even if he does not know. This allows you to make one point, that the plaintiff had three pre-exposure visits for headaches. On the other hand, consider what happens if you ask: "Did the plaintiff ever complain about headaches prior to his exposure?," and follow it up, if he answers affirmatively, with, "How often?" and "When?" The

physician will either answer correctly -- in which case you've still made your one point -- or he will answer incorrectly or say he doesn't know. In the latter case, you can still make the point about the headaches by showing him the records. In addition, you will establish that he has not, in fact, considered those records. Similar non-leading questions can be asked in any area where you have records to support the answer you are seeking.

Questionnaires Administered by the Expert's Team

As part of the expert's examination, some of the consultants -- for example, the electrodiagnostician or the neuropsychologist -- may have administered questionnaires. Make sure these are produced to you, and analyze the plaintiffs' responses. The plaintiffs may have denied problems attributed to them by the chief expert. For example, in the Kemner case, the chief expert claimed most of the children had experienced unusual fatigue. Yet the parents of nearly every one, in completing a 600-item psychological questionnaire, agreed that their children had as much pep and energy as most children.

Testimony of Other Witnesses

Contradictory testimony of other witnesses can effectively be used in cross-examining the plaintiffs' major medical witness. For example, if the plaintiff fails to mention or even denies a particular complaint during his own testimony, that can be used to impeach the expert if he claims that the plaintiff made the complaint to him.

There may also be contradictions from the consultants used by the principal expert. If the principal expert relies on one of his consultant's findings, testimony by the consultant that the test result was normal will effectively contradict him. On the other hand, not every contradiction can be used effectively. If the consultant believed that the finding, though abnormal, was not due to the chemical, the chief expert is likely to respond that his own opinion is more valid. He will claim that the consultant knows less about the plaintiff's total medical condition or about the chemical's toxicity than he does.

If you have taken the deposition of a pathologist with the laboratory used by the expert witness, his testimony might also provide effective cross-examination. For example, he might disagree with the expert's opinion that a low cholesterol indicates liver disease.

Evidence Refuting the Expert's Frequency Distribution

In a multi-plaintiff case, the expert may rely on a so-called frequency distribution -- i.e., a table purporting to list the numbers and percentages of the plaintiffs with various complaints, physical examination findings and laboratory abnormalities. The expert will claim that this table shows a far greater percentage of individuals with symptoms and abnormalities than he would expect in a healthy population and that the only conceivable explanation is the "one fact they all have in common" -- i.e., exposure to the toxic chemical. If faced with such "voodoo epidemiology," you must first attempt

to have it excluded from evidence as unscientific and non-probative.[8] Assuming this effort is unsuccessful, the frequency distribution can be attacked in cross-examination on a number of grounds. First, you should point out that the expert did not compare the plaintiffs to a control group as is mandated by standard epidemiological practice. While this fact might be persuasive to a group of scientists, however, it is probably less so with jurors. They may feel, for example, that having 50% of the plaintiffs with abnormal neurological findings or complaints of frequent headaches is excessive, whether or not there is a control group.

The main focus of the attack on the frequency distribution should be on its accuracy. Obtain from the expert the list of each plaintiff's symptoms and findings which were included in the frequency distribution. Then compare this list with the expert's reports on each plaintiff and with the plaintiff's medical records. In our experience, these frequency distributions are notoriously inaccurate. To cite a few examples from the Kemner case, the expert listed individuals as having symptoms which they had expressly denied to him, he included neurological findings as abnormal though his report said they were normal, and he employed the wrong reference ranges for laboratory tests. If these inaccuracies do not enable you to have the frequency distribution stricken from evidence, they should at least diminish its value in the eyes of the jury. In fact, in Kemner, after the errors were pointed out, neither the plaintiffs' counsel nor his experts ever

mentioned the frequency distribution again.

Background and Qualifications as an Expert

Do not assume that the expert actually has the qualifications he claims. Plaintiffs' medical experts are often weak in their professional accomplishments and are prone to exaggeration of their honors and experience. We have encountered experts who have misrepresented their college and post-graduate degrees, board certifications, academic positions, publications, membership in professional societies and requirements for such membership. Each of these should therefore be checked thoroughly. Much of this information can be obtained without having to subpoena it.

One example from the recent Kemner trial might suffice to show the benefits that can be gained from checking into the accuracy of the expert's representations about his background. The plaintiffs' chief expert, who claimed a speciality in Internal Medicine, was not board-certified in that field but was certified in Occupational Medicine. In deposition, he claimed that he had taken the examination in Internal Medicine only once and that he had not completed it because of illness. He had given similar testimony many times in the past. By subpoenaing his records from the American Board of Internal Medicine, however, we learned that he had actually failed the exam five times.

This example points out another benefit to be gained from making an issue of the expert's background. If the expert believes that you know the truth about his background, he will,

of course, testify accurately about it. He may not have been such a stickler for accuracy in the past, however. Therefore, you should obtain his testimony in previous cases. False testimony given in the past can be used for impeachment. The greater the number of impeaching transcripts that can be obtained the better. The witness may then appear to be what he actually is -- a professional testifier.

VII. LOCAL TREATING DOCTORS AND OTHER INDEPENDENT WITNESSES

One of the most effective parts of the defendant's case can be the presentation of testimony from the plaintiffs' own treating physicians and other "independent" witnesses. At first, it may seem unlikely that such individuals would be willing to testify. After all, the treating doctors, for example, would be testifying against the interest of their own patients. However, if the law of your state allows you to communicate informally with a plaintiff's physician,[9] you may find that these doctors are genuinely offended by the claims being made by the plaintiffs' experts and are willing to let the jury hear the truth.

Testimony from the plaintiffs' treating physicians can take a number of forms. They might contradict the plaintiffs' testimony about their complaints. They might contradict the plaintiffs' expert's interpretation of laboratory tests or his testimony on general medical principles. They might testify that their own physical examination findings differ from the plaintiffs' expert's. They might testify that, so far as they

have been concerned, their patients are in excellent health.

Where informal communication is allowed, you should provide the treating physicians with some basic literature on the chemical's toxicity, but they will undoubtedly not be experts in that area. Nor need they be. A physician need not be an expert in toxicology to recognize an abnormal reflex or diagnose liver disease.

Another potential source of "independent" expert testimony can come from the individuals who perform laboratory tests for the plaintiffs' experts. The plaintiffs' experts may order these tests from one of several large national laboratories. As is the case with the treating physicians, the pathologists at these laboratories may also be offended at the misuse of their test data by the plaintiffs. Testimony from these physicians, contradicting the opinions of their own client and agreeing with the defendant's experts, can be very effective.

Another potential source of independent testimony can come from lay witnesses. They can provide critical support for the "common sense" aspect of your defense. Other individuals who have had similar exposure to the chemical might testify that their health has been good. Teachers, coaches and employers of the plaintiffs might testify that the plaintiffs failed to follow their expert's recommendations, such as using sunscreen. They might also attest to the plaintiffs' excellent performance at work or at school. For example, testimony that one of the children is an outstanding athlete might refute a diagnosis of systemic neurologic damage. In Kemner v.

Monsanto, one of the boys even overcame that exact dire diagnosis to pitch a no-hitter for his Little League team.

VIII. PRESENTATION OF DEFENDANT'S MEDICAL EXPERTS

Because the presentation of the defendant's own medical experts is likely to be the strongest part of its case, these experts should probably be the final witnesses, with the chief spokesman as the ultimate witness. You should portray these witnesses as what they undoubtedly are and as what the plaintiffs' witnesses most likely are not: real-life physicians who regularly treat patients, not plaintiffs. They should explain to the jury how physicians make diagnoses by considering all the relevant possibilities -- not by jumping to the conclusion that whatever the patient has, it was due to a toxic chemical.[10]

Preparation of these medical witnesses requires lengthy, meticulous work. First of all, unlike the local treating doctors, they must be thoroughly prepared on the toxicological and epidemiological literature regarding the chemicals in question. Even though your evidence on the toxicity of the chemicals will principally come from a toxicologist and/or epidemiologist, the physicians must be knowledgeable in this area too. They must be able to defend their opinion that the plaintiffs' conditions are inconsistent with an effect of the chemicals.

The medical experts must therefore be thoroughly conversant with principles of epidemiology and toxicology. If the court

allows animal studies in evidence, they must also be able to distinguish the results of those studies. Plaintiffs' attorneys are very fond of such animal studies and will attempt to translate them directly to humans. They will argue that scientists do not study guinea pigs to find out whether a chemical is toxic to guinea pigs. Rather, the argument goes, they study guinea pigs because if a chemical has an effect there, they assume it will have a similar effect in humans. The physicians must therefore know why animal studies are used -- i.e., to study the mechanisms of chemicals, but not to determine whether the chemical will have the same effects in humans. The doctors should be prepared to point out that some medications, such as Griseofulvin and Flagyl, are routinely given to humans for relatively minor problems even though they cause cancer in some laboratory animals.

In addition, the physicians must review all pertinent medical, employment, and school records. A large part of their testimony should be to explain to the jury why the facts shown by those records refute the plaintiffs' claims. In presenting this testimony, the most efficient and effective method is for the experts to testify from narrative summaries prepared pursuant to Fed.R.Evid. 1006 or local rules of evidence. One convenient method of preparing these summaries is for an attorney to review the records with the expert and to take detailed notes of the expert's comments. The attorney should draft a summary, and the expert should review and finalize it. The summary should include all pertinent records concerning the

condition at issue, not just those records which counsel considers to be favorable. The consequences of having the omission of a pertinent, unfavorable record pointed out by the plaintiffs' attorney can be seriously damaging.

In addition to using narrative summaries, a summary chart of the records can also be displayed to the jury. Such charts effectively clarify complicated records, heighten jurors' interest and help keep their minds from wandering while the witness is reviewing lengthy records. One effective method is to prepare the chart on a transparency and display it to the jury with an overhead projector. Every entry can then be masked except the one being referred to, thus focusing the jury's attention on it. With respect to complaints, a chart can include separate entries for each medical visit, with specification of the date, physician, pertinent complaints (with emphasis on contradictions of the plaintiffs' claims), physical exam findings, and diagnosis and treatment. The chart should also include entries for those visits where one would expect such a complaint to be made, but where it was not mentioned. It can also show the relationship of complaints to events such as injuries or marital problems.

A similar chart can also effectively emphasize contradictions regarding physical examination findings. For example, the plaintiffs' expert may claim that he found abnormal deep tendon reflexes. Reflexes are often examined by treating doctors, and a chart showing each instance in which the reflexes were examined and found to be normal can highlight

for the jury the flimsy basis for the plaintiffs' claim.

Similar charts can be used to show that laboratory results relied on by the plaintiffs are insignificant. Where the plaintiffs' expert has relied on an isolated abnormality of one liver enzyme, a chart can show all occasions in which this and the other liver enzymes were tested, both by the testifying experts and the local doctors, and the overwhelming number of instances in which such results were normal. The chart may also include any indication that a treating physician regarded the isolated abnormality as medically insignificant.

Even where the particular laboratory abnormality is not an isolated finding, a chart can be used to show that it is not due to the chemical exposure. For example, the plaintiff might have developed elevated cholesterol following his exposure. However, cholesterol levels normally increase with age. Although the pre-exposure cholesterol measurements may have been within the overall reference range, they may still have been relatively high for the person's age. Standard textbooks contain tables of cholesterol values showing percentiles broken down by different age groups. Very likely, the plaintiff's percentile for his age group did not change significantly after his exposure even though the actual value increased. A chart can effectively show this to the jury. Other charts might demonstrate the relationship of lab abnormalities to other factors such as medications or weight gain.

IX. CONCLUSION

As can be seen from this discussion, the medical issues in a toxic tort case can be among the most complex and challenging a trial lawyer will ever face. As with all other aspects of the art of trying lawsuits, there is no substitute for meticulous preparation and a thorough knowledge of the subject matter. The difference is that, in this case, the subject matter might involve any branch of medical science. At times, defense counsel may feel like a physician. It is hoped that, ultimately, he will feel like a successful attorney.

Appendix

Medical Summary

I. GENERAL INFORMATION AND PERSONAL DATA
(Age, employment, family history, etc.)

II. BRIEF SUMMARY OF PRE-EXPOSURE HISTORY

III. EXPOSURE
(From Interrogatory Answers, Expert's Reports and Deposition Testimony)

IV. PLAINTIFF'S COMPLAINTS AND EXPERT MEDICAL FINDINGS

- A. Plaintiff's Answers to Interrogatories
- B. Complaints and Symptoms Told to Expert Medical Witnesses
- C. Complaints and Symptoms From Plaintiff's Deposition
- D. Plaintiff's Expert's Positive Findings

V. DEFENDANT'S EXPERT'S MEDICAL FINDINGS

VI. MEDICAL RECORDS

- A. Doctor/Institution Index
- B. Detailed Chronological Summary of Doctor Visits and Hospitalizations
- C. Height, Weight, and Blood Pressure Charts
- D. Medications

VII. ADDITIONAL RECORDS

- A. School Records
(Including grades, attendance, teacher comments, athletic accomplishments, standardized test results).
- B. Employment Records
- C. Insurance or Military Records

VIII. LABORATORY CHARTS

A. Blood Count/Blood Chemistry Charts
(With applicable reference ranges)

B. Urinalyses

C. Electrodiagnostic: EKG, EMG, PNVC, EEG

D. Audiometric

E. Vision

F. Other tests

FOOTNOTES

[1] Cases which have allowed such causes of action include Hagerty v. L & L Marine Services, Inc., 788 F.2d 315, 319 (5th Cir.), modified on other grounds, 797 F.2d 256 (5th Cir. 1986); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412-413 (5th Cir. 1986), cert. denied, 106 S.Ct. 3339 (1986); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 116-119 (D.C. Cir. 1982); Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303, 321-322 (W.D. Tenn. 1986); Brafford v. Susquehanna Corp., 586 F. Supp. 14, 17-18 (D. Colo. 1984).

[2] E.g., Ayers v. Jackson Township, 106 N.J. 557, 525 A.2d 287 (1987); Barth v. Firestone Tire and Rubber Co., No. C-85-20534-RPR (D.N.C. filed Sept. 1, 1987); Hagerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986); Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984).

[3] No. 80-L-970 in the Circuit Court of St. Clair County, Illinois.

[4] J.G., Gleeson, "Deposing the Plaintiff in a Chemical Exposure Case" in Defending Chemical Exposure Cases (DRI Monograph, 1985).

[5] See, e.g., United States v. International Business Machines Corp., 453 F. Supp. 194, 195 (S.D.N.Y. 1977).

[6] The following states have enacted both Fed.R.Evid. 703 and 705 verbatim: Arizona, Arkansas, Colorado, Minnesota, Montana, North Dakota, Oklahoma, Washington, and Wyoming. See 3 Weinstein's Evidence, ¶ 703[05] and 705[02] (1987). In addition, other states have judicially allowed an expert to rely on matters not in evidence. State v. Villafuerte, 142 Ariz. 323, 690 P.2d 42 (en banc), cert. denied, 469 U.S. 1230 (1985); Wilson v. Clark, 84 Ill.2d 186, 49 Ill. Dec. 308, 417 N.E.2d 1322, 1326 (1981), cert. denied, 454 U.S. 836 (1981); McLellan v. Morrison, 434 A.2d 28 (Me. 1981); Clark v. Clark, 220 Neb. 771, 371 N.W.2d 749 (1985); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); Jefferis v. Marzano, 298 Or. 782, 696 P.2d 1087 (1985)(en banc); State v. Ecklund, 30 Wash. App. 313, 633 P.2d 933 (1981). In some states, an expert may not base an opinion upon anything other than what he has observed or what is independently admitted into evidence. State v. Johnson, 504 S.W.2d 334 (Mo. Ct. App. 1973); Kraner v. Coastal Tank Lines, Inc., 26 Ohio St.2d 59, 269 N.E.2d 43 (1971). In these states there is no point to having the plaintiff examined by a specialist unless the specialist is to testify.

[7] A list of general and specialty medical books and journals, along with a description of many of the books, is set forth in C.S. Lewis, Jr., A Library for Internists V: Recommended by the American College of Physicians, 102 Annals of Internal Medicine 423 (1985).

[8] In In Re: "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223, 1236-39 (E.D.N.Y. 1985), similar evidence was presented by plaintiffs' expert. After analyzing this and other evidence presented by the plaintiffs' expert, the court found the expert's testimony to be inadmissible in its entirety.

[9] Such communications have been allowed in Gailitis v. Bassett, 5 Mich.App. 382, 146 N.W.2d 708 (1966); State ex rel. Stufflebaum v. Applequist, 694 S.W.2d 882 (Mo. Ct. App. 1985); Callahan v. Burton, 487 P.2d 515 (Mont. 1971).

[10] A good basic discussion of the problem-solving method used in clinical medicine, including a diagram of "The Diagnostic Tree" schematically representing this method of diagnosis, is contained in P. Cutler, Problem Solving in Clinical Medicine: From Data to Diagnosis at 51 (1979). The diagram of the tree can effectively be displayed to the jury as a visual aid.

m/A 7

RECENT DEVELOPMENTS IN THE LAW OF CONTRIBUTION AND INDEMNITY - TEXAS, LOUISIANA AND MARITIME LAW

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I. Contribution - How Obtained in the Event of Settlement By One of Several Joint Tortfeasors

A. Maritime

1. How Contribution is Effected - No further claim by non-settling defendant against settling defendant for contribution. Rather, reduce plaintiff's recovery by percentage fault of settling defendant. Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1251 (5th Cir. 1979).

2. Must settling defendant be a party in order to submit its fault to the factfinder? There are two different views:

   a. Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716 (11th Cir. 1982), cert. denied, 460 U.S. 1083 (1983); Drake Towing Co. v. Meisner Marine Const. Co., 765 F.2d 1060 (11th Cir. 1985); Joia v. Jo-Ja Service Corp., 817 F.2d 908, 917 (1st Cir. 1987), cert. denied, 108 S.Ct. 703 (1988). Settling defendant must be a party to submit fault to jury or court.

   b. Bordelon v. Consolidated Georex Geophysics, 628 F. Supp 810 (W.D. La. 1986). Settling defendant need not remain a party to submit fault of settling defendant (encourages settlements).

3. Reduction for Percentage of Fault or Straight Credit for Amount of Settlement?

   a. Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979). Rejects

credit for settlement amount in favor of proportionate fault reduction.

b. Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987). Third-party defendant settled with plaintiff and was not a party to the first trial. In second trial, 30% fault finding on non-settling; 70% on settling defendant. But 11th Circuit holds Leger distinguishable (or overruled) and plaintiff takes reduction for only the amount of settlement.

Compare court's analysis in Self to Leger reasoning:

(1) Should plaintiff who settles for too little be deprived of a full recovery?

(2) Should non-settling defendant be required to pay plaintiff more than that defendant's proportionate share?

c. Hernandez v. M/V Rajaan, 841 F.2d 582 (5th Cir. 1988). Third-party defendant settled with plaintiff and participated in trial but fault of settling third-party defendant not found by trial court in bench trial. Held, plaintiff takes reduction for the amount of the settlement.

Compare to Leger: is this contrary to Leger or merely a rule so that unjust enrichment is prevented?

d. So . . . is there an "option" in the Fifth Circuit for either percentage fault reduction or credit for amount of settlement? Does it depend on whether the fault of the settling party is determined by the factfinder? Is the Fifth Circuit still following Leger?

e. So . . . in the 11th Circuit, will Self rule apply if plaintiff receives "windfall" settlement amount from settling defendant far

in excess of the settling defendant's proportionate fault? Will the non-settling defendant receive benefit of windfall?

B. Texas

1. Pre-tort reform (suits filed on or before September 2, 1987)

a. How Contribution Effected In Event of Settlement

(1) Negligence (by statute)

TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.014 and 33.015 (Vernon Supp. 1988). Percentage fault reduction if settling defendant's fault submitted to jury; otherwise, reduce for amount of settlement.

(2) Products Liability (by common law scheme)

Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). Pure comparative fault - reduce plaintiff's recovery for percentage fault of settling defendant.

b. Must Settling Defendant be a Party in Order to Submit its Fault for Proportionate Reduction?

(1) Negligence

Browning - Ferris, Inc. v. Mack Trucks, Inc., 714 S.W.2d 405 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.). Unclear whether settling defendant must remain a party - so precaution should be taken to keep settling defendant as a party. See Harmon v. Grande Tire Co., 821 F.2d 252, 257 n.6 (5th Cir. 1987) (appears to be no difference to justify different rule in "pure negligence cases" from products cases).

(2) Products Liability

Acord v. General Motors Corp., 669 S.W.2d 111, 117 (Tex. 1984). Settling defendant need not be a

party in order to submit its fault to determine proportionate reduction.

2. Post-tort reform (suits filed after September 2, 1987).

TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001-33.017 (Vernon Supp. 1988). Applies both to negligence and strict products liability. Presumably need not keep settling defendant as party to find settling defendant's fault; non-settling defendants elect reduction for amount of settlement or "sliding scale reduction."

C. Louisiana - Proportionate Fault Reduction

Butler v. InterSouth Pipeline, 655 F. Supp. 587 (M.D. La. 1986). When plaintiff settled with one group of alleged joint tort-feasors, non-settling defendants lost their right of contribution against settling defendants; however, non-settling defendants could show at trial fault of released defendants and accordingly claim reduction in judgment by that percentage of fault.

II. Non-Settling Defendant has no Further Contribution Right from Settling Defendant

A. Texas

Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19 (Tex. 1987). One tort-feasor cannot settle plaintiff's entire claim and seek contribution from non-settling defendants. See Texas Distributors, Inc. v. Texas College, 747 S.W.2d 371 (Tex. 1987) (same).

International Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932 (Tex. 1988). Settling joint tort-feasor could not reserve right to reimbursement or contribution from non-settling joint tort-feasor by taking assignment of common plaintiff's cause of action; joint tort-feasor could only settle its proportionate share of common plaintiff's cause of action.

Adams v. Drilling Measurements, Inc., 678 F. Supp. 148 (W.D. La. 1988). Under Texas law, contribution rights against non-settling tort-feasor vanish when one joint tort-feasor settles plaintiff's entire claim, even if settling joint tort-feasor reserves his right to claim over against other non-settling joint tort-feasors or obtains an assignment of those rights against non-settling joint tort-feasor from settling plaintiff.

B. Maritime

Jovovich v. Desco Marine, Inc., 809 F.2d 1529 (11th Cir. 1987). Settling tort-feasor cannot settle plaintiff's entire claim and seek contribution from non-settling defendants.

C. Louisiana

Diggs v. Hood, 772 F.2d 190 (5th Cir. 1985) (applying Louisiana law) (same as Texas and maritime).

III. What is Left of Common Law Tort Indemnity?

A. Texas

Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc., 31 Tex. Sup. Ct. J. 312 (April 6, 1988) ("The only remaining vestiges of common law indemnity involve purely vicarious liability or the innocent product retailer situation."). See Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 819-20 (Tex. 1984); Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987)

B. Maritime - same as Texas

Loose v. Offshore Navigation, Inc., 670 F.2d 493 (5th Cir. 1982); United States Lines, Inc. v. Newport News Shipbuilding & Dry Dock Co., 688 F.2d 236 (4th Cir. 1982); Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229 (5th Cir. 1985) (user of defective product entitled to tort indemnity from manufacturer where user is sued by injured plaintiff).

c. Louisiana - same as Texas

Under Louisiana law, non-negligent professional seller is entitled to common law tort indemnity from manufacturer of defective product. Molett v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987).

IV. Contractual Indemnity

A. Overall Considerations

1. Public policy and/or statutes may invalidate the indemnity

a. Anti-indemnity statutes for oil field operations (Texas & Louisiana)

TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001-127.008 (Vernon 1986); Louisiana Revised Statutes 9:2780.

b. L&H Act - 33 U.S.C. § 905(b)

Section 905(b) of the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) - invalidates certain indemnities given by "vessel" to one who is employer under the L&H Act.

c. Indemnity for Punitives May Violate Public Policy

Daughdrill v. Ocean Drilling & Exploration Co. (ODECO), 665 F. Supp. 477 (E.D. La. 1987). Owner of oil rig could not, as matter of public policy, require charter vessel that transported its crew to indemnify owner against punitive damages awarded to crewman as a result of rig owner's own willful and gross misconduct. But see Creech v. Aetna Casualty & Surety Co., 516 So.2d 1168 (La. App. 1987), writ denied, 519 So.2d 128 (La. 1988).

d. Express Negligence Rule

Validity of indemnity for indemnitee's own negligence, i.e., the "express negligence" rule and variations thereof, may invalidate indemnity for indemnitee's own negligence.

2. Recovery on contractual indemnity after settlement. Getty Oil Corp. v. Duncan, 721 S.W.2d 475 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.). In order for settling indemnitee to recover amount of settlement from indemnitor, indemnitee must show

potential liability and that his settlement was reasonable, prudent, and in good faith under the circumstances.

B. Texas

1. Texas Anti-Indemnity Statute, formerly Article 2212b, TEX. REV. CIV. STAT., now TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001 - 127.008 (Vernon 1986).

Transworld Drilling Co. v. Levingston Shipbuilding Co., 693 S.W.2d 19 (Tex. App. -- Beaumont 1985, no writ) (addressing types of contracts within scope of Texas anti-indemnity act).

2. "Express Negligence" Rule - Indemnity for Indemnitee's Own Negligence Only If Expressly Provided.

a. Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987) - adopts express negligence rule. See Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App. -- Fort Worth 1988, no writ).

b. Indemnity not valid even to the extent indemnitee not negligent - Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987), "contractual comparative indemnity" not provided for in indemnity agreement.

c. Mirror Image Rule Invalid - Singleton v. Crown Central Petroleum Corp., 729 S.W.2d 690 (Tex. 1987). Indemnity language: "except for indemnitee's sole negligence" did not satisfy express negligence rule. See Court of Appeals decision, 713 S.W.2d 115. See Sun Oil Co. v. Massey, 594 S.W.2d 125 (Tex. Civ. App. -- Houston [1st Dist.] 1979, writ ref'd n.r.e.).

d. The Prior "Exceptions" are No Longer Valid - Eastman Kodak Co. v. Exxon

Corp., 603 S.W.2d 208, 211 (Tex. 1980); Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 822 (Tex. 1972), overruled, 725 S.W.2d 705 (Tex. 1987). Three exceptions to prior "clear and unequivocal" test:

(1) liability for defects in certain premises or maintenance/operation of certain instrumentality;

(2) indemnitor has complete supervision over property and employees of indemnitee in performance of contract;

(3) all injuries sustained by indemnitor's employees.

Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc., 739 S.W.2d 239 (Tex. 1987) (indemnity provision which did not specifically state within four corners of instrument that parties intended to protect and indemnify plant's owner from his own negligence was unenforceable as a matter of law) (contract stated that "Contractor [Gulf Coast] agrees to indemnify and save owner [Owens-Illinois] harmless from any and all losses sustained by owner by reason of damage to owner's property or operations, and from any liability or expense on account of property damage or personal injury (including death resulted therefrom) sustained or alleged to have been sustained by any person or persons, including but not limited to employees of owner, contractor and subcontractors, arising out of or in any way connected with or attributable to the performance or non-performance of work hereunder by contractor, its subcontractor(s) and their respective employees and agents, whereby any act or omission of contractor, its subcontractor(s) and their respective employees and agents while on owner's premises, or by defects in material or equipment furnished hereunder").

C. Maritime

1. Express Negligence Rule

Also applies variation of "express negligence" rule. Daughdrill v. Ocean Drilling & Exploration Co. (DECO), 665 F. Supp. 477 (E.D. La. 1987). To be valid, indemnification provision in maritime contract must be express and specific.

See Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986) - "without regard to the . . . negligence of any party" - satisfied the express negligence rule.

But see Chevron Oil Co. v. E.D. Walton Constr. Co. 517 F.2d 1119 (5th Cir. 1979) "irrespective of negligence" was insufficient to pass muster under express negligence rule.

2. L&H Act -- 33 U.S.C. § 905(b)

a. Invalidates contractual indemnities owed by the employer under the Longshore and Harbor Workers' Compensation Act, (L&H Act) to a "vessel." See Ketchum v. Gulf Oil Corp., 798 F.2d 159 (5th Cir. 1986); Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d 1174 (5th Cir. 1984), cert. denied, 470 U.S. 1053 (1985) (name and waive insurance obligation of vessel not barred by § 905(b)).

b. Definition of "vessel" includes time charter=oil field operator who hired drilling rig. Fuhrmann v. D.S. Transworld 61, Slip Op. No. 84-2292 (E.D. La. Jan. 15, 1986).

c. But see new 33 U.S.C. § 905(c) (removes § 905(b) invalidity under certain circumstances) = (1) on OCS (2) knock for knock indemnity and (3) injury after Sept. 1984).

3. Anti-indemnity statutes (Texas & Louisiana)

Anti-indemnity statutes do not apply to maritime contracts. Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986).

a. What contracts are maritime?

Laredo Offshore Constructors, Inc., 754 F.2d 1223 (5th Cir. 1985) (installation of fixed platform on Outer Continental Shelf not maritime); Homes Ins. Co. v. Garber Industries, Inc., 588 F. Supp. 1218 (W.D. La. 1984) (mixed contract) (maritime law applies to indemnity contract when the injured party was himself employed to provide maritime services; maritime law not applicable merely because injured party is injured by [rather than in] the performance of a maritime obligation); Hale v. Comar Offshore Corp., 588 F. Supp. 1212 (W.D. La. 1984) (mixed contracts).

b. Contractual selection of maritime law -- when will it be upheld?

(1) Matte v. Zapata Offshore Co., 784 F.2d 628 (5th Cir. 1986), cert. denied, 107 S.Ct. 247 (1986) (parties' choice of maritime law will not circumvent state anti-indemnity statute where state law otherwise applies as surrogate federal law on Outer Continental Shelf).

(2) Fuhrmann v. D/S Transworld 61, Slip Op. No. 84-2292, (E.D. La. Jan. 15, 1986) (contractual selection of Louisiana law where maritime law would otherwise govern results in application of Louisiana anti-indemnity statute).

4. Attorneys Fees

For costs of defense recoverable under indemnity "protect, defend" language. But attorneys fees for asserting the indemnity claim are not recoverable unless the indemnity provision expressly provides for such recovery. Lirette v. Popich Bros. Water Transport, Inc., 699 F.2d 725 (5th Cir. 1983).

D. Louisiana

1. Express Negligence Rule

Louisiana also applies variation of the "express negligence" rule. Soverign Ins. Co. v. Texas Pipe Line Co., 488 So. 2d 982 (La. 1986).

2. Louisiana Anti-Indemnity Act - LSA R.S. 9:2780

a. Types of Contracts Within Anti-Indemnity Act - Ferguson v. Stingray Pipeline Co., 672 F. Supp. 944 (W.D. La. 1987) - Louisiana Oil Field Indemnity Act applied in action by worker seeking to recover for injuries allegedly sustained while he was working on natural gas pipeline company's offshore compression platform and, therefore, pipeline company was not entitled to indemnity from worker's employer pursuant to an indemnity provision in construction contract between pipeline company and employer.

b. Meloy v. Conoco, Inc., ~~493~~ So. 2d ~~1211~~ (La. 1987) (if indemnity fails per anti-indemnity statute then indemnity is assumed invalid, and thus, there is not duty to defend. However, if upon trial there is a finding that the indemnitee is not at fault, then indemnitee can recover costs of defense).

c. Patterson v. Conoco, Inc., 670 F. Supp. 182 (W.D. La. 1987) - under Louisiana Oil Field Indemnity Act,

(1) provisions in oil field contracts are void and unenforceable to extent that they provide for indemnification for losses caused by negligence or fault of indemnitee;

(2) anti-Indemnity Act also precludes insurance arrangements that accomplish

same thing. However, Louisiana's Oil Field Indemnity Act did not render invalid agreement between employer and DuPont for employer to provide liability insurance coverage at expense of DuPont for activities within agreement, which included injuries sustained by employee working on fixed platform beyond three-mile limit of Louisiana shoreline; DuPont paid insurance premiums as indicated in agreement and thus, DuPont's claim against insurer could be maintained. LSA-R.S.9:2780.

Contrast Texas Anti-Indemnity Act, which permits insurance arrangements for otherwise invalid indemnity up to certain amount of money ($300,000). TEX. CIV. PRAC. & REM. CODE ANN. § 127.005 (Vernon 1986).

2. Strict Liability - must indemnity contract expressly refer to strict liability in order for the indemnitee to be indemnified for strict liability? Under Louisiana law, the answer is No! Hyde v. Chevron U.S.A., Inc., 697 F.2d 614 (5th Cir. 1983); Knapp v. Chevron USA, Inc., 781 F.2d 1123 (5th Cir. 1986); Soverign Ins. Co. v. Texas Pipe Line Co., 488 So. 2d 982 (La. 1986)

V. OTHER RECENT CASES OF INTEREST

TEXAS CASES

INDEMNITY

A. Nature of Obligation

1. Amoco Chemicals Corp. v. Malone Service Co., 712 S.W.2d 611 (Tex. App. - Houston [1st Dist. 1986], no writ) (rights of indemnity and contribution are derivative of plaintiff's primary cause of action and neither contribution nor indemnity is recoverable from a third party against whom plaintiff has no cause of action)

B. Construction and Operation of Indemnity Contracts

1. Liberty Steel Co. v. Guardian Title Co. of Houston, Inc., 713 S.W.2d 358 (Tex. App. - Dallas 1986, no writ) (a contract for indemnity is read as any other contract to ascertain intent of the parties).

2. Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933 (Tex. App. - Dallas, 1987, no writ) (contractual provision requiring general contractor to hold harmless and indemnify architect for any and all damages did not require general contractor to indemnify architect for damages arising from architect's breach of its contractual obligation to owner to observe progress of general contractor's work and to endeavor to guard owner against defects in work).

C. Notice to Indemnitor

1. Liberty Steel Co. v. Guardian Title Co. of Houston, Inc., 713 S.W.2d 358 (Tex. App. - Dallas 1986, no writ) (indemnitee breached indemnity agreement by failing to obtain indemnitor's consent to a certain settlement with a third party; indemnitor was not required to initially assume defense of claims against the indemnitee, although it had a right to do so).

D. Implied Contracts

1. Kamani v. Port of Houston Authority, 725 S.W.2d 336 (Tex. App. - Houston [14th Dist.] 1987, no writ) (where conditions on board vessel which allegedly cause longshoreman's injury were not fault of port authority or Stevedore unloading cargo, shipowner had no right of indemnity and/or contribution against the port authority and thus had no claim to assign to longshoreman).

E. Actions on Contracts

1. Garza v. Arizona Refining Co., 634 F. Supp. 959 (S.D. Tex. 1986) (alleged tort-feasor who was not obligated to pay plaintiff in state court case which had not proceeded to judgment was not entitled to indemnity from joint tort-feasors and, therefore, was not entitled under Texas law to litigation costs or mental anguish damages incurred in defending state court suit).

2. Garza v. Arizona Refining Co., 634 F. Supp. 959 (S.D. Tex. 1986) (alleged tort-feasor's complaint against joint tort-feasors for litigation expenses and mental anguish damages incurred in defense of unfinished state court action was essentially action for contribution or indemnity).

3. Koonce v. Quaker Safety Products and Manufacturing Co., 798 F.2d 700 (5th Cir. 1986) (under Texas law, defendant seeking indemnity or contribution from third-party alleged tort-feasor is not barred from relief simply because plaintiff's cause of action against third-party is barred by general statute of limitations; disapproving Powell v. Charles Offutt Co., 576 F. Supp. 272 (E.D. Tex.1983), aff'd 731 F.2d 886 (5th Cir. 1984)).

4. Conroe Truck and Tractor, Inc. v. Childs Truck Equipment, Inc., 723 S.W.2d 207 (Tex. App. - Beaumont 1986, writ ref'd n.r.e.) (third-party indemnification and contribution action which was brought by personal injury defendant was not barred by original plaintiff's statute of limitations; recognizing prior overruling of Powell v. Charles Offut Co.).

5. Parker v. Associated Indem. Co., 715 S.W.2d 398 (Tex. App. - San Antonio 1986, writ ref'd n.r.e.) (determination of indemnity, contribution or subrogation is question of law for the trial court).

6. Warren Petroleum Co. v. International Service Ins. Co., 727 S.W.2d 801 (Tex. App. - Tyler 1987, writ ref'd n.r.e.) (defense of laches could be urged by insurer with respect to contractor's third-party indemnification claim and extraordinary circumstances, even though statute of limitations may not have commenced running until trial court entered judgment against contractor, but since record did not conclusively establish defense of laches urged by insurer, and parties in main action had entered into a compromise by which owners agreed to accept as assignment of any judgment contractor recovered on third-party claim against insurer for indemnification, trial court errored in dismissing contractor's third-party claim).

7. Johnson v. Abbey, 737 S.W.2d 68 (Tex. App. - Houston [14th Dist.] 1987, no writ) (common law indemnity between negligent tort-feasors is not a viable cause of action).

CONTRIBUTION

A. Common Interest or Liability

1. Amoco Chemicals Corp. v. Malone Service Co, 712 S.W.2d 611 (Tex. App. - Houston [1st Dist.] 1986, no writ) (rights of indemnity and contribution are derivative of plaintiff's primary cause of action and neither contribution nor indemnity is recoverable from a third party against whom plaintiff has no cause of action; claim for contribution of one defendant against another defendant was not barred by the fact that plaintiff's claim against party from whom contribution was sought was time barred, declining to follow Powell v. Charles Offutt Co., 576 F. Supp. 272 (E.D. Tex.)).

2. Garza v. Arizona Refining Co., 634 F. Supp. 959 (S.D. Tex. 1986) (contribution complaint for litigation costs and mental anguish of alleged tort-feasor which failed to claim that joint tort-feasors were liable to plaintiff, that alleged tort-feasor was judgment debtor, and that alleged tort-feasor paid disproportionate share of damages, failed to state cause of action for contribution under Texas law to be relieved from paying entire, future judgment in state court).

B. Payment or Discharge of Common Liability

1. Conoco, Inc. v. Affolter Contracting Co., 732 S.W.2d (Tex. App. - Corpus Christi 1987, no writ) (by entering into settlement with plaintiffs, obtaining a release only of its liability to plaintiffs, settling joint tort-feasor which did not have settlement approved by trial court or incorporated into judgment had no right to contribution against other joint tort-feasors under former contribution statute).

C. Actions

1. Amoco Chemicals Corp. v. Malone Servico, 712 S.W.2d 611 (Tex. App. - Houston [1st Dist.] 1986)

(to obtain contribution, claimant must assert that a final judgment has been entered, that he has paid the injured party, and that he has secured a release that satisfies the liability of the alleged tort-feasors against him contribution is sought).

2. Garza v. Arizona Refining Co., 634 F. Supp. 959 (S.D. Tex. 1986) (alleged tort-feasor who was not obligated to pay plaintiff in state court case which had not proceeded to judgment was not entitled to indemnity from joint tort-feasors and, therefore, was not entitled under Texas Law to litigation costs or mental anguish damages incurred in defending state court suit).

3. Parker v. Associate Indem. Co., 715 S.W.2d 398 (Tex. App. - San Antonio 1986, writ ref'd n.r.e. (determination of indemnity, contribution or subrogation is question of law for the trial court).

4. Conroe Truck and Tractor, Inc. v. Childs Truck Equipment, Inc., 723 S.W.2d 207 (Tex. App. - Beaumont 1986, writ ref'd n.r.e.) (third-party indemnification and contribution action which was brought by personal injury defendant was not barred by original plaintiff's statute of limitations; recognizing prior overruling of Powell v. Charles Offut Co.).

5. Conoco, Inc. v. Affolter Contracting Co., 732 S.W.2d 783 (Tex. App. - Corpus Christi 1987, no writ) (settling joint tort-feasor may not proceed against third-party, non-settling joint tort-feasor in separate action under former contribution statute because such non-settling defendant was party to primary suit even though plaintiffs did not assert a cause of action against non-settling joint tort-feasor).

FEDERAL CASES

CONTRIBUTION

A. Common Interest or Liability

1. Parks v. United States, 784 F.2d 20 (1st Cir. 1986) (maritime case) (contribution between joint tort-feasors in maritime action for personal injuries is only allowed where neither tort-feasor's liability is limited by statute).

2. C.H.B. Foods, Inc. v. Rebelo, 662 F. Supp. 1359 (S.D. Cal. 1987) (if a seaman assaults a co-employee and the co-employee sues the employer for damages, the employer may sue the assaulting employee for contribution or indemnity; vessel owner and employer could not sue seaman for indemnity and contribution for damages paid to co-seaman injured in course of his duties, not caused by assault, since seaman had no direct liability to fellow seaman and therefore could not be liable for indemnity).

INDEMNITY

A. Nature of Obligation

1. Doucet v. Gulf Oil Corp., 788 F.2d 250 (5th Cir. 1986), cert. denied, 107 S. Ct. 272 (1986) (federal common law does not control validity and interpretation of indemnity clauses and contracts for work on outer continental shelf).

2. Butler v. Inter South Pipeline, 655 F. Supp. 587 (M.D. La. 1986) (unlike contribution, right to indemnification is not based on right of subrogation to creditor's claim; rather, claim to indemnification is based on legal concepts of restitution and unjust enrichment).

3. Daughdrill v. Ocean Drilling & Exploration Co. (ODECO), 665 F. Supp. 477 (E.D. La. 1987)

a. Indemnification provision in parties' maritime service contract was not severable from rest

of contract, so that entire agreement was governed by maritime law.

4. Federal Savings & Loan Ins. Corp. v. Quinlan, 678 F. Supp. 174 (E.D. Mich. 1988) (doctrine of "contribution" is based on equitable principal that party who is compelled to pay more than his or her fair share of obligation for which several parties are equally liable, is entitled to contribution from other parties).

B. Requisites and Validity of Contracts

1. Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265 (5th Cir. 1986) (maritime) (builder of vessel under construction at a shipyard was not a "vessel" for purposes of the longshore and harbor worker's compensation act §33 U.S.C.A. 905(b), which invalidates indemnification agreement between the employer of an injured worker and the prohac vice owner of a vessel; thus, shipyard owner's indemnity agreement with injured ship fitter's employer was valid).

2. Copous v. Odeco Oil & Gas Co., 835 F.2d 115 (5th Cir. 1988) (Louisiana) (master service agreement for renovation of living quarters on oil production platform was agreement to production of oil and gas and was "agreement" within scope of Louisiana Oil Field Indemnity Act; thus, claim for indemnity predicated on that agreement was precluded, LSA-R.S.9:2780,C)

3. Cormier v. Gulf Oil Corp., 665 F. Supp. 1226 (E.D. La. 1987) (Louisiana Oil Field Indemnity Act applied retroactively to a blanket contract which was executed and made binding prior to effective date of Act and which did not govern a specific, terminable performance; a blanket contract requiring that oil field labor contractor defend and indemnify a corporation for a corporation's negligence and/or strict liability was null and void as against public policy under Louisiana Oil Field Indemnity Act. LSA-R.S. 9:2780)

4. Stubblefield v. Vickers Towing Co., 674 F. Supp. 566 (N.D. Miss. 1987) (Jones Act's incorporation by reference of Federal Employer's Liability Act, that contains section forbidding any contract, rule, regulation or device, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the chapter, avoided indemnity clause by which contractor towing company that owned and operated vessel that was under charter to corps of engineers assumed responsibility for all injuries to its employees and for all injuries to plant and equipment not caused by acts of the Government to extent of liability under the Jones Act, even though action was brought by injured seaman employed by towing company against United States under the Suits and Admiralty Act).

C. Construction and Operation of Contracts

1. McCall v. Columbia Gas Development Corp., 635 F. Supp. 49 (W.D. La. 1986) (maritime case) (Louisiana's more significant interest required application of Louisiana, rather than Texas law to Texas fixed drilling platform owner's indemnity claim against Louisiana platform operator and Louisiana platform painter to cover alleged liability to platform painter's employee injured on Outer Continental Shelf adjacent to Louisiana, even if contracts with platform owner were negotiated and perfected in Texas).

2. Duplechin v. Missouri Pacific R.F., 670 F. Supp. 185 (W.D. La. 1987) (rule that indemnity contract is to be strictly construed against indemnification applied only to indemnification for ones own negligence, while general rules of construction applied to indemnification where loss was not occasioned by one's own negligence; general rules of construction should be followed with respect to indemnity contracts in all cases where liabilities are imposed for any reason other than negligence).

D. Implied Contracts

1. Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986) (Louisiana) (worker's compensation carrier for plaintiff's employer could not recover from chemical company compensation benefits paid to plaintiffs for exposure to phosgene, where a jury found that a chemical company had no legal liability to pay any damages).

2. Ingersoll Mill Mach. Co. v. M/V Bodina, 829 F.2d 293 (2d Cir. 1987), cert. denied, 108 S. Ct. 774 (1988) (New York; maritime case)

a. Indemnity rests upon principal that true wrong-doer should bear ultimate burden of payment; there can be no indemnity as between parties that each beach primary responsibility for wrong regardless of their relative degrees of fault.

b. Carrier and freight forwarder who each breached separate contracts with shipper when cargo was shipped on deck rather than below deck could not recover indemnity against each other after cargo was damaged.

3. C.H.B. Foods, Inc. v. Rebelo, 662 F. Supp. 1359 (S.D. Cal. 1987) (if a seaman assaults a co-employee and the co-employee sues the employer for damages, the employer may sue the assaulting employee for contribution or indemnity; vessel owner and employer could not sue seaman for indemnity and contribution for damages paid to co-seaman injured in course of his duties, not caused by assault, since seaman had no direct liability to fellow seaman and therefore could not be liable for indemnity).

4. Allstate Home Craft, Inc. v. Kaiser Aluminum and Chemical Sales, Inc., 672 F. Supp. 965 (S.D. Tex. 1987) (roofing installer, which had never brought any of manufacturer's aluminum shingles, and buyer of manufacturer's shingle-making machinery were not entitled to enjoy manufacturer from making cash settlement of warranty claims, nor did they have any relationship which would warrant ordering manufacturer to bear the cost of replacement materials supplied by buyer and cost

of replacement process undertaken by the installer, nor would failure to do so result in tortious interference with contract, disparagement, lost profits, lost opportunities or unjust enrichment on theory that users of manufacturer's products might seek to hold installer liable for damages attributable to paint peeling from shingles).

E. Relative Culpability

1. Butler v. Intersouth Pipeline, 655 F. Supp. 587 (M.D. La. 1986) (one who is himself guilty of fault is never entitled to indemnity).

2. Campbell Industries, Inc. v. Offshore Logistics Intern., Inc., 816 F.2d 1401 (9th Cir. 1987) (California) (doctrine of workmanlike performance between contractor and ship owner permitted indemnification of ship owner by contractor for breach of implied warranty of workmanlike performance in case where seaman, rather than longshoreman, was injured; contractor whose violations of OSHA regulations in operating crane over ship deck constituted negligence per se was required to indemnify ship owner for maintenance and cure ship owner paid to injured crewmen).

3. Fontenot v. Mesa Petroleum Co., 791 F.2d 1207 (5th Cir. 1986) (Louisiana) (rig owner was not entitled to indemnification from helicopter contractor based on implied warranty of workmanlike performance following owner's settlement with employee of third party who was injured in fall while disembarking from helicopter during refueling stop at owner's rig, where helicopter contractor was providing services for rig charterer rather than rig owner).

4. Transorient Navigators Co., S.A. v. M/S Southwind, 788 F.2d 288 (5th Cir. 1986) (Louisiana) (in admiralty cases, an innocent plaintiff may recover his full damages from any one of two joint tort-feasors, leaving that tort-feasor to seek contribution or indemnity from his co-tortfeasors).

5. Parks v. United States, 784 F.2d 20 (1st Cir. 1986) (Massachusetts) (negligence on part of ship owner, which prevented Stevedore from doing workmanlike job, may preclude indemnity).

6. Saks Intern., Inc. v. M/V Export Champion, 817 F.2d 1011 (2d Cir. 1987) (New York) (Stevedore is obliged to indemnify ship owner for any loss incurred because of Stevedore's breach of its warranty of workmanlike service, and obligation extends to litigation expenses incurred by ship owner in defending any suit brought against him as a result of breach; Stevedore's obligation to indemnify ship owner for his litigation expenses does not extend to expenses incurred in establishing Stevedore's indemnity obligations).

F. Accrual of Liability

1. Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229 (Louisiana) (under maritime law, actions for indemnity and contribution do not finally accrue until principal defendant is cast in judgment on principal demand).

G. Conclusiveness of Former Adjudication in Action Against Indemnitor or Indemnitee

1. Soto v. United States Lines, Inc., 608 F. Supp. 904 (D.C. New York 1985) (judgment entered in action against indemnitor precludes later action against indemnitee, to same extent as it precludes second action against the indemnitor).

H. Actions on Contracts

1. Molett v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987) (Louisiana) (district court was required to determine whether settlement reached by seller of defective chain with plaintiffs in products liability action was reasonable before seller could receive indemnity from chain's manufacturer).

2. Daughdrill v. Ocean Drilling & Exploration Co. (ODECO, 665 F. Supp. 477 (E.D. La. 1987) (party may not recover from insurer the indemnification which it cannot obtain from insured party

I. Conditions Precedent

1. Fontenot v. Mesa Petroleum Co., 791 F.2d 1207 (5th Cir. 1986) (Louisiana) (where indemnity agreement does not require notice, courts will not infer notice requirement as condition precedent to right to recover on indemnity contract).

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