

September 16, 2013

Via E-filing

Blake A. Hawthorne  
Clerk of the Court  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

Re: No. 10-0775; *Susan Elaine Bostic, et al. v. Georgia-Pacific Corporation*, in the Supreme Court of Texas

Dear Mr. Hawthorne:

Respondent Georgia-Pacific Corporation files this post-submission letter brief to address several arguments raised by Petitioners during rebuttal. Please circulate a copy of this letter brief to the Court.

**Consumer Product Safety Commission's Proposed  
Rulemaking Report on Respirable Free-Form Asbestos**

During rebuttal, Petitioners directed the Court to a proposed rulemaking report issued by the Consumer Product Safety Commission ("CPSC") as alleged scientific evidence setting a "threshold dose" for developing mesothelioma from chrysotile-containing joint compound. *See* PX 26. Specifically, Petitioners asserted that this "unobjected to" report was a "full-blown study" on the issue. This assertion is incorrect for two reasons. First, Respondents did object to the admission of the CPSC report during trial. 6 RR 4-7. Second, the report does not purport to set a "threshold" for developing any disease from exposure to joint compound. Rather, the CPSC's Health Sciences Staff calculated an assessment of the risk of consumer exposure to respirable free-form asbestos based on the application of a theoretical model used in regulatory-decision making. *See* PX 26 at 38787. Such a calculation does not satisfy the requirements of *Havner*. *See Merrill Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 717-18, 720 (Tex. 1997). Moreover, the epidemiological study cited by the CPSC for purposes of its

assessment was a single study of insulation workers (*see* PX 26 at 38787, 38789 n.41)—not workers exposed to chrysotile-containing joint compound. Indeed, Petitioners’ counsel acknowledged during trial that “[t]he studies that were considered by the CPSC were mixed dust exposures for the most part, that included chrysotile and amosite.” 6 RR 6-7. There is no allegation here that Georgia-Pacific joint compound ever contained amosite.

In any event, numerous Texas federal and state courts have agreed that the standard of scientific proof used by regulatory entities, like the CPSC, is below the legal standard required to establish causation in court actions and that evidence of regulatory determinations should therefore be excluded as irrelevant.<sup>1</sup> *See Johnson v. Arkema, Inc.*, 685 F.3d 452, 464 (5th Cir. 2012) (holding that OSHA, NIOSH, and NRC guidelines are insufficient to support plaintiff’s expert’s causation theory); *Allen v. Penn. Eng’g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996) (regulatory agencies’ threshold of proof is “lower than that appropriate in tort law” as a result of “the preventive perspective that the agencies adopt”); *Abraham v. Union Pac. R.R.*, 233 S.W.3d 13, 22 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“A governmental agency finding that exposure to a substance increases the risk of disease cannot generally be considered as reliable evidence of causation in a tort case”); *Exxon Corp. v. Makofski*, 116 S.W.3d 176, 188 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (same); *see also* Brief of Amicus Curiae Product Liab. Advisory Council, Inc. in Support of Respondent Georgia-Pacific Corp. at 15 n.5.

### **Studies Allegedly Proving that Chrysotile Causes Mesothelioma**

During rebuttal, counsel for Petitioners also maintained that *Havner*-compliant studies exist that prove that “chrysotile asbestos causes mesothelioma.” In their reply brief on the merits, Petitioners list four “studies” that purportedly prove that “chrysotile asbestos causes mesothelioma.” *See* Pet’rs Reply Br. Merits at 13 n.18.<sup>2</sup> Such studies, however, are relevant only to the question of general

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<sup>1</sup> The CPSC is an independent federal regulatory agency that was created by Congress in 1972. *See* [www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You/](http://www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You/)

<sup>2</sup> *See* Lemen, R. “Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model,” *INT’L J. OCCUP. ENVIRON. HEALTH*, 10:233-39 (2004); Piolatto, G., et al., “An update of cancer mortality among chrysotile asbestos workers in Balangero, northern Italy,” *BR. J. IND. MED.*, 47: 810-14 (1980); Cullen, M., et al., “Chrysotile Asbestos and Health

causation—*i.e.*, whether chrysotile asbestos *can* cause mesothelioma. Georgia-Pacific did not challenge general causation for purposes of this appeal. *See* Resp. Br. Merits at 31 n.28. Rather, Georgia-Pacific challenged specific causation—*i.e.*, whether Timothy Bostic’s exposure to chrysotile-containing joint compound more than doubled his risk of developing mesothelioma. Petitioners offered no epidemiological studies showing that exposure to chrysotile-containing joint compound doubles the risk of developing mesothelioma at any level allegedly experienced by Timothy Bostic.

Instead, Petitioners offered four studies that fail to satisfy *Havner*. Of those four studies, two (Lemen and Camus) were not admitted into evidence. Therefore, those studies constitute no evidence.<sup>3</sup> Moreover, the Lemen study is *Havner* deficient because it is not an epidemiological study. The other three studies (Piolatto, Cullen, and Camus) are deficient because they examine millers, miners, and women who lived near asbestos mines who were exposed to high levels of chrysotile asbestos, not test subjects who were exposed to levels of chrysotile-containing joint compound similar to those of Timothy Bostic. *See Havner*, 953 S.W.2d at 715, 720 (when a plaintiff relies on epidemiological studies to prove causation, he must present “proof that [he] was exposed to the same substance [and] that the exposure or dose levels were comparable to or greater than those in the studies”); *see also* Resp. Br. Merits at 30-34 (examining other studies discussed by Petitioners’ experts at trial and explaining why those studies constitute no evidence of causation).

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in Zimbabwe: I. Analysis of Miners and Millers Compensated for Asbestos-Related Disease Since Independence,” *AM. J. IND. MED.*, 19:161-69 (1991); Camus, et al., “Nonoccupational exposure to mesothelioma and the risk of cancer,” *N. ENGL. J. MED.*, 338:1565071 (1998).

<sup>3</sup> Under Texas law, an expert must identify the specific studies on which he relies, have those studies admitted into evidence, and explain how the methodology of the studies is scientifically reliable. *Minn. Min. and Mfg. Co. v. Atterbury*, 978 S.W.2d 183, 198 (Tex. App.—Texarkana 1998, pet. denied) (citing *Havner*, 953 S.W.2d at 725); *see Frias v. Atl. Richfield Co.*, 104 S.W.3d 925, 929-30 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (determining reliability of studies supporting experts’ general causation opinion and noting that certain studies were not in the record and thus could not be reviewed for compliance with the *Havner* standards).

### **The *Boomer* Case**

Contrary to Petitioners' assertion at oral argument, the Virginia Supreme Court in *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013), did not "state[] that *Borg-Warner* cannot apply to a mesothelioma case." Although the *Boomer* court uses different terminology, its test for the but-for component of proximate cause is entirely consistent with the cause-in-fact requirement of *Borg-Warner*. For example, in *Boomer*, the Virginia Supreme Court held that, to satisfy the cause-in-fact portion of the proximate cause requirement, a mesothelioma plaintiff must prove that "exposure to the defendant's product *alone* must have been *sufficient to have caused the harm*." *Id.* at 731 (emphasis added). Similarly, in *Borg-Warner*, this Court required proof that the "asbestos fibers from [defendant's product] were released in an amount sufficient to cause [plaintiff's] asbestosis." *Borg-Warner v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007). Moreover, like Texas, the Virginia Supreme Court recognized that there may be more than one proximate cause of the plaintiff's injury in a case involving multiple defendants and rejected the notion that "but-for" causation means sole cause. *See Boomer*, 736 S.E.2d at 732 (the "sufficient-to-have-caused" standard requires that the "exposure must have been 'a' sufficient cause: if more than one party caused a sufficient exposure, each is responsible."); *see also* Honeywell Int'l Inc. Amicus Brief in Support of Respondent at 17-22 (surveying causation law in Texas and elsewhere and examining the similarities between *Borg-Warner* and *Boomer*); Brief of Amicus Curiae Product Liab. Advisory Council, Inc. in Support of Respondent Georgia-Pacific Corp. at 25 (discussing parallels in *Boomer* and *Borg-Warner* standards).

### **Characteristics of Different Types of Asbestos Fibers**

Finally, during argument, Respondent discussed the differing characteristics and potency levels of chrysotile and amphibole asbestos fibers. Justice Boyd asked whether this evidence was in the record. For the Court's convenience, the record citations are provided here. *See* 13 RR 105-09; *see also* 4 RR 87-89, 143-44; 5 RR 110; 7 RR 135; 11 RR 39, 86-87; 13 RR 43-45.

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Sincerely,

/s/ Deborah G. Hankinson  
Deborah G. Hankinson

DGH/kht  
cc: Denyse Clancy (via e-filing)