

## Birth Defects — Prenatal Liability Or Workers Comp?

*Law360, New York (March 06, 2012)* -- U.S. courts have seen an influx of birth defects cases filed against manufacturers, transnational corporations and U.S. employers.[1]

As one example, more than 25 multiparty cases have been filed in the past three years against semiconductor manufacturers, alleging that employees working in “clean rooms” were exposed to chemicals, such as ethylene glycol ethers, which caused birth defects in their children. These cases seek direct recovery in tort for the children of the employees, who allege that they were exposed to these chemicals through their employee-parents prior to birth.[2]

In addition to raising a number of environmental and causation issues[3], these cases seek to create a significant exception to workers’ compensation schemes and extend employer duties in the nonmedical industry to unborn persons.

*Peters v. Texas Instruments Inc.*[4], a bellwether clean room case currently pending in Delaware state court, brings these issues to the fore and may be indicative of decisions to come in this developing area of law, particularly because more than a dozen clean room cases are pending before the same Delaware court.

The crux of the allegations in *Peters* and similar cases is that employees’ reproductive systems were “insulted” or injured through their alleged exposure to reproductively toxic chemicals at the workplace, which in turn caused their children to be born with serious birth defects.

In *Peters*, a former Texas Instruments employee, Grady Peters, alleged causes of action on behalf of his infant son, Christopher Peters, for negligence, “strict liability,” ultra-hazardous activity and premises liability, among other torts.

The crux of the child plaintiff’s claims is that his father, Grady Peters, was exposed to allegedly “hazardous, genotoxic and reproductively toxic substances, pollutants or contaminants released into the environment” at defendant Texas Instrument’s facility, and that as a consequence of his father’s exposure, Christopher was born with serious birth defects.[5]

Under the state workers’ compensation systems throughout the U.S., an employee — like Peters — cannot typically bring a civil suit in order to recover for the type of workplace exposure alleged in *Peters*. Instead, employers are required to provide workers’ compensation benefits to compensate for workplace injuries.[6] While this can be costly for employers, by that same token, in almost every state by operation of law, workers’ compensation is the exclusive remedy for workplace injuries, and employees are barred from bringing civil suits based on those injuries.[7]

Thus, state legislatures have struck a balance: employers often spend millions on workers' compensation every year, but an employee's recovery for work-related injuries is typically limited to the amount fixed by the governing workers' compensation scheme and the employer will not be liable in tort unless the injury was intentionally caused, and even then only in specified circumstances.

A key question presented in *Peters* and similar cases around the country is whether workers' compensation exclusivity bars the claims of child plaintiffs like Christopher Peters, who themselves are not employees, but whose claims are causally dependent on their parent-employees' alleged workplace exposures.

On Sept. 30, 2011, in ruling on Texas Instruments' motion to dismiss, the *Peters* court, applying Texas law, held that such claims are barred by workers' compensation exclusivity.[8] Specifically, the Delaware court found that the exclusivity provision of the Texas Workers' Compensation Act barred Christopher's civil claims against defendant Texas Instruments, because his claims were dependent on the parent-employee's:

"The crux of the court's inquiry rests on whether the claim in this case derives from an injury to [the parent-employee], or whether the claim in this case derives from an independent injury suffered by [the minor plaintiff] ... To recover, [the minor plaintiff] would have to show, inter alia, the insult to [the parent employee] proximately caused [the minor plaintiffs'] injury." [9]

Consequently, the court found that the minor's claims were derivative and barred by the exclusive remedy provision of Texas' workers' compensation law.

The *Peters* court also addressed an independent but equally sufficient basis for dismissing Christopher Peters' claims. It found that, to the extent plaintiffs sought to hold Texas Instruments liable for acts predating the child's conception, Texas courts have not recognized preconception tort liability and it would be improper for Delaware courts to do so when applying and interpreting Texas law.

This was particularly so under Texas appellate decisions, because the expansion of a legal duty falls within the realm reserved to the legislative, as opposed to judicial, branches.

The plaintiffs in *Peters* have moved for reconsideration of the court's dismissal order, challenging both grounds for dismissal. The reconsideration motion is fully briefed and the court's decision is expected soon. This will be an important case to watch in this developing area of law, particularly because Delaware's Superior Court has more than a dozen birth defects cases waiting in the wings that are likely to follow *Peters*, cases which implicate the workers' compensation systems of several different states.

*Peters* is also an important decision in the developing body of transgenerational tort law and birth defects cases generally. While a handful of courts have recognized that medical professionals can be liable to individuals for their actions prior to that person's birth, numerous courts have recognized that imposing duties that run directly to unborn children, as opposed to their parents, beyond a very narrow set of circumstances would not only prove unworkable, but would also constitute an improper judicial interference in a realm reserved for the legislative branch.

*Gibson Dunn is not involved in the Peters case. Gibson Dunn represents clients involved in clean room birth defects litigation currently pending in Delaware.*

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[1] See, e.g., *Hupan v. Alliance One Int'l*, Case No. N12C-02-171 (Del. Super. Ct.); *Tumlinson v. AMD*, Case No. 08C-07-106 (Del. Super. Ct.); *Smith v. Freescale*, Case No. N10C-07-273 (Del. Super. Ct.).

[2] See, e.g., *Peters v. Texas Instruments*, Case No. 10-C-06-043 (Del. Super. Ct.), Complaint at ¶ 5.

[3] See, e.g., *Tumlinson v. AMD*, Case No. 08C-07-106, Order Excluding Plaintiffs' Causation Expert, Dr. Linda Fazier, Ph.D. (Jan. 6, 2012).

[4] *Peters v. Texas Instruments*, Case No. 10-C-06-043 (Del. Super. Ct.).

[5] *Peters v. Texas Instruments*, Case No. 10-C-06-043 (Del. Super. Ct.), Complaint at pp 6-7.

[6] See, e.g., 1 *Modern Workers' Compensation* § 102:1 (updated February 2012) ("The workers' compensation system is not cumulative or supplemental to the tort system, but is wholly substitutional. An employee does not have the option of suing in tort or recovering compensation. A basic workers' compensation statutory provision makes workers' compensation the exclusive remedy for an employee's injuries arising out of and in the course of employment. The effect of such exclusivity provisions is to abolish an injured worker's civil causes of action against his or her employer.") (footnotes omitted).

[7] See, e.g., 19 Del.C. § 2304 ("Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies."); see also Tex. Lab. Code § 408.001(a) (2010).

[8] *Peters v. Texas Instruments*, Case No. 10-C-06-043 (Del. Super. Ct.), Dismissal Order (Sept. 30, 2011).

[9] *Peters v. Texas Instruments*, Case No. 10-C-06-043 (Del. Super. Ct.), Dismissal Order at \*6 (Sept. 30, 2011).

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