SMU | Dedman School of Law

SMU Law Review

Volume 58
Issue 3 *Annual Survey of Texas Law*

Article 27

2005

Toxic Torts and Mass Torts

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TOXIC TORTS AND MASS TORTS

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FOR years, courts and commentators have recognized that toxic torts and mass torts present substantive and procedural issues distinct from those typically presented by other types of tort litigation.[1] The special problems arising from toxic tort litigation largely result from the latent nature of the injuries caused by exposure to chemicals or other toxic agents and from the scientific complexity of attributing causation to a toxic exposure. Mass tort cases, because of the sheer number of claims, present unique problems of case management. Developments in the case law involving toxic and mass tort litigation are thus worthy of separate review.

In the last Survey period, the Texas Legislature's enactment of the comprehensive tort reform package known as "House Bill 4" overshadowed judicial developments in the areas of toxic and mass tort law. House Bill 4 contained provisions specifically addressing certain types of mass tort procedures and toxic tort cases,[2] as well as statutes generally affecting tort law but likely to have a particularly dramatic effect on toxic

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1. *See, e.g.*, *In re* Ethyl Corp., 975 S.W.2d 606, 609 (Tex. 1998) (mass tort litigation "has caused departures from traditional ways in which cases have been filed, discovery has proceeded, and trials have been set"); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997) (recognizing "difficult issues surrounding proof of causation in a toxic tort case such as this"); CSR, Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (noting "problems inherent in many, if not all, mass tort cases"); LINDA S. MULLENIX, MASS TORT LITIGATION CASES AND MATERIALS, at 5 (West 1996) ("mass tort litigation has evolved as a separate and compelling set of legal and social problems that are worthy of discrete study.").

2. *See, e.g.*, Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 1.01; TEX. CIV. PRAC. & REM. CODE ANN. §§ 26.001-26.003 (Vernon Supp. 2004) (class actions); Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 3.02; TEX. GOV'T CODE ANN. §§ 74.161-74.164 (Vernon 2005) (multidistrict litigation); Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 4.04; TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (Vernon Supp. 2004) (eliminating "toxic tort exception" in proportionate liability statute); Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 17.01; TEX. CIV. PRAC. & REM. CODE ANN. §§ 149.001-149.006 (Vernon 2005) (limiting asbestos-related liabilities of successor corporations).

and mass tort cases.[3] Like exposure to a chemical, however, the effect of statutory changes to substantive and procedural law is often latent, and many of the changes wrought by House Bill 4 have yet to be applied or examined in court opinions.

But toxic tort law and mass tort law have continued to evolve in the Texas state and federal courts. Many of the trends observed in previous Surveys—stricter evaluation of expert scientific proof of causation, circumscription of duties owned by product suppliers and premises owners to workers and bystanders, and wariness of collective methods of resolving tort cases such as class actions, consolidations, and joint settlements—are reflected in this Survey period. This Survey period also exhibited several new trends, including a willingness of the newly-created Judicial Panel on Multidistrict Litigation ("MDL Panel") to certify litigation for collective pretrial management and a renewed vigor on the part of appellate courts in protecting defendants in toxic and mass tort cases from discovery perceived as overbroad and coercive. Whether these trends continue or subside, and whether House Bill 4 will have as drastic an effect on toxic and mass tort litigation as many suspect, will undoubtedly be explored in future Surveys.

I. PROCEDURAL ISSUES

A. ORDERS OF THE MULTIDISTRICT LITIGATION PANEL

In 2003, as part of the legislative tort-reform package known as House Bill 4, the Texas Legislature passed a series of statutes creating a system for centralizing cases presenting common questions of fact in a single district court for pretrial management.[4] The legislation created the MDL Panel consisting of five active court of appeals justices or administrative judges appointed by the Chief Justice of the Texas Supreme Court, to consider motions to transfer particular cases pending in the Texas trial courts to a district court for "consolidated or coordinated pretrial proceedings."[5] Pursuant to a directive in the legislation,[6] the Texas Supreme Court promulgated Rule 13 of the Texas Rules of Judicial Administration to govern the management of cases transferred by the MDL Panel to "pretrial" courts.[7] This Survey period presented the MDL Panel with its

3. *See, e.g.*, Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 4.04; TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (Vernon Supp. 2004) (eliminating various exceptions in proportionate liability statute); Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 5.02; TEX. CIV. PRAC. & REM. CODE ANN. § 82.008 (Vernon 2005) (limiting liability of manufacturers of products that comply with federal regulations).

4. Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 3.02; TEX. GOV'T CODE ANN. §§ 74.161-74.164 (Vernon 2005).

5. Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 3.02; TEX. GOV'T CODE ANN. §§ 74.161 (Vernon 2005).

6. Tex. H.B. 4, 78th Leg., R.S. (2003), ch. 204, § 3.02; TEX. GOV'T CODE ANN. §§ 74.163 (Vernon 2005).

7. TEX. R. JUD. ADMIN. 13, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (Vernon 1988).

first opportunities to consider requests to transfer cases under the new legislation.

Fittingly, the first request to transfer considered by the MDL Panel involved asbestos litigation, frequently referred to by commentators as the "mother of all mass torts."[8] On December 30, 2003, in a 3-2 decision, the MDL Panel ordered the transfer of all asbestos litigation in the state filed after September 1, 2003 to a single judge for pretrial proceedings. The MDL Panel's short per curiam opinion tracked the statutory language in finding that the asbestos cases "involve one or more common questions of fact, and that transfer of these cases and tag-along cases to one district judge will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the cases."[9] In dissent, Justice Kidd observed that Texas trial courts had already resolved almost 30,000 cases without the supervision of a single judge, and contrasted that "success" with the federal experience, in which multidistrict transfer of asbestos litigation had caused "that dreaded disease commonly known as 'pretrial paralysis.'"[10] In a subsequent order, the MDL Panel assigned the asbestos cases to Judge Mark Davidson of the 11th District Court of Harris County.[11]

In May, the MDL Panel granted an unopposed motion to transfer several cases involving allegedly defective Firestone tires on Ford vehicles to a single court for pretrial proceedings. The MDL Panel assigned the cases to Judge Michael Mayes of the 410th District Court of Montgomery County.[12]

Most recently, the MDL Panel ordered the transfer of cases involving allegations of injury caused by exposure to silica to Judge Tracy Christopher of the 295th District Court of Harris County for coordinated pretrial management.[13] In an opinion delivered by Justice Peeples and joined by Justices Hanks and Lang, the MDL Panel concluded that the silica cases present common fact questions and that transfer would promote the convenience of parties and witnesses and the just and efficient handling of the cases. Responding to the contention that transfer was unnecessary

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8. Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1756 (2002); *see also* Mary J. Davis, *Mass Tort Litigation: Congress's Silent, But Deadly, Reform Effort*, 64 TENN. L. REV. 913, 918 (1997), *and* Alex J. Grant, Note, *When Does the Clock Start Ticking? Applying the Statute of Limitations in Asbestos Property Damage Actions*, 80 CORN. L. REV. 695, 696 (1995).

9. Union Carbide v. Audrey Amelia Adams, No. 03-0895 (Tex. M.D.L. Panel Dec. 30, 2003), *available at* http://www.supreme.courts.state..tx.us/historical/2003/dec/030895.htm.

10. *Id.* (Kidd, J., dissenting), *available at* http://www.supreme.courts.state..tx.us/historical/2003/dec/030895.htm.

11. Union Carbide v. Audrey Amelia Adams, No. 03-0895 (Tex. M.D.L. Panel Jan. 13, 2004), *available at* http://www.supreme.courts.state..tx.us/opinions/case.asp?filingID=24276.

12. *In re* Firestone Ford Litig., No. 04-0262 (Tex. M.D.L. Panel May 4, 2004), *available at* http://www.supreme.courts.state..tx.us/mdl_2.pdf.

13. *In re* Silica Prods. Liab. Litig., No. 04-0606 (Tex. MDL Panel Nov. 10, 2004), *available at* http://www.supreme.courts.state..tx.us/Historical/2004/nov/04-0606%20-%20MDL%20ORDER%20APPOINTING%20JUDGE.htm.

because silica litigation in Texas courts had been proceeding efficiently, the MDL Panel noted that "Rule 13 is not limited to correcting ongoing problems from the past; it seeks to prevent the occurrence of problems in the future."[14] Justice Kidd again dissented, expressing his view that "MDL consolidation is an extraordinary remedy that should only be considered where the burden of proof has been met."[15] Noting that the major silica defendants and all of the plaintiffs opposed transfer, Justice Kidd found silica litigation in Texas to be "as close to a perfect litigant-driven system as can be found," and believed MDL transfer of the litigation under that circumstance to be "inconvenient, unjust, inefficient, and unneeded."[16]

B. Case Management Issues

1. Consolidation

In *In re Van Waters & Rogers, Inc.*, the Texas Supreme Court issued a writ of mandamus to vacate an order consolidating the cases of twenty plaintiffs who alleged injuries caused by exposure to a "toxic soup" of chemicals at the plant at which they worked. After noting that the tort was immature because "no 'toxic soup' case has ever been tried or appealed in Texas,"[17] the court analyzed consolidation in light of the nine "Maryland factors" adopted in *In re Ethyl Corp.*[18] to guide consolidation of mass tort cases. The court found that the consolidated cases did not satisfy four of the factors: (1) plaintiffs did not share a common worksite since the large plant had several separate work areas and buildings, each serviced by different air conditioning and ventilation systems; (2) the plaintiffs did not have similar occupations and, therefore, were not exposed to the same chemicals or the same combination of chemicals; (3) the plaintiffs were not exposed to chemicals on the same dates or for the same length of time since the plaintiffs began working at the plant over a span of thirteen years; and (4) the plaintiffs were not complaining of similar injuries but rather alleged more than fifty-five physical ailments with no two plaintiffs alleging identical symptoms. Though the court found that the remaining factors—including whether plaintiffs were alive or deceased, the status of discovery, and identity of counsel—weighed in favor of consolidation, the court held that the trial court abused its discretion in consolidating the cases because the dissimilarities outweighed the similarities. The court also held that mandamus was proper given the "extraordinary circumstances" of the case since "[j]uror confusion and prejudice, under these facts is almost certain, and it would be impossible for an appellate court to untangle the confusion or prejudice on

14. *Id.*, *available at* http://www.supreme.courts.state..tx.us/Historical/2004/nov/04-0606%20-%20MAJORITY%20OPINION.htm.

15. *Id.* (Kidd, J., dissenting), *available at* http://www.supreme.courts.state..tx.us/Historical/2004/nov/04-0606%20-%20DISSENT%20OPINION.htm.

16. *Id.*

17. *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 208 (Tex. 2004).

18. *In re* Ethyl Corp., 975 S.W.2d 606 (Tex. 1998).

appeal."[19]

In another mandamus action, *In re Amfels, Inc.*, the Corpus Christi Court of Appeals reviewed a trial court's consolidation of ten silicosis cases involving approximately 700 plaintiffs and eighty defendants, originally filed in six district courts in Cameron County. The judge of the 197th District Court ordered all cases transferred to her court. The judges in two other district courts in Cameron County—the 138th District and 404th District—refused to transfer the cases in their courts since they neither authorized nor agreed to the transfers. The defendants in the cases filed petitions for writ of mandamus to order the judges in the 138th and 404th District Courts to vacate all orders issued subsequent to the transfer and to transfer their cases to the 197th District, and filed motions for emergency stays pending the mandamus petitions. The plaintiffs then filed a cross petition for writ of mandamus, ordering the judge of the 197th District to vacate her consolidation order and to assign the cases to their original courts, except for the cases transferred on the basis of voluntary recusal. The court stayed all proceedings pending its review of the mandamus petitions. The court held that, rather than a mandamus proceeding, "the better approach" would be for the local administrative judge to resolve the dispute.[20] The court found that the local administrative judge is statutorily charged with local rules of administration, including the transfer of cases, and "is in the better position to interpret the Cameron County local rules."[21] The court denied the petitions and cross petition for mandamus and vacated its emergency stay order.

2. *Docket Management*

In *In re Union Carbide Corp.*, the Fourteenth Court of Appeals declined to require the trial court presiding over the state's multidistrict asbestos litigation to adopt a scheduling order proposed by defendants that would indefinitely defer trial of cases involving injuries that do not satisfy certain medical criteria. Defendants had moved the MDL pretrial court to create a special "inactive" docket for "unimpaired" plaintiffs. After conducting an evidentiary hearing on the motion, the pretrial court refused to create such a docket and issued findings of fact and conclusions of law in support of its decision. Defendants asked the court of appeals to issue a writ of mandamus requiring the pretrial court to create the proposed "inactive" docket, specifically urging the court to review the pretrial court's conclusions that the proposed docket would violate the Texas Constitution and other provisions of Texas law. The court of appeals declined to reach the issue of whether the pretrial court's legal conclusions were correct because the material facts on which the scheduling motion was based were disputed and because the defendants were not

19. *In re Van Waters*, 145 S.W.3d at 211.

20. *In re* Amfels, Inc., 129 S.W.3d 810, 813 (Tex. App.—Corpus Christi 2004, pet. denied); *In re* U.S. Silica Co., 48 Tex. Sup. J. 410 (Tex. 2005).

21. *In re Amfels, Inc.*, 129 S.W.3d at 814.

entitled as a matter of law to the relief that they sought in the motion (the creation of an inactive docket). The court of appeals concluded that defendants had failed to demonstrate that the pretrial court abused its discretion in declining to adopt defendants' "inactive docket" proposal, finding it "clear" that "the MDL Court is diligently attempting to deal efficiently with the difficult and challenging issues presented by the massive MDL docket."[22]

3. Class Actions

In *Richard v. Hoechst Celanese Chemical Group, Inc.*, the Fifth Circuit affirmed the dismissal of a class action suit against the seller and manufacturers of polybutylene ("PB") plumbing systems that sought to supersede or supplement relief obtained in prior class actions in state courts in Tennessee and Alabama. The plaintiff alleged that defendants' PB systems were inherently defective and that leaks from the systems caused damage to class members' homes. The plaintiff tried to avoid the preclusive effect of the prior class action judgments by alleging that, by colluding with class counsel in settling the prior actions, the defendants had violated 42 U.S.C. § 1983 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Fifth Circuit held that the *Rooker-Feldman* doctrine, which provides that the lower federal courts lack jurisdiction to review constitutional deficiencies "inextricably intertwined" in state court judgments, required dismissal of the plaintiff's class action complaint.[23] The court recognized the "tension" between the need to review whether the absent class members, such as plaintiff, were subject to the state court's jurisdiction and bound by its judgment on the one hand and, on the other hand, *Rooker-Feldman*'s prohibition against federal review of substantive state court findings.[24] The court ultimately relieved the tension in this case by noting that the plaintiff's § 1983 claim was "clearly untenable" and "groundless."[25] Because the plaintiff's § 1983 claim merely served "as an instrument for evading *Rooker-Feldman*," the district court did not err in dismissing the claim for lack of subject matter jurisdiction.[26] The court added that dismissal of the RICO claim for disgorgement of profits was also appropriate because the statute authorizes equitable remedies only to prevent ongoing and future conduct and that plaintiff failed to argue that disgorgement would "prevent and restrain" the defendants from producing PB plumbing systems or from violating RICO in the future.[27] The dissent criticized the majority's

22. *In re* Union Carbide Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

23. Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 350 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 46 (2004) (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)).

24. *Richard*, 355 F.3d at 351.

25. *Id.* at 352, 354.

26. *Id.* at 352.

27. *Id.* at 355.

interpretation of RICO on this point, finding it "to be self-evident to courts and litigants alike that a prayer for disgorgement of profits in a case like this one is intended to prevent and restrain similar future conduct."[28]

In *In re Wood*, the Texas Supreme Court held that in a putative class action governed by an arbitration clause, issues relating to the propriety of class certification should ordinarily be decided by the arbitrator and not the court. In *Wood*, claimants in the breast implant litigation filed a class action suit against the attorney that handled their claims alleging that he improperly deducted from their settlement proceeds a 1.5 percent assessment to reimburse himself for "common expenses."[29] The attorney-client contracts included a provision that all disputes arising out of the fee agreement would be submitted to binding arbitration. The trial court ordered the case, including the class certification issue, to arbitration; the court of appeals conditionally issued a writ of mandamus directing the trial court and not the arbitrator to decide whether the claims could proceed as a class or must be individually arbitrated. Citing a recent decision of the United States Supreme Court, the Texas Supreme Court concluded that the issue of class arbitrability is one of contract interpretation that is "committed to the arbitrator."[30] The court thus held that "the court of appeals abused its discretion in directing the trial court to decide the class certification issue."[31]

4. Discovery

During the Survey period, the Texas Supreme Court acted twice to protect defendants in mass tort cases from what the court found to be improper discovery requests. In *In re Dana Corp.*, the Texas Supreme Court held that the efforts of over 1,200 plaintiffs in asbestos litigation to discover information about the defendant's available insurance coverage is limited both by Texas Rule of Civil Procedure 192.3(f), which specifically governs discovery of insurance policies held by the defendant, and by the general scope of discovery relevance standard in Texas Rule of Civil Procedure 192.3(a). The trial court had ordered the defendant to satisfy the plaintiffs' request for production of all insurance policies obtained by the defendant from 1930 through the present and ordered the defendant to produce for deposition a witness to testify "regarding such insurance policies."[32] A subgroup of forty-nine plaintiffs filed affidavits describing their exposure to the defendant's asbestos products; none, however, could demonstrate exposure earlier than 1945. The defendant argued that production of their insurance policies should not be ordered until all plaintiffs produced evidence of exposure to the defendant's prod-

28. *Id.* at 356 (Wiener, J., dissenting).
29. *In re* Wood, 140 S.W.3d 367, 368 (Tex. 2004).
30. *Id.* at 369 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality op.)).
31. *In re Wood*, 140 S.W.3d at 370.
32. *In re* Dana Corp., 138 S.W.3d 298, 300 (Tex. 2004).

ucts. The supreme court rejected the defendant's contention "that a special rule should apply in toxic-tort cases," but nevertheless held that the trial court abused its discretion in ordering production of insurance policies issued before 1945.[33] The court noted that under Rule 192.3(f), insurance policies are not discoverable "until they are shown to be applicable to a potential judgment,"[34] and reasoned that because the plaintiffs had not shown that pre-1945 policies would cover any of the plaintiffs' claims, the trial court should not have compelled production of the policies. The court also held that the order requiring the defendant to produce a witness to testify "regarding such insurance policies" was not *per se* improper, but warned that insurance information beyond the existence and content of the policies—such as the amount of unexhausted coverage remaining under the policies, the number of plaintiffs essentially competing for insurance proceeds, and "policy erosion" in general—are typically outside the scope of permissible discovery. Although the plaintiffs' interest in such matters is understandable, those matters usually do not relate to the actual underlying "claim or defense" of the party seeking discovery, and are thus not usually discoverable under the terms of the general scope of discovery rule, Texas Rule of Civil Procedure 192.3(a).[35]

In *In re E.I. DuPont De Nemours & Co.*, the Texas Supreme Court held that the trial court abused its discretion in failing to conduct an *in camera* review of documents withheld from production by the defendant on the ground that they were protected by the attorney-client or work product privilege. In response to requests for production propounded by almost 400 plaintiffs in a suit to recover damages for asbestos-related injuries, defendant DuPont produced a detailed privilege log accompanied by an affidavit describing, by category, the basis for each assertion of privilege. The documents fell into three categories: documents showing only the names of members of DuPont's legal department; documents showing both "DuPont Legal" and other names; and documents not showing on their face a "DuPont Legal" connection. The trial court ordered production of the documents in the second and third categories without conducting an *in camera* review. The supreme court held that although the affidavit failed to establish a prima facie basis for withholding documents in the third category, it did so for the second category; the affidavit adequately explained that some documents might be protected by the attorney-client or work product privilege even though all senders or recipients were not identified as "DuPont Legal" on the document. The court also noted that DuPont's global affidavit adequately presented the prima facie support for the claim of privilege and that plaintiffs' global challenge of the privilege log sufficiently placed the claims of privilege in issue.[36]

33. *Id.* at 301.
34. *Id.*
35. *Id.* at 302-04.
36. *In re* E.I. DuPont De Nemours & Co., 136 S.W.3d 218, 221-27 (Tex. 2004).

The courts of appeals have actively enforced the Texas Supreme Court's recent directive to restrict discovery in toxic tort and mass tort cases to products and facilities that the plaintiff actually encountered.[37] In *In re Sears, Roebuck & Co.*, the plaintiff claimed that he developed mesothelioma as a result of his exposure to products sold by Sears, a nationwide retailer, and thirty-seven other defendants. The plaintiff propounded a sixty-four-page set of discovery requests to Sears which included, for example, interrogatories asking Sears to identify the name and asbestos content of every asbestos-containing product it ever sold, and to identify the name and address of all Sears sales offices or authorized dealers of asbestos-containing home construction products in the United States. The trial court, in a series of written and oral rulings, compelled Sears to answer the discovery requests. But the Fourteenth District Court of Appeals, in an opinion authored by then-Chief Justice Brister, ruled that the discovery requests were overbroad. The court noted that the plaintiff's discovery responses showed exposure to only two Sears products—boilers and water heaters—and that his counsel's guess that he was exposed to other Sears products did not justify the additional discovery requests. The court acknowledged that "asbestos claimants face substantial obstacles in proving the products to which they were exposed decades earlier," but noted that these difficulties do not entitle claimants "to recover money from all companies selling asbestos products."[38] Because the "discovery requests could have been more narrowly tailored" to address the products to which the plaintiff could actually show exposure, the court held the trial court abused its discretion in compelling the discovery.[39]

In a different but factually similar and identically styled case, the Beaumont Court of Appeals held that the trial court abused its discretion in ordering defendants in asbestos litigation to produce information potentially demonstrating general knowledge of the hazards of asbestos but not specifically related to the circumstances of the decedent's exposure. The decedent died at age twenty-six of mesothelioma; his exposure to asbestos occurred through contact with his stepfather's work clothes, which were laden with asbestos dust from his stepfather's work on automotive brakes for his employer Sears. The plaintiffs sought production from Sears and Ford of all files of workers' compensation claims against the companies based on asbestos-related disease. The plaintiffs also sought from Sears all minutes and other corporate documents in which asbestos issues were discussed and all records of OSHA violations related to asbestos. The court of appeals held that both categories of requests were overbroad. Although some of the workers' compensation documents "may have a tendency to show a fact of consequence in the case," the

37. *See In re* CSX Corp., 124 S.W.3d 149 (Tex. 2003).

38. *In re* Sears, Roebuck & Co., 123 S.W.3d 573, 578 (Tex. App.— Houston [14th Dist.] 2003, pet. granted).

39. *Id.* at 579.

request for all files from all locations was too broad to justify the expense of production.[40] Similarly, the request for Sears documents discussing asbestos and for records of OSHA violations was overbroad "without tying the discovery to the type of exposure, a reasonable time period, the relevant location, and the particular products or work involved."[41]

On the other hand, in *Hill & Griffith Co. v. Bryant*, the Tyler Court of Appeals upheld sanctions imposed by a trial court against a defendant for wrongfully withholding documents from production in response to plaintiffs' broad discovery requests. In *Hill & Griffith*, the plaintiffs alleged that they had sustained injuries caused by their exposure to the defendant's silica products, and requested production of "all internal memoranda related to the marketing of silica-containing products sold to Plaintiffs' employer."[42] In response to the request, the defendant produced warning labels affixed to its silica products, but did not produce an internal memorandum detailing the history of the warning labels previously produced. On the plaintiffs' motion, the trial court awarded monetary and community service sanctions against the defendant and its counsel, rejecting the defendant's argument that the memo concerning warning labels was not responsive to the request for information concerning marketing. The court of appeals upheld the sanctions, noting that the trial court's "expansive and liberal view of Plaintiffs' discovery requests . . . corresponds with the views taken by both the Texas Supreme Court and the United States Supreme Court."[43]

5. *Issues Relating to Professional Responsibility*

The Texas Supreme Court and the courts of appeals had several opportunities to consider the propriety of attorney conduct in mass and toxic tort litigation. In *In re Kansas City Southern Industries*, a defendant that had settled the claims of over two thousand plaintiffs who alleged exposure to a hazardous chemical that leaked from a railroad car asked the Texas Supreme Court to issue a writ of mandamus requiring the return of settlement monies allocated to minors who could not be located and did not sign releases. The plaintiffs and the guardian ad litem opposed the request, arguing that the settlement was in the minors' best interests, whether their parents knew and approved the settlement or not. The supreme court denied the writ, ruling that the defendant had an adequate remedy through appeal of any final trial court order approving the settlement.[44] Justice Hecht filed a concurring opinion in which he noted that the denial of relief "in no way suggests that the children's claims were properly settled" and described as "astonishing" the notion that it would

40. *In re* Sears, Roebuck & Co., 146 S.W.3d 328, 332-33 (Tex. App.—Beaumont 2004, pet. granted).

41. *Id.* at 334.

42. Hill & Griffith Co. v. Bryant, 139 S.W.3d 688, 691 (Tex. App.—Tyler 2004, pet. denied).

43. *Id.* at 695.

44. *In re* Kansas City S. Indus., 139 S.W.3d 669, 670 (Tex. 2004).

be "in the best interest of a party before the court to have his claim for personal injuries settled without his knowledge."[45]

In re Mitcham illustrates the danger that the mobility of legal professionals poses to law firms practicing in a specialized area of the law such as toxic torts. Waters & Kraus, a law firm that represents plaintiffs in asbestos litigation, hired as an attorney Mortola-Strasser, who previously worked as a paralegal for a law firm that represented Texas Utilities ("TXU"), a defendant in the asbestos litigation. Waters and Mortola-Strasser signed an agreement with TXU in which they agreed that neither they nor any Waters & Kraus attorneys would participate in asbestos suits against TXU or "[s]hare any information with any person regarding the facts and circumstances surrounding [TXU's] use of asbestos."[46] After Mortola-Strasser left Waters & Kraus, the firm filed an asbestos-related lawsuit against TXU on behalf of the Mitchams. TXU moved to disqualify Waters & Kraus; the trial court denied the motion. In a decision reported in last year's Survey, the Waco Court of Appeals issued a writ of mandamus requiring the disqualification of Waters & Kraus.[47] The court of appeals based its decision on the irrebutable presumption that a lawyer will share the confidences of a former client with a new employer, even though Mortola-Strasser was theoretically exposed to TXU's confidences only as a non-lawyer.[48] Waters & Kraus sought mandamus of the court of appeals' decision from the Texas Supreme Court.

The supreme court avoided the issue of whether Mortola-Strasser and Waters & Kraus were bound by the irrebutable presumption of disclosure applied to lawyers or the rebuttable presumption of disclosure applied to non-lawyers. It ruled instead that Waters & Kraus' engagement as counsel for the Mitchams was precluded by Waters' agreement with TXU not to share any information about its use of asbestos. The court concluded that because Waters & Kraus "cannot give the Mitchams the representation to which they are entitled" without violating the agreement with TXU, disqualification of the firm was required.[49]

Because of the high stakes and scientific uncertainty in most toxic and mass tort cases, such cases have a higher propensity than other types of litigation to generate post-resolution charges of mistake, attorney misconduct, or outright fraud—in other words, to get ugly. *Atlantic Lloyds Insurance Co. v. Butler*, in which the parties sought to avoid the terms of a settlement of a toxic tort case based on reciprocal charges that one side fraudulently induced the other to settle, provides a textbook example. The plaintiffs in the underlying case were residents of an apartment complex that had been sprayed with chlordane, an insecticide. They sued the

45. *Id.* at 671 (Hecht, J., concurring).
46. *In re* Mitcham, 133 S.W.3d 274, 277 (Tex. 2004).
47. *See* Brent M. Rosenthal, Misty A. Farris & Carla M. Burke, *Toxic Torts and Mass Torts*, 57 SMU L. REV. 1267, 1283 (2004) (discussing *In re* TXU Holdings Co., 110 S.W.3d 62 (Tex. App.—Waco 2002, pet. denied)).
48. *In re TXU Holdings Co.*, 110 S.W.3d at 66-67.
49. *In re Mitcham*, 133 S.W.3d at 277.

owner and the two corporate managers of the complex, alleging that they had sustained injuries caused by their exposure to the chemical. One of the managers, H.R. Management Company ("HRM"), held three insurance policies: a primary coverage policy of $300,000, a $15 million umbrella policy issued by Centennial, and a separate $10 million policy also issued by Centennial. Centennial contended that the $15 million policy did not cover the plaintiffs' claims but did not deny coverage by the $10 million policy. The plaintiffs settled with HRM for a total of approximately $9.7 million (the total of the $300,000 and $10 million policies, less the amount paid in settlement to another plaintiff) based in part, the plaintiffs later alleged, on HRM's representation that the settlement consumed all of HRM's uncontested coverage for the claims. After the plaintiffs' noticed that the settlement check delivered to them was drafted against the $15 million policy, they sued HRM and its agents, alleging that HRM had breached an agreement to pay plaintiffs in settlement all available insurance coverage, and that HRM's misrepresentation of the value of available coverage fraudulently induced plaintiffs to settle. HRM countered with allegations that plaintiffs fraudulently obtained the settlement by exaggerating or falsely representing their injuries and damages.[50]

The First District Court of Appeals affirmed summary judgment against the plaintiffs on the principal claims and against the defendants on the counterclaims. The court found that the settlement agreement specified that HRM would pay a sum certain to resolve the claims, and that this settlement provision could not be contradicted by extrinsic evidence that HRM had agreed to pay all of its insurance coverage in settlement of the claims. The court also rejected the plaintiffs' fraud theory, finding that the settlement releases signed by the plaintiffs expressly provided that plaintiffs had not relied on any representation by HRM in agreeing to the settlement. Finally, the court rejected HRM's allegation that the plaintiffs had fraudulently induced HRM to settle by submitting false proof in support of their claims. The court noted that because the parties were "engaged in litigation and negotiating at arm's length and from equal bargaining positions," the defendant could not claim reasonable or justifiable reliance on the plaintiffs representations "that, with reasonable diligence, could easily have been refuted."[51]

In *Goffney v. O'Quinn*, the First District Court of Appeals rejected the claims of fourteen disgruntled plaintiffs against their former attorneys for allegedly coercing them to settle their toxic tort claims for inadequate amounts. The plaintiffs were among 406 workers and family members who claimed that they sustained injuries as a result of their exposure to chemicals at the Brio superfund site near Houston. After receiving what they considered an inadequate settlement offer, they discharged their at-

50. Atlantic Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 206-07 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

51. *Id.* at 226.

torneys and hired new counsel. They then accepted the settlement offer and sued their former attorneys under a variety of theories, including legal malpractice and breach of fiduciary duty. The trial court granted summary judgment in favor of the attorneys, and the court of appeals affirmed. The court found that the plaintiffs had presented no evidence that they would have prevailed in the underlying toxic tort suit, particularly on the issue of causation. The court also noted that the plaintiffs' claim of breach of fiduciary duty was foreclosed by conclusive proof that the plaintiffs had settled their toxic tort claims voluntarily on the independent advice of their new counsel.[52]

The high-stakes and pressurized environment of mass tort litigation provides a fertile breeding ground for inter-lawyer fee disputes. The Corpus Christi Court of Appeals resolved one such dispute in an interesting and lengthy memorandum opinion in *Hoeffner, Bilek & Eidman, L.L.P. v. Guerra.* In that case, two lawyers, Guerra and Beam, intervened in a mass toxic tort case to claim a portion of the contingent fee recovered by lead plaintiffs' counsel, Hoeffner, Bilek & Eidman, L.L.P. ("HBE"). Guerra and Beam asserted that a written agreement in which they agreed to serve as local counsel in the case promised them a fee; HBE argued that the lawyers were not entitled to the fee because they breached the agreement and their fiduciary duty to the clients by abandoning work on the case. The trial court held a bench trial and ruled that HBE had committed an anticipatory breach of the contract by attempting to coerce Guerra to accept a lower fee than that specified in the contract and then refusing to work with him. It held that Guerra was therefore justified in failing to perform and was entitled to his contractual fee, but refused to award Guerra additional attorneys' fees for bringing his breach of contract claim. The court also ruled that Beam was not entitled to the contractual fee because he had declared his intent to leave the practice of law and thereby abandoned the contract. All parties appealed. The court of appeals affirmed the award of fees to Guerra and the denial of fees to Beam, holding that sufficient evidence supported the trial court's findings. The court modified the judgment to award Guerra attorneys' fees for prosecuting his fee claim and to add postjudgment interest to the award at ten percent.[53]

C. Procedural Defenses

1. Personal Jurisdiction

In *Koll Real Estate Group, Inc. v. Howard*, the Fourteenth District Court of Appeals rejected the plaintiffs' attempt to attribute to a nonresident corporation the jurisdictional contacts—and asbestos-related

52. Goffney v. O'Quinn, No. 01-02-00192-CV, 2004 WL 2415067, at *9 (Tex. App.—Houston [1st Dist.] Oct. 28, 2004, no pet.) (mem. op.) (not designated for publication).

53. Hoeffner, Bilek & Eidman, L.L.P. v. Guerra, No. 13-01-503-CV, 2004 WL 1171044, at *13 (Tex. App.—Corpus Christi May 27, 2004, pet. denied) (mem. op.) (not designated for publication).

torts—of its predecessors. Following the lead of the First Court of Appeals in *Koll Real Estate Group, Inc. v. Pursely*, reported in last year's Survey,[54] the court found that the defendant acquired only indemnity obligations and not liabilities for its predecessor's torts. The court then adopted the reasoning of the *Purseley* court, holding that even if the indemnity obligations constituted a "minimum contact," these agreements could not form the basis to assert specific jurisdiction because the plaintiffs' cause of action did not arise from the indemnity agreement.[55]

2. Subject Matter Jurisdiction

Rodriguez Delgado v. Shell Oil Co. is yet another chapter in the Dickensian saga of the litigation brought in Texas state court by Costa Rican banana plantation workers against the makers of the pesticide known as DBCP. In *Rodriquez Delgado*, a federal court in the Southern District of Texas considered whether it had subject matter jurisdiction to rule on the plaintiffs' motion to reinstate claims in light of a 2003 case from the United States Supreme Court. The plaintiffs had filed their suits in state court in 1994, but two third-party defendants known as the Dead Sea entities removed the cases to federal court alleging that they were instrumentalities of the State of Israel entitled to remove under the Foreign Sovereign Immunities Act ("FSIA").[56] In 1995, the district court found the removal proper, granted a motion to dismiss based on the doctrine of forum non conveniens, and included a return jurisdiction clause in the dismissal order. The Fifth Circuit affirmed all rulings and the United States Supreme Court denied certiorari.[57] When the highest court in Costa Rica affirmed the dismissal of the plaintiffs' claims, the plaintiffs filed a motion to reinstate the claims in the Southern District of Texas. But in *Dole Food Co. v. Patrickson*, which was reported in last year's Survey,[58] the United States Supreme Court "squarely rejected" the district court's and Fifth Circuit's conclusion that the original removal was proper, holding that the Dead Sea entities were not "instrumentalities" but "indirect subsidiaries" of the State of Israel under FSIA.[59] The district court was confronted with the questions of whether it had jurisdiction to enforce the return clause, or, for that matter, to take any action in light of the Supreme Court's holding in *Patrickson*. The court held that, although its assertion of subject matter jurisdiction was erroneous in light of *Patrickson*, the forum non conveniens dismissal of the action and the

54. *See* Rosenthal, *supra* note 47, at 1287 (discussing Koll Real Estate Group, Inc. v. Purseley, 127 S.W.3d 142 (Tex. App.—Houston [1st Dist.] 2003, no pet.)).

55. Koll Real Estate Group, Inc. v. Howard, 130 S.W.3d 308, 314 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

56. 28 U.S.C. §§ 1602-11 (2005).

57. Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

58. *See* Rosenthal, *supra* note 47, at 1291 (discussing Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)).

59. Rodriguez Delgado v. Shell Oil Co., 322 F. Supp. 2d 798, 802-03 (S.D. Tex. 2004) (describing the effect of *Patrickson* on the court's prior holdings).

return jurisdiction clause remained valid and enforceable because the Supreme Court issued the *Patrickson* decision after the district court's rulings became operative. The court also held that although the *Patrickson* decision terminated the court's ancillary enforcement jurisdiction in the case preventing it from ruling on the plaintiffs' motion to reinstate claims, *Patrickson* did not terminate its power to remand because the forum non conveniens dismissal was not a final judgment. The court remanded the pending motion to reinstate claims to Texas state court.[60]

3. *Venue*

In *In re Shell Oil Co.*, the Beaumont Court of Appeals rejected an attempt by plaintiffs to avoid the effect of an order transferring venue by nonsuiting the case and filing it in another county. The plaintiffs, who alleged that they had sustained injuries caused by exposure to benzene, initially filed suit in Orange County. After the defendants moved to transfer the cases to Harris County, the plaintiffs filed an identical suit in Jefferson County. The Orange County court granted the motion to transfer the case in that court to Harris County. The plaintiffs then nonsuited the Harris County case. The defendants moved to transfer the Jefferson County case to Harris County. The trial court denied the motion, but the court of appeals issued a writ of mandamus to require the transfer. The court held that, under Texas Rule of Civil Procedure 87.5, once an action has been transferred to a proper county in response to a motion to transfer venue—in this case, from Orange County to Harris County—then venue is established for any subsequent suit involving the same subject matter and the same parties as the initial suit. The court added that the trial court's error in denying transfer was an "exceptional circumstance" for which mandamus was proper since mandamus is available "to correct improper venue procedure."[61] The dissent disagreed with the propriety of mandamus in this case, finding that the Jefferson County court's ruling on the motion to transfer venue did not constitute "exceptional circumstances" under Texas Supreme Court mandamus precedent.[62]

4. *Limitations*

In *Schneider National Carriers, Inc. v. Bates*, the Texas Supreme Court reversed a decision of the First District Court of Appeals reported in a previous Survey,[63] and held that plaintiffs' property damage claims concerning "contaminants, odors, lights, and noise from the plants" near the Houston Ship Channel were for a permanent rather than a temporary

60. *Rodriguez Delgado*, 322 F. Supp. 2d at 817.

61. *In re* Shell Oil Co., 128 S.W.3d 694, 696 (Tex. App.—Beaumont 2004, pet. granted).

62. *Id.* at 698, 701 (Burgess, J., dissenting).

63. *See* Brent M. Rosenthal, *Toxic Torts and Mass Torts*, 56 SMU L. REV. 2053, 2054-55 (2003) (discussing Bates v. Schneider Nat'l Carriers, Inc., 95 S.W.3d 309 (Tex. App. — Houston [1st Dist.] 2002), *rev'd*, 147 S.W.3d 264 (Tex. 2004)).

nuisance and were thus barred by the statute of limitations.[64] Under Texas law, the statute of limitations begins to run for a permanent nuisance on the date the nuisance commences, but begins anew for each injury caused by a temporary nuisance. The court held that a nuisance is temporary "only if it is so irregular or intermittent over the period leading up to the filing and trial that future injury cannot be estimated with reasonable centrality [sic]," and a nuisance is permanent "if it is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably evaluated."[65] This test requires that the conditions be evaluated over a period of years; if the nuisance is predictable and frequent enough to lower market values of the neighboring land, the nuisance is likely to be permanent. The court also held that, if either the defendant's operations or the plaintiff's injuries are frequent and regular, it raises a rebuttable presumption that the nuisance is permanent—i.e., a constant source causing constant injuries. Finally, the court held that whether the nuisance can or will be abated is not a factor in determining whether the nuisance is temporary or permanent. Based on the court's newly established guidelines, the court held that the plaintiffs' affidavits established a permanent nuisance as a matter of law because they described "conditions that occur at least several times in most weeks or months," frequently enough to allow the jury to assess the impact of the nuisance on property values.[66]

In *Youngblood v. United States Silica Co.*, the Texarkana Court of Appeals reversed summary judgment on the statute of limitations, finding a fact issue concerning the date on which the plaintiff knew or should have known he had silicosis. Although the plaintiff had been told he had abnormal x-rays for several years before suit was filed, the plaintiff consulted a physician every time he was informed of an abnormal x-ray and denied that he was told he had silicosis until the year before he filed suit; while the medical records showed differential diagnoses (which included silicosis as a possibility), the records did "not affirmatively indicate Youngblood was ever made aware of these differential diagnoses."[67] The court held that the plaintiff's repeated visits to his physician after he was notified of abnormal x-rays demonstrated "due diligence in trying to find the cause of his abnormal x-rays."[68] In light of his efforts and the plaintiff's testimony that the doctors did not inform him that he had silicosis, the plaintiff presented "more than a scintilla of evidence" that he discovered his injury within the limitations period and reasonably could not have discovered it sooner.[69]

64. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 268 (Tex. 2004).

65. *Id.* at 281.

66. *Id.* at 290.

67. Youngblood v. United States Silica Co., 130 S.W.3d 461, 470 (Tex. App.—Texarkana 2004, pet. denied).

68. *Id.* at 471.

69. *Id.*

In *Blackmon v. American Home Products Corp.*, a federal district court held that the plaintiffs' failure to pursue administrative remedies for their children's autism allegedly caused by the vaccine preservative thimerosal, as required by the Vaccine Act,[70] barred them from pursuing common law tort remedies. The plaintiffs failed to file administrative claims because they would have been untimely; the Vaccine Act required them to file such claims within thirty-six months of the manifestation of injuries alleged to be caused by the vaccine, and the plaintiffs did not discover the possible causal link between thimerosal and autism within that time. The court rejected the argument that the exhaustion-of-remedies requirement did not apply to claims that would be untimely under the Act, finding that such a construction of the statute "would nullify the limitations provision and, with it, the Vaccine Act itself."[71] The court also rejected the plaintiffs' arguments that the absence in the Vaccine Act of a provision allowing the filing of claims within a reasonable time after the discovery of a causal relationship between the vaccine and the injury violated their constitutional rights to equal protection, due process, and trial by jury.[72]

II. SUBSTANTIVE ISSUES

A. Theories of Liability and Defenses

1. Duty of a Supplier and the "Sophisticated Employer" Doctrine

The most anticipated development in the substantive law governing toxic and mass torts was the release by the Texas Supreme Court of its opinion in *Humble Sand & Gravel, Inc. v. Gomez*. In *Humble Sand*, the supreme court considered whether the "sophisticated user" doctrine absolved a supplier of flint used in abrasive blasting (sandblasting) of liability for injuries (silicosis) sustained by a worker as a result of his use of the product. The worker claimed that the supplier was liable because the packages of flint did not bear a label adequately warning workers of the dangers of exposure to silica caused by the use of flint in abrasive blasting; the supplier countered that it had no duty to convey such a warning because employers engaged in abrasive blasting operations were fully knowledgeable about the hazards and were in the best position to warn of, and protect workers from, such hazards. The jury found that the supplier's negligence proximately caused the worker's injuries and awarded damages. The trial court entered judgment on the verdict, and, in an opinion described three Surveys ago, a divided Texarkana Court of Appeals affirmed.[73]

The supreme court reversed in a majority opinion by Justice Hecht, holding that the record did not adequately establish whether or not the

70. 42 U.S.C.A. § 300aa-11(a)(2)(B) (West 2003).
71. Blackmon v. Am. Home Prods. Corp., 328 F. Supp. 2d 647, 654 (S.D. Tex. 2004).
72. *Id.* at 655-58.
73. Humble Sand & Gravel, Inc. v. Gomez, 48 S.W.3d 487 (Tex. App.—Texarkana 2001), *rev'd*, 146 S.W.3d 170 (Tex. 2004), *discussed in* ERROR! BOOKMARK NOT DEFINED., *Toxic Torts and Mass Torts*, 55 SMU L. REV. 1375, 1375-76 (2002).

flint suppliers had a duty to warn workers of the dangers posed by the use of flint in abrasive blasting. The court emphasized that the existence of such a duty depended not on the individual circumstances of a particular case, but on the circumstances prevailing in the "abrasive blasting industry as a whole."[74] The court identified six factors to apply in determining whether flint suppliers had a duty to warn: (1) the likelihood of serious injury from a supplier's failure to warn; (2) the burden on a supplier of giving a warning; (3) the feasibility and effectiveness of a supplier's warning; (4) the reliability of operators to warn their own employees; (5) the existence and efficacy of other precautions; and (6) the social utility of requiring, or not requiring, suppliers to warn. Application of these factors, the court noted, would allow the court to decide the ultimate issue of whether the supplier "has a reasonable assurance that its warning will reach those endangered by the use of its product."[75] Although the burden of proof is usually on the plaintiff to show the existence and scope of duty, a product supplier invoking the "sophisticated user" doctrine to avoid liability bears the burden of negating the duty to warn because "in most circumstances a supplier's duty is simply assumed." Cases in which that "assumption is not warranted, as when sales are in bulk or there is an intermediary who should have the duty to warn, seem more the exception than the rule."[76] The court added that the supplier should bear the burden of negating duty because suppliers generally have better access to proof of industry practices which would render warnings from suppliers ineffective and because most courts have treated the "intermediary issue" as defensive.[77] The court noted that the existence and scope of the duty to warn is a question of law for the court, but if evidence relevant to the duty issue is in conflict, "that conflict should first be resolved by the finder of fact and then the duty issue determined."[78]

Justice O'Neill issued a dissenting opinion joined by Justice Schneider in which she observed that although the defendant probably appreciated the opportunity for a retrial, the majority opinion did not provide the defendant with "a clue what to do" to negate the supplier's duty to warn.[79] Contrary to precedent, Justice O'Neill argued, the majority adopted a sophisticated user doctrine that "swallows the rule, absolving manufacturers of the duty to warn even when the product is admittedly dangerous and the manufacturer could easily provide an effective warning."[80] Justice O'Neill attributed the majority's "abandonment of fundamental product-liability principles" to its desire "to judicially cabin widespread and oft-abused mass-tort claims that have arisen from latent

74. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 192 (Tex. 2004).
75. *Id.* at 196 (quoting Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591 (Tex. 1986)).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 197 (O'Neill, J., dissenting).
80. *Id.* at 199.

workplace injuries caused by substances like silica and asbestos."[81]

2. *Duty of a Product Designer*

In *Blackmon v. American Home Products Corp.*, a federal district court held that a product designer who does not participate in or profit from the product's manufacture does not owe a duty to plaintiffs who are injured by the product. Although Eli Lilly ("Lilly") designed thimerosal, a mercury-containing preservative that was used in vaccines received by the minor plaintiffs, Lilly did not license other manufacturers to produce thimerosal or otherwise profit when companies copied Lilly's design. The court determined that the burden of passing on information about the hazards of thimerosal to unlicensed manufacturers was too great and, even if Lilly had such a duty to pass on information of known or knowable hazards, plaintiffs could offer no evidence that Lilly knew or should have known of the risk of autism from exposure to vaccines containing thimerosal.[82]

3. *Duty of a Lessor*

In *Caldwell v. Curioni,* the Dallas Court of Appeals reversed summary judgment, finding that the plaintiff presented evidence that the landlord knew or should have known that toxic mold was present in the apartment at the time it was leased but concealed that fact from the tenants. Although landlords generally do not have a duty to protect tenants from dangerous conditions on leased premises, a landlord may be liable if he conceals defects of which he is aware or should be aware. The plaintiffs' experts testified that the mold probably resulted from flooding caused by a broken water heater. Before the plaintiffs rented the apartment, the landlord repainted the carpet tackboards, apparently to conceal the mold problem, and advertised the apartment as "freshly redone."[83] In light of this evidence, the defendant "failed to conclusively negate he owed a duty to the Caldwells."[84]

4. *Government Liability for Toxic Exposures*

In *City of San Antonio v. Pollock,* the San Antonio Court of Appeals affirmed judgment for the plaintiffs, holding that the plaintiffs' nuisance claim for personal injuries from benzene exposure was brought "in the nature of a takings claim" and thus fell within the exception to government immunity provided in Article I, section 17 of the Texas Constitution.[85] To fall within the exception, the nuisance must have resulted from

81. *Id.* at 203.
82. Blackmon v. Am. Home Prods. Corp., 346 F. Supp. 2d 907 (S.D. Tex. 2004).
83. Caldwell v. Curioni, 125 S.W.3d 784, 791 (Tex. App.—Dallas 2004, pet. denied).
84. *Id.*
85. City of San Antonio v. Pollock, 155 S.W.3d 322, 327 (Tex. App.—San Antonio 2004, no pet.).

the City's "non-negligent acts."[86] The release of benzene from the municipal landfill was caused by the City's "intentional failure to act" because the City: (1) ignored internal recommendations that monitors be placed in backyards along the perimeter of the landfill; (2) failed to update the methane system for three years after reports showed the system was inadequate "to insure compliance and safety;" (3) ignored TNRCC recommendations that testing be performed ten feet below the surface; and (4) misled the public, including the plaintiff, about the risk even when the City knew toxins were migrating into the neighborhood from the landfill.[87] Because of the City's failure to act, the benzene migrated onto the plaintiffs' property where prenatal exposure caused the minor plaintiff to develop acute lymphocytic leukemia. Having found that the nuisance claim fell within the immunity exception, the court concluded that personal injury damages, provided for in nuisance actions under Texas law, are also recoverable against the City.

In *Watson v. Dallas Independent School District*, the Waco Court of Appeals affirmed summary judgment for the defendant school district, holding that the defendant enjoyed sovereign immunity from the plaintiffs' claims for toxic exposures during their employment as maintenance workers with the school district. Although the Hazard Communication Act expressly applies to public schools, it does not provide a private cause of action for violations of the statute and thus does not waive sovereign immunity.[88] Because the Labor Code does not apply to political subdivisions of the State (such as the defendant school district), it too does not waive sovereign immunity.[89] The plaintiffs' claims for occupational exposure to toxins also do not come within the waiver of sovereign immunity provided by the Texas Tort Claims Act because the claims do not involve a motor vehicle. Nor do the claims fall within Article I, section 17 of the Texas Constitution because they do not implicate the plaintiffs' right to enjoy their property.[90]

B. Admissibility and Legal Sufficiency of Scientific Evidence of Causation

Texas trial and appellate courts continued to carefully scrutinize plaintiffs' scientific proof of causation in toxic tort cases. In *Brookshire Brothers, Inc. v. Smith,* the First District Court of Appeals in Houston issued an opinion on rehearing reversing judgment for the plaintiff, holding that material safety data sheets ("MSDS") and warning labels cannot provide a basis for an expert opinion on general causation because they do not "provide the type of specific, detailed showing of scientific reliability re-

86. *Id.*
87. *Id.* at 328.
88. Tex. Health & Safety Code Ann. §§ 502.001-502.020 (Vernon 2003).
89. Tex. Lab. Code Ann. § 411.103 (Vernon 1996).
90. Watson v. Dallas Indep. Sch. Dist., 135 S.W.3d 208 (Tex. App.—Waco 2004, no pet.).

quired to accord evidentiary value to an expert's opinion."[91] The MSDS and the warning labels provided on the cleaning products to which plaintiff was exposed stated that high levels of exposure could cause asthma and reactive airways dysfunction syndrome ("RADS"), the same injury suffered by the plaintiff. However, the MSDS and warning labels did not cite studies to document the scientific basis for concluding that the products could cause these injuries. Because the plaintiff's expert cited no scientific literature that supported a finding of general causation—i.e, that the product was capable of causing RADS—the plaintiff had no evidence of causation.

In *In re R.O.C.*, the San Antonio Court of Appeals affirmed the trial court's exclusion of the plaintiffs' experts' testimony and the resulting summary judgment on causation because the plaintiffs failed to show that they were exposed to injurious forms of asbestos or silica, and further failed to offer reliable diagnoses of asbestosis or silicosis. Although the plaintiffs provided proof that the paint and coating products used in the facility contained asbestos and that the air was very dusty when these products were sprayed, sanded or ground, they did not provide expert testimony to establish that friable asbestos fibers were released in this dust. Additionally, the type of silica contained in the products at issue was not a type that had been proven to cause silicosis. The plaintiffs' diagnoses themselves could not be considered proof of the plaintiffs' exposure to asbestos, silica, or both, because the diagnoses "are circular, from an assumption of exposure to a diagnosis based on that assumption."[92]

On the other hand, in *City of San Antonio v. Pollock,* the San Antonio Court of Appeals affirmed judgment for the plaintiff, finding evidence that benzene was present in and around the plaintiffs' home during the mother's pregnancy in quantities sufficient to cause acute lymphocytic leukemia ("ALL"), and that the minor plaintiff demonstrated chromosomal markings that signal exposure-related leukemia. The plaintiff and defense experts provided models based on historical benzene and methane gas readings from nearby wells to estimate the levels of benzene present in the home during the mother's pregnancy, both experts estimating exposure levels that were high enough to cause ALL. Based on this evidence, the plaintiff's expert testified that exposure to benzene from the municipal landfill caused the minor plaintiff's ALL. The court refused to entertain the defendant's argument that the evidence of causation was insufficient under *Merrell Dow Pharmaceuticals, Inc. v. Havner*[93] because

91. Brookshire Bros. v. Smith, No. 01-02-00677, 2004 WL 1064776, at *5 (Tex. App.—Houston [1st Dist.] May 13, 2004, no pet.). This is the court's second opinion on rehearing. The first opinion on rehearing was reported in last year's Survey. *See* Rosenthal, *supra* note 47, at 1277-78 (discussing Brookshire Bros. v. Smith, No. 01-02-00677, 2003 WL 23123043 (Tex. App.—Houston [1st Dist.] Dec. 31, 2003, no pet.)).

92. *In re* R.O.C., 131 S.W.3d 129, 137 (Tex. App.—San Antonio 2004, no pet.).

93. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).

the defendant failed to preserve error by objecting on this basis at trial.[94]

In *Caldwell v. Curioni,* the Dallas Court of Appeals reversed summary judgment for the defendants in a toxic mold case, holding that reports and affidavit testimony by plaintiff's experts provided evidence "regarding the amount and types of mold found," including the presence of a particular strain of mold which reportedly "produces a myotoxin documented as toxic to humans."[95] Although plaintiff's expert admitted the dearth of standards for permissible airborne exposure to molds, the court held that "the lack of any established standards does not confirm that the levels of mold present were not dangerous."[96] The court found that the plaintiff had presented more than a scintilla of evidence to defeat summary judgment.

The federal courts have also continued to demand solid proof of causation in toxic tort cases. In *Blackmon v. American Home Products Corp.*, a federal district court held that the plaintiff's citation to a single study, which found insufficient data to reach a conclusion on the ability of thimerosal-containing vaccines to cause neurological damage in children, was no evidence that the minor plaintiff's autism was caused by exposure to thimerosal. The court noted that the plaintiffs had made no effort to exclude other causes of autism or to show that the thimerosal worked in combination with those other known causes to cause the minor plaintiff's autism. Finally, the court held that any link between the defendant designer's actions in the 1920s and 1930s and the minor plaintiff's autism several decades later was not foreseeable and was too attenuated to support a causation finding.[97]

94. City of San Antonio v. Pollock, 155 S.W.3d 322, 327 (Tex. App.—San Antonio Aug. 18, 2004, no pet.). The court also rejected the defendant's argument concerning the jury's failure to make a finding on causation. Because the defendant failed to object to the omission of this element from the charge, the court deemed the finding necessary to support the judgment.

95. Caldwell v. Curioni, 125 S.W.3d 784, 793 (Tex. App.—Dallas 2004, pet. denied).

96. *Id.*

97. Blackmon v. Am. Home Prods. Corp., 346 S.W.3d 907 (S.D. Tex. 2004).