Toxic Torts and Mass Torts

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TOXIC torts and mass torts present distinct challenges for the judicial system. Because toxic-tort cases frequently involve latent injuries, complex and cutting-edge theories of causation, and an abundance of alleged tortfeasors, traditional legal concepts must often be tweaked, modified, or reconfigured to produce just and acceptable results. Mass torts, defined simply as litigation involving many claims of injury allegedly caused by the same product or tortious conduct, present obvious but novel case-management problems.

Having established many of the major ground rules applicable in these relatively new areas of litigation in prior years, the Texas appellate courts did not plow much new ground during the Survey period but largely applied those rules to new fact patterns. Judicial developments include not only appellate court rulings, but also landmark rulings issued by the trial courts presiding over the statewide asbestos multidistrict litigation proceeding and the federal silica multidistrict proceeding. Most of the noteworthy activity during the Survey period took place in the legislatures. The Texas Legislature joined other states in enacting sweeping legislation that promises drastically to curtail asbestos and silica litigation in the state courts. In addition, Congress considered, but has not yet passed, federal legislation that would eliminate asbestos litigation entirely and channel claims for compensation to a new bureaucracy run by the federal government and funded by industry. Congress also passed legislation designed to correct perceived abuses in class-action litigation.

I. LEGISLATIVE DEVELOPMENTS

A. TEXAS LEGISLATION

In 2003, the Texas Legislature addressed perceived deficiencies in Texas tort law by enacting legislation still known to practitioners and commentators as "House Bill 4." Although House Bill 4's caps on non-

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economic damages in medical malpractice cases received the most attention in the popular press, the bill's scope is so comprehensive that it has been described by Justice Hecht as "among the most sweeping statutes the legislature has ever enacted."[1] As a previous Survey notes, House Bill 4 contains provisions that specifically and directly address the management of mass-tort litigation, such as the statute creating MDL procedures for mass-tort cases and the statute amending rules governing class actions.[2] Additionally, many substantive provisions of general application in the bill—such as the effective abolition of joint and several liability, the erection of presumptions of non-liability for injuries caused by a product upon proof of federal agency approval of the product, and the creation of a procedure for partial shifting of attorney's fees following a formal offer of settlement—will have a particular impact on toxic-tort litigation.

In its 2005 session, the Texas Legislature was more focused in its revision of tort law. Its principal achievement in this area was its enactment of Senate Bill 15, an overhaul of the common-law rules for resolving claims for injuries caused by exposure to asbestos or silica. Under the common law as applied in Texas (and in most states), a person could recover damages for any injury or abnormality caused by asbestos or silica, regardless of its severity. For decades, lawyers and legal scholars with ties to the asbestos industry argued that because of the vast number of persons claiming compensation for such injuries, the common-law standard was too permissive.[3] Compensation should be limited, these commentators contended, to persons who could demonstrate significant impairment from an asbestos-related disease. They proposed that courts adopt specific, "objective" medical criteria for establishing impairment and place any claim in which the claimant could not satisfy the criteria on an "inactive" or "suspense" docket. Alternatively, they urged Congress and state legislatures to pass laws making the ability to satisfy specific medical criteria a substantive prerequisite to recover damages in asbestos cases.[4]

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1. Justice Nathan L. Hecht, *House Bill 4 Symposium Issue*, 46 S. TEX. L. REV. 729, 729 (2005).

2. Brent M. Rosenthal, Misty A. Farris & Carla M. Burke, *Toxic Torts and Mass Torts*, 57 SMU L. REV. 1267, 1267 (2004).

3. *See, e.g.*, Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 383 n.aa1 (1993) (acknowledging that "the research reflected in this Article was funded in part by the Center for Claims Resolution (CCR), an organization established to pursue alternatives to asbestos litigation"); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 541 n.a1 (1992) (acknowledging that the author "wrote on this subject at the request of the Center for Claims Resolution (CCR), a non-profit claims resolution facility representing twenty companies involved as defendants in the asbestos litigation, and his work was funded by the CCR").

4. *See* Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Congress Should Act To Resolve the National Asbestos Crisis: The Basis in Law and Public Policy for Meaningful Progress*, 44 S. TEX. L. REV. 839, 870-72 (2003); George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 985-87 (2003).

In May 2004, the Texas court presiding over the statewide asbestos multidistrict litigation entered an order refusing to create an inactive docket for so-called "unimpaired" cases.[5] While petitions for review of the order were pending in the Texas Supreme Court, the Texas Legislature finally succumbed to the pressure for reform and enacted medical criteria for both asbestosis and silicosis claims.[6] The substantive and procedural requirements for pursuing claims based on injuries caused by exposure to asbestos and silica are contained in new Chapter 90 of the Texas Civil Practice and Remedies Code. Under the legislation, all plaintiffs seeking compensation for an injury caused by asbestos or silica must file a report from a board-certified physician attesting to the presence of the disease and its relationship to the substance in question.[7] The reports filed by plaintiffs seeking damages for nonmalignant asbestos-related and silica-related diseases must additionally (1) state that the plaintiff was physically examined by the physician who prepared the report or by a medical professional under the physician's supervision and control; (2) contain a detailed occupational, exposure, medical, and smoking history; (3) verify that the plaintiff's x-rays show abnormalities of a specified level of profusion (at least 1/1 under the grading system of the International Labour Organization); and (4) verify that the plaintiff has pulmonary impairment as demonstrated by specific abnormal findings on pulmonary-function tests.[8] The law further provides that in exceptional cases, plaintiffs that do not meet the impairment criteria may nevertheless qualify for compensation if their x-rays show a greater degree of abnormality. Cases filed after the effective date of the act (September 1, 2005) in which the plaintiff does not file the required report are subject to mandatory dismissal.[9]

The legislation also broadens the reach of the MDL statute by making it applicable to asbestos and silica cases filed before September 1, 2003, unless (1) the action was set for trial, and was actually tried, within 90 days of the act's effective date; (2) the plaintiff served a report complying with the new requirements within 90 days of the act's effective date; or (3) the case involves an alleged asbestos-related mesothelioma or an asbestos- or silica-related cancer.[10] Thus, except for cases involving cancer or the handful of cases in which plaintiffs filed complying reports, all asbestos and silica personal-injury litigation is now subject to the management of the respective MDL pretrial courts. The act further provides that cases transferred to the MDL proceeding under the new law may not be remanded for trial unless and until the plaintiff serves a report complying

5. *See In re* Union Carbide Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding [mand. denied]).

6. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Sess. Law. Serv. 169.

7. TEX. CIV. PRAC. & REM. CODE ANN. § 90.003 (Vernon Supp. 2005) (asbestos); TEX. CIV. PRAC. & REM. CODE ANN. § 90.004 (Vernon Supp. 2005) (silica).

8. *Id.* §§ 90.003-.004.

9. *Id.* § 90.007.

10. *Id.* § 90.010(a).

with the new requirements.[11] Additionally, the new law prohibits consolidation of asbestos or silica personal-injury cases for trial; the cases must be tried individually "unless all parties agree otherwise."[12]

Senate Bill 15 purports to confer three benefits on some persons exposed to asbestos or silica. First, it all but abolishes the statute of limitations for injuries caused by exposure to asbestos or silica. The bill adds a new section to the Civil Practice & Remedies Code, which provides that a cause of action for injuries caused by asbestos or silica accrues on the date that the claimant serves on a defendant the report required by the new legislation or on the date of the exposed person's death, whichever is earlier.[13] Although the statute of limitations may bar wrongful-death cases in which the cause of the fatal disease is initially unknown, it is unlikely that the statute will ever bar another personal-injury case, as the date of accrual is now entirely within the control of the plaintiff and the plaintiff's attorney.

The legislation also amends the Government Code to require trial courts to give scheduling preference to "actions in which the claimant has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer or acute silicosis."[14] Although many courts have historically given preferential or special settings in malignancy cases as an exercise of judicial discretion, the granting of preference in such cases is now a statutory imperative.

Finally, the bill adds to the Insurance Code a provision that prohibits insurance companies from "us[ing] the fact that a person has been exposed to asbestos fibers or silica" to "reject, deny, limit, cancel, refuse to renew, increase the premiums for, or otherwise adversely affect the person's eligibility for or coverage under the policy or contract."[15] It is now against the law in Texas for an insurance company to discriminate against persons exposed to asbestos or silica in providing coverage or in setting premiums.

Texas was not alone in enacting minimum medical criteria for claimants seeking compensation for injuries caused by exposure to asbestos or silica. Legislatures in Florida, Georgia, and Ohio passed statutes adopting similar criteria for application in asbestos and silica litigation.[16] However, trial courts in Ohio and Georgia have issued orders holding that application of the new statutory requirements would violate various provisions of the respective state's constitution.[17] It remains to be seen

11. *Id.* § 90.010(d).
12. *Id.* § 90.009.
13. *Id.* § 16.031.
14. TEX. GOV'T CODE ANN. § 23.101(a)(7) (Vernon Supp. 2005).
15. TEX. INS. CODE ANN. art. 21.53X(c) (Vernon 2005).
16. FLA. STAT. ANN. § 774.204 (West Supp. 2005); GA. CODE ANN. § 51-14-1 (Supp. 2005); OHIO REV. CODE ANN. § 2307.92 (West 2005).
17. *In re*: Special Docket No. 73958, in the Court of Common Pleas of Cuyahoga County, Ohio, Entry and Opinion (Jan. 6, 2006) (per Hanna, Sepellacy, and Sweeney, J.J.) (on file with the author); Judith H. Ross v. Georgia Pacific Corp., No. 2003AB00206, in the

whether similar constitutional challenges will be asserted against the application of Senate Bill 15 in Texas.

Absent a successful constitutional challenge, the effect that Senate Bill 15 will have on asbestos and silica personal-injury litigation cannot be overstated. From now on, asbestos and silica cases may proceed to trial only with the approval of the MDL pretrial court. Only cases involving catastrophic injuries such as mesothelioma, lung cancer, and disabling asbestosis or silicosis may proceed to trial, and, absent an unlikely agreement of the parties, they must be tried one at a time. Application of the statute will thus dramatically reduce the volume, if not the quality, of asbestos and silica cases filed and tried in Texas.

B. Federal Legislation

The most significant developments in Congress during the Survey period relating to mass torts and toxic torts involved proposed legislation that did *not* pass. For many years, Congress has considered but failed to enact proposals that would reform asbestos-litigation in the state and federal courts by imposing medical criteria on claimants similar to that ultimately enacted in Texas and other states. In 2004, the major proponents of asbestos litigation reform abandoned this approach in favor of a proposal that would channel all asbestos claims to a federally administered trust funded by defendants in the asbestos litigation, their insurers, and bankruptcy trusts created to pay asbestos claims. Although the bill failed in 2004, it was reintroduced on April 8, 2005 as Senate Bill 852, the "Fairness in Asbestos Injury Resolution Act of 2005."[18] After extensive private negotiations with the manufacturers and insurers who would fund the trust, public committee hearings, and lengthy mark-up sessions, the Senate Judiciary Committee voted 13-5 to approve the measure.[19] Some senators, however, noted that they did not support the bill as currently drafted; they only voted to approve the bill to send it to the full Senate for further debate and amendment. Predictably, some Democrats asserted that the $140-billion fund that the bill would create would be too small to compensate all victims of asbestos disease, while several Republicans complained that the proposed fund was too generous. Although approval of the bill by the committee created momentum, prospects for passage suffered a serious blow when some manufacturers and insurers withdrew their support. Like Rasputin, however, this ambitious proposal for asbestos-litigation reform has not succumbed easily. Republican Senate leader William Frist has announced his intention to call the bill to the floor in the first part of 2006.[20]

Superior Court of Fulton County, Georgia (Nov. 25, 2005) (per Downs, J.) (on file with the author).

18. S. 852, 109th Cong. (2006).

19. Stephen Labaton, *Bill To Create Asbestos Disease Fund Goes to Senate for Vote*, N.Y. Times, May 27, 2005, at C7.

20. *Frist Says Asbestos Bill Will Be First Order of Business Next Year*, Congress Daily, Nov. 16, 2005, *available at* 2005 WL 18588567.

Despite pressure from the oil industry and other energy interests, Congress refused to include a provision preempting liability for environmental harm caused by the fuel additive methyl tertiary butyl ether ("MTBE") in the Energy Policy Act of 2005. Since 1990, MTBE has been widely used by gasoline manufacturers to cleanse automobile emissions, but the additive has leaked from underground storage tanks, contaminating drinking-water supplies throughout the country. The version of the energy bill approved by the House contained a "safe harbor" provision that would have relieved gasoline and MTBE suppliers of responsibility under state product-liability law for clean-up costs. The liability waiver would have been retroactive to September 5, 2003, and would have barred several pending lawsuits brought by municipalities and other providers of drinking water.[21] But the provision was opposed by water suppliers and environmental groups and was omitted from the legislation signed into law by President Bush on August 8, 2005.[22]

One piece of legislation that Congress did manage to enact is the Class Action Fairness Act of 2005 (the "Act"), signed into law by President Bush on February 18, 2005.[23] The Act is intended to remedy perceived abuses of the class-action device by state courts, including the increasing willingness of remote state courts to certify nationwide class actions that have little connection with the jurisdiction and the proliferation of "coupon settlements" that provide little benefit to class members but can generate large fees for class counsel. The Act broadens federal court jurisdiction over class actions by amending the diversity statute to authorize federal jurisdiction over any proposed class action in which the aggregate amount in controversy exceeds $5 million and in which any plaintiff is diverse from any defendant.[24] The Act also requires courts presiding over class actions in which coupon settlements are proposed to calculate class counsel's attorney's fee based on either the value of the coupons actually redeemed by class members (as opposed to the value of the coupons issued by the defendant) or by the hours reasonably spent by counsel on the case.[25] Although the substantive provisions of the Act are directed primarily at commercial class actions rather than mass-tort class actions, the Act includes a provision authorizing the exercise of federal diversity jurisdiction over certain "mass actions" in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or

21. Debra DeHaney-Howard, *Major Victory for Mayors on MTBE Liability Protection*, U.S. MAYOR NEWSPAPER, Aug. 8, 2005, *available at* http://www.usmayors.org/USCM/us_mayor_newspaper/documents/08_08_05/MTBE.asp.

22. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

23. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

24. Pub. L. No. 107-2, § 4, 119 Stat. 4 (2005) (codified at 78 U.S.C. 1332(d)). The Act, however, requires abstention if two-thirds or more of the proposed class members are citizens of the state in which the action was filed and permits abstention if at least one-third of the class are citizens of the forum state. *Id.*

25. *Id.* § 3 (codified at 28 U.S.C. § 1712).

fact."[26] It appears that this provision intended to eliminate mass consolidations such as the unified asbestos trial of some 8,000 plaintiffs in West Virginia in 2002.[27] Although widely reported, such "mega-trials" are rare, so it is unlikely that this provision will have a major impact on mass tort litigation in Texas or elsewhere.

II. TEXAS MDL TRANSFERS AND PROCEEDINGS

A. The Silica Litigation Transfer Order

As reported in the last Survey, House Bill 4 created a Judicial Panel on Multidistrict Litigation ("MDL"), which consolidated cases involving allegations of injury caused by exposure to silica before Judge Tracy Christopher of the 295th District Court of Harris County as the pretrial judge.[28] Judge Christopher has entered a series of case-management orders designed to prepare the cases for trial promptly and to promote the remand of cases in an orderly, manageable way.[29] Judge Christopher has not yet entered any order relating to any common substantive legal issue in the silica litigation.

B. Orders of the State Asbestos MDL Pretrial Court

The district judge overseeing the Texas multidistrict litigation for asbestos cases, Judge Mark Davidson of the Harris County Eleventh District Court in Houston, issued several significant rulings in 2004 and 2005. The first ruling, issued on January 20, 2004, involved a global motion filed by DaimlerChrysler Corporation and other automobile manufacturers. The manufacturers asked the court to strike all expert testimony that asbestos-containing "friction products," such as brakes and clutches, can cause any asbestos-related disease. The court granted the motion in part, finding that epidemiological studies involving friction products were not sufficient to "establish a causation link."[30] The court denied the motion with respect to case-specific evidence based on an individual plaintiff's physical condition and occupational history. Citing the testimony of a cell biologist who specialized in studying asbestos-related diseases, the court found that such case-specific testimony was "scientifically provable, measurable, peer-reviewed and credible."[31] The court concluded that it would be necessary to conduct "a case-by-case review of the occupational

26. *Id.* § 4 (codified at 28 U.S.C. § 1332(d)(4) (2000)).

27. State *ex rel.* Mobil Oil Co. v. Gaughan, 563 S.E.2d 419 (W. Va. 2002). *See also In re* Hopeman Bros., 569 S.E.2d 409 (Va. 2002) (allowing consolidated trial of approximately 1,300 claims).

28. *In re* Silica Prods. Liab. Litig., 166 S.W.3d 3, 8 (Tex. Judicial Panel on Multidistrict Litigation 2004); *see* Brent M. Rosenthal, Misty A. Farris & Amanda R. Tyler, *Toxic Torts and Mass Torts*, 58 SMU L. Rev. 1183, 1184 (2005).

29. 295th Court-Orders, http://www.justex.net/civil/295/orders.htm.

30. *In re* Asbestos Litigation, No. 2004-03964 (11th Dist. Ct., Harris County, Tex. Jan. 20, 2004), *available at* http://www.justex.net/civil/11/orders.htm (follow "Havner Ruling" link).

31. *Id.*

history of each Plaintiff, together with a review of the pathology, to determine whether there is a scientific basis to admit any evidence of causation. . . ."[32]

The MDL court subsequently issued a more comprehensive ruling on products containing chrysotile asbestos. Georgia-Pacific and Garlock, manufacturers of chrysotile asbestos products, made a global motion to exclude expert testimony that chrysotile asbestos causes mesothelioma, a rare form of cancer caused by exposure to asbestos. The manufacturers argued that the scientific evidence did not establish that chrysotile asbestos, as distinguished from other types of asbestos, caused mesothelioma. After a lengthy hearing, the MDL court denied the motion on June 30, 2005. Citing several epidemiological studies that reported a statistically significant link between chrysotile asbestos and mesothelioma, the court concluded that the plaintiffs had "made a valid epidemiological case."[33] The court also reviewed expert testimony from two cell biologists who studied asbestos-related diseases and found that the testimony was "credible, consistent, generally accepted in the scientific literature, and is sufficient evidence, even without epidemiological evidence discussed above, for proof of general causation."[34]

The MDL pretrial court also issued a letter ruling in which it considered motions for summary judgment filed by two suppliers of raw asbestos who contended that they owed no duty to the plaintiffs because the asbestos was merely a "component" in products that other companies manufactured and sold. The suppliers argued that the court should apply the test in section 5 of the Restatement (Third) of Torts: Products Liability, under which liability is imposed on the supplier of a component of a product only if (1) the component is defective in itself, or (2) the supplier substantially participates in the integration of the component into the design of the product and the inclusion of the component causes the product to be defective. The MDL pretrial court agreed that the Texas Supreme Court would apply the Restatement's test, but found that the suppliers had not established, as a matter of law, that the test would not be satisfied. The court cited evidence that one of the suppliers "substantially participated" in the design of the finished products by discounting health risks associated with asbestos and noted that the other supplier had failed to establish that asbestos was not "inherently dangerous." The court thus denied both defendants' motions.[35]

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32. *Id.*

33. *In re* Asbestos Litigation, No. 2004-03964 (11th Dist. Ct., Harris County, Tex. June 30, 2005), *available at* http://www.justex.net/civil/11/orders.htm (follow "Georgia Pacific Robinson Havner" link).

34. *Id.*

35. *In re* Asbestos Litigation, No. 2004-03964 (11th Dist. Ct., Harris County, Tex. Sept. 26, 2005), *available at* http://www.justex.net/civil/11/orders.htm (follow "THAN and UC Bulk Supplier MFSJ" link).

C. Orders of the Federal Silica MDL Court

No discussion of developments in mass-tort and toxic-tort litigation during the Survey period would be complete without mention of the voluminous and scathing critique of case-screening practices in the federal silica MDL proceeding by United States District Judge Janis Jack.[36] In September 2003, the federal MDL panel transferred over 10,000 silica claims to Judge Jack's court in Corpus Christi, most of which had been originally filed in Mississippi state court and removed to federal court. The plaintiffs, represented by various counsel, disputed federal court jurisdiction and moved for remand of the cases to Mississippi state court. In the course of supervising discovery on the jurisdictional issues, Judge Jack became concerned that many of the claims lacked a sufficient factual basis to support the exercise of jurisdiction. She ordered plaintiffs' designated medical experts to appear in court for a *Daubert* hearing to determine the admissibility of the diagnosis of injury caused by silica. After three days of testimony, Judge Jack concluded that "virtually all of the diagnoses fail to satisfy the minimum, medically-acceptable criteria for the diagnosis of silicosis, and therefore, the testimony of the challenged doctors cannot be admissible under the standards set by Rule 702 and Daubert."[37] Judge Jack recited her grounds for this conclusion at exhaustive, and painful, length: the number of silicosis filings in Mississippi exceeded by a factor of five the total number of silicosis cases expected in the entire United States during the same time period; of the 9,000 claimants that filed diagnosis information, more than 8,000 treating doctors were identified but only 12 were listed as witnesses who could attest to the silicosis diagnosis; the doctors often did not sign, prepare, or even review their reports; the diagnosing verbiage in thousands of the reports was identical; several of the doctors withdrew their diagnoses when advised by defense counsel of the underlying data; thousands of the claimants had also previously claimed compensation for asbestosis, although the presence of asbestosis and silicosis in the same person, though theoretically possible, is extremely rare; and several of the doctors interpreted the very same x-ray as showing only silicosis when the x-ray was offered to support a claim for silicosis and as showing only asbestosis when the x-ray was offered to support an asbestosis claim. Judge Jack expressed her view that "these diagnoses were about litigation rather than health care" and "were manufactured for money."[38] However, because Judge Jack also concluded that the court lacked subject-matter jurisdiction over the vast majority of the claims, Judge Jack's observations were, for the most part, advisory only.[39] Judge Jack found that the court had jurisdiction over one case involving 100 plaintiffs, and ruled that the diagnoses of

36. *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 566 (S.D. Tex. 2005).
37. *Id.* at 625.
38. *Id.* at 635.
39. *Id.* at 665.

silicosis were inadmissible in that case.[40] The judge added that by continuing to prosecute the claims after learning that the diagnoses were "fatally unreliable,"[41] plaintiffs' counsel had "multiplie[d] the proceedings . . . unreasonably and vexatiously" and would be required to pay defendants' costs, expenses, and attorney's fees arising from the *Daubert* hearing and related proceedings.[42]

III. DEVELOPMENTS IN CASE LAW

A. Procedural Issues

1. Personal Jurisdiction

In toxic and mass tort cases, the first obstacle faced by many plaintiffs is obtaining personal jurisdiction over manufacturers in a global market. In *Glas v. Adame*,[43] a class action brought by United States veterans suffering from Gulf War Syndrome, the Fourteenth District Court of Appeals in Houston reversed the trial court's denial of a special appearance by a German manufacturer of glass vessels used in Iraq's chemical-warfare program. First, the court concluded that the jurisdictional analysis would include only contacts until the date of injury: in this case, the summer of 1991, when the Gulf War ended. The court rejected the plaintiffs' contention that the discovery rule should apply to define the date of injury. In addition, the court denied the plaintiffs three bases for finding sufficient contacts with Texas. First, the plaintiffs' attempted to impute contacts of related corporate entities, which was rejected without analysis for failure to plead that the entities were a "single business enterprise."[44] Next, the court rejected the plaintiffs' attempt to impute the contacts of a Texas sales representative to the defendant because the evidence was factually insufficient to establish that the sales representative was the defendant's agent, that is, that it "controlled the means and details of [his] work."[45] Finally, the court found that the defendant's own contacts with the forum—product sales transacted almost entirely F.O.B. Germany and several trips to the forum, virtually all either service calls initiated by a customer request or trade exhibitions in which the defendant had no voice in choosing a location—were insufficient to establish general jurisdiction over the defendant.

Even plaintiffs exposed to dangerous products in Texas face difficulties in obtaining jurisdiction over nonresident defendants. In *Thunderbird Supply Co. v. Williams*,[46] the Beaumont Court of Appeals reversed the trial court's denial of a special appearance filed by a New Mexico manufacturer of a silica-containing polishing compound, finding that its sales to

40. *Id.* at 666.
41. *Id.* at 675.
42. *Id.* at 676 (citing 28 U.S.C. § 1927 (2000)).
43. 178 S.W.3d 307 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).
44. *Id.* at 314.
45. *Id.* at 316.
46. 161 S.W.3d 731 (Tex. App.—Beaumont 2005, no pet. h.)

a New York retailer who marketed its product to a Texas jeweler were insufficient to support specific jurisdiction. Comparing the case to *CMMC v. Salinas*, the court found that the evidence did not demonstrate that the defendant "purposefully availed itself of the Texas market" because it did not market its product in Texas or attempt to serve a Texas market.[47] The evidence did not reflect that the defendant "was even aware that a third party marketed Thunderbird's products in Texas."[48] The appellate court declined to consider the plaintiff's argument that the exercise of general jurisdiction over the defendant was warranted because the plaintiff had not alleged in the petition that the defendant had "continuous and systematic contacts" with Texas and because the trial court's findings of fact related solely to specific jurisdiction.[49] The court also declined to remand the case for further discovery because the plaintiff did not request a continuance for further discovery from the trial court.[50]

2. *Statute of Limitations*

Because toxic injuries are often latent and their causes can remain undiscovered for some time, defining the date of accrual and applying the discovery rule is often a contested issue. In *Pirtle v. Kahn*,[51] the First District Court of Appeals in Houston ruled that the statute of limitations began to run on the plaintiff's personal-injury claims for mold-related illness at the time she discovered the mold growing in her apartment rather than at the time that a doctor expressly linked her illness to mold exposure. The plaintiff claimed that she suffered symptoms from the time that she moved into her apartment and was diagnosed with various diseases, but did not discover the mold until about four years later. The plaintiff argued that her action did not accrue until she received the results of environmental mold tests and was diagnosed by her doctor with mold-related disease. The court held that when she discovered the mold in her apartment and believed that it had caused her illness, she was "on notice . . . of facts that would cause a reasonable person to make inquiries sufficient to discover her causes of action."[52] Because the plaintiff did not file her claims for almost three years after she discovered the mold, the court affirmed summary judgment on her claims for negligence, premises liability, and violations of the Deceptive Trade Practices Act; however, the court reversed summary judgment on the plaintiff's claims for common-law fraud or fraudulent inducement, which were governed by a four-year statute of limitations.

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47. *Id.* at 735 (citing CMMC v. Salinas, 929 S.W.2d 435, 436-40 (Tex. 1996)).
48. *Id.*
49. *Id.*
50. *Id.* at 736.
51. 177 S.W.3d 567, 574 (Tex. App. —Houston [1st Dist.] 2005, pet. denied).
52. *Id.* at 574.

3. Federal Removal Jurisdiction

Forum choice remained an issue in toxic-tort cases this year, as defendants continued to accuse plaintiffs of improperly joining resident defendants to avoid federal jurisdiction. In *McDonal v. Abbott Laboratories*,[53] the United States Fifth Circuit Court of Appeals affirmed the district court's refusal to remand the plaintiffs' claims against various manufacturers and physicians for causing their daughter's mercury poisoning. The court held that resident physicians were improperly joined because suit against them was jurisdictionally barred by the National Childhood Vaccine Act ("Vaccine Act") until the plaintiff exhausted her remedies before the United States Court of Federal Claims ("Vaccine Court"). The court noted that if the Vaccine Act applied equally to bar claims against all the defendants, as the district court had found, the common defense theory would require remand of the case because "the resident defendants were no more improperly joined than the non-resident defendants."[54] Citing its decision in *Moss v. Merck & Co.*, however, the court held that the Vaccine Act did not apply to plaintiffs' claims against the thimerosol manufacturers, and the Fifth Circuit reversed the district court's dismissal of those claims. [55] Because the Vaccine Act's jurisdictional defense applied to some, but not all, of the defendants, denial of the motion to remand was proper.

In *Ramirez v. American Home Products*,[56] a federal district court followed *McDonal* in a factually similar case in which the child suffered autism. The court denied the motion to remand, dismissed the plaintiffs' claims against the resident physicians and the vaccine manufacturers without prejudice so that the plaintiffs could pursue their claims before the Vaccine Court, and stayed the plaintiffs' claims against the thimerosal manufacturer pending the plaintiffs' exhaustion of remedies under the Vaccine Act.[57]

4. Case Management and Discovery

Case management and other discovery-control issues continue to arise in mass tort litigation. This Survey period included a case in which an appellate court affirmed a trial court's use of a *Lone Pine* order. The term "*Lone Pine* order" originates from an unreported New Jersey trial court decision from 1986, styled *Lore v. Lone Pine Corp.*,[58] in which the court ordered the multiple plaintiffs to present prima facie causation evidence for their claims against hundreds of defendants before the end of the discovery period. In recent years, some Texas courts have approved

53. 408 F.3d 177 (5th Cir. 2005).
54. *Id.* at 183-84.
55. *Id.* at 185 (citing Moss v. Merck & Co., 381 F.3d 501, 503 (5th Cir. 2004)).
56. No. C.A. B-03-155, 2005 WL 2277518 (S.D. Tex. Sept. 16, 2005).
57. *Id.* at *5-7.
58. No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

of the use of *Lone Pine* orders in certain mass tort cases.[59] In *Bell v. ExxonMobil Corp.*,[60] the First District Court of Appeals in Houston considered a *Lone Pine* order entered by a trial court, which required fifty plaintiffs to submit expert reports and affidavits substantiating their personal-injury and property damage claims arising from an explosion and chemical release at the ExxonMobil plant in Baytown, Texas. These fifty plaintiffs had been parties to an earlier, identical suit filed by seventy-one plaintiffs and had non-suited their claims after the judge in the first case entered a *Lone Pine* order. The plaintiffs then refiled their claims in another court. Unfortunately, their cases were transferred back to the original court, which then reentered the *Lone Pine* order. The plaintiffs did not initially object to the second order, but renewed their objections once the judge threatened dismissal of their claims for noncompliance with the order. When twenty-three of the plaintiffs failed to comply, even after the judge granted additional time to submit the reports and affidavits, the trial court dismissed the claims of those plaintiffs.[61] The plaintiffs appealed the dismissal of their claims, arguing that the trial court lacked the authority to issue the *Lone Pine* order and, in the alternative, that the trial court erred in using the "death penalty" sanction of dismissal for failure to comply with the order.[62] After finding that the appellants waived their first issue by failing to cite authority for their contention that the court lacked the authority to issue the order, the appellate court found that the trial court did not abuse its discretion in issuing the death-penalty sanction, noting the "appellants' many opportunities to comply with the court's order and their refusal to do so."[63]

Given the paramount importance of causation in toxic-tort cases, parties often request leave to perform testing of allegedly contaminated areas. Since these requests can lead to delays in the resolution of cases, courts must balance the need for testing against the need for progress in the litigation. In *In re Dominion Resources, Inc.*,[64] the Corpus Christi Court of Appeals conducted this kind of balancing exercise in considering defendants' requests for testing. The underlying tort case involved allegations of underground hydrocarbon contamination, which the plaintiffs alleged were caused by leaking gasoline- and fuel-storage facilities and a natural-gas pipeline. The plaintiffs' experts concluded that "some of the pipeline's valves leaked creating cone-shaped areas of contamination in

59. *See* Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 268 (Tex. 2004); Martinez v. City of San Antonio, 40 S.W.3d 587 (Tex. App.—San Antonio 2001, pet. denied); *In re* Mohawk Rubber Co., 982 S.W.2d 494 (Tex. App.—Texarkana 1998, orig. proceeding); Adjemian v. Am. Smelting & Ref. Co., No. 08-00-00336-CV, 2002 WL 358829 (Tex. App.—El Paso Mar. 7, 2002, no pet.); *In re* Jobe Concrete Prods., Inc., No. 08-01-00351-CV, 2001 WL 1555656 (Tex. App.—El Paso Dec. 6, 2001, no pet.).

60. No. 01-04-00171-CV, 2005 WL 497295 (Tex. App.—Houston [1st Dist.] Mar. 3, 2005, pet. denied).

61. *Id.* at *1-2.

62. *Id.* at *2.

63. *Id.* at *4.

64. Nos. 13-04-00536-CV, 13-04-00622-CV, 2005 WL 310778 (Tex. App.—Corpus Christi Feb. 10, 2005, no pet. h.).

the soil."[65] The relators, current and former owners of the pipeline, requested leave to "pressure-test the valves and test the soil adjacent to the pipeline to determine if the plaintiffs' theory of contamination is correct."[66] The relators also requested leave to "measure and test abandoned sections of pipe unearthed during excavations near the pipeline" in order to determine "whether the pieces were ever part of the Dominion pipeline."[67] The trial court denied both of these requests.

On mandamus, the court of appeals held that the trial court abused its discretion in denying relators' first request, but not in denying their second request. The court directed the trial court "to allow relators to perform such testing of the ground, valves, and pipe as is reasonably responsive to the . . . testimony of the plaintiffs' experts," but it provided that the "testing must be performed expeditiously and may not delay a further trial setting in this matter."[68] In denying relators' supplemental petition for writ of mandamus as to the second testing request, the court noted that the "destructive testing protocol would entail cutting, marking, cleaning, measuring, and testing the pipe for chemical and metallurgical content."[69] The court held the trial court did not abuse its discretion in finding the destructive testing not warranted "[g]iven the apparent physical discrepancy of the abandoned parts of the pipeline, and given that relators have denied ownership of these parts."[70]

Expert testimony is often the linchpin in toxic-tort cases. One peripheral but crucial issue in many of these cases is any alleged biases of these experts. In *In re Weir*,[71] the defendants filed a petition for writ of mandamus after the trial court ordered a second deposition of defendants' expert witness, Frances W. Weir, for testimony regarding the percentage of his income received from litigation-related work and his total income for that work over a three-year period. The Beaumont Court of Appeals conditionally granted the petition, holding that the trial court's order constituted an abuse of discretion. The court relied on precedent from the Fort Worth Court of Appeals,[72] explaining that "[t]he parties' interests in obtaining discovery solely for impeachment must be weighed against the witness's legitimate interest in protecting unrelated financial information."[73] The court noted that the expert witness had provided some testimony regarding bias in the first deposition, including "his hourly rate, his time spent working on the case, and the fact he testifies almost exclusively for defendants."[74] The court held that "[t]he deposition ordered

65. *Id.* at *2.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at *3.
71. 166 S.W.3d 861 (Tex. App.—Beaumont 2005, orig. proceeding).
72. *Id.* at 864-65 (citing Olinger v. Curry, 926 S.W.2d 832, 834-35 (Tex. App.—Fort Worth 1996, no writ.)).
73. *Id.* at 865.
74. *Id.*

here would not materially benefit the dispute resolution process in this case" and that "[t]he intrusion on the witness's privacy interest, the burden in obtaining the information, and the impact on the willingness of reputable experts to provide testimony when needed in litigation outweigh any possible benefit from the additional discovery ordered."[75]

In *In re Southwest Airlines Co.*,[76] plaintiffs filed a lawsuit in 2002 for personal injuries that they allegedly sustained from exposure to toxic chemicals while working at a Southwest Airlines reservation center during their employment in the 1980s and early 1990s. The plaintiffs rebutted defendant's limitations defense in discovery responses, stating that Southwest had "covered up the extent of the unreasonably dangerous indoor air quality" and that plaintiffs were "unaware of the concealment until discovery of matter by [their] attorney which was communicated to [them] in November of 2001."[77] When defense counsel asked the plaintiffs at their depositions what was communicated to them in November 2001, plaintiffs claimed that the information communicated was protected by the attorney-client privilege. Defendant filed a motion to compel, arguing that the plaintiffs' offensive use of the privilege resulted in its waiver. After the trial court denied the motion, defendant petitioned for writ of mandamus. The San Antonio Court of Appeals conditionally granted the petition, holding that the trial court abused its discretion in denying defendant's motion to compel. The court found that "Southwest's ability to succeed on its limitations defense hinges on what was discovered in the November 2001 communication" and that "disclosure of the communication is the only means by which Southwest can obtain evidence regarding the plaintiffs' affirmative defense to Southwest's limitations defense because the communication contains the information on which the plaintiffs seek to rely to defeat limitations."[78] The court held that sufficient factors existed to find that a waiver under the offensive-use doctrine had occurred and instructed the trial court to grant Southwest's motion to compel.[79]

5. *Admissibility and Sufficiency of Scientific Evidence of Causation*

The admissibility and sufficiency of expert testimony concerning causation remained a critical and outcome-determinative issue in toxic tort cases during the Survey period. In *Borg-Warner Corp. v. Flores*,[80] the Corpus Christi Court of Appeals affirmed judgment for the plaintiff, finding sufficient evidence that exposure to asbestos fibers released from the defendant's brake pads caused the plaintiff's asbestosis. The court relied on testimony that the plaintiff ground new brake pads before installation, the grinding produced visible dust that he inhaled, the brake pads con-

75. *Id.*
76. 155 S.W.3d 622 (Tex. App.—San Antonio 2004, orig. proceeding).
77. *Id.* at 623.
78. *Id.* at 624.
79. *Id.* (citing Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993)).
80. 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004, pet. granted).

tained seven to twenty-eight percent asbestos by weight, and the dust contained respirable asbestos fibers that "can cause asbestosis."[81] The court distinguished the decision of the San Antonio Court of Appeals in *In re ROC Pretrial*, reported in the last Survey,[82] which found no evidence that respirable asbestos fibers were released from spraying, sanding, or grinding liquid paint or coating products based on the expert testimony presented by the plaintiff.

In *Burleson v. Texas Department of Criminal Justice*,[83] the United States Fifth Circuit Court of Appeals affirmed the exclusion of the plaintiff's expert's testimony and the grant of summary judgment against an inmate exposed to welding electrodes containing thorium dioxide, a naturally occurring, radioactive carcinogen. In this civil-rights action, the trial court excluded the toxicologist's opinion that inhaled thorium dioxin particles from the welding electrodes lodged in the plaintiff's airways damaged local cells—the "radiation hot spot" theory—and that this exposure was more significant to his development of throat and lung cancer than his forty-five year, two-pack-per-day smoking history or his family history of cancer.[84] Although the toxicologist cited studies in which exposure to Thorotrast (which also contains thorium dioxide) was found to cause certain cancers, the court noted that the studies did not link that exposure to throat or lung cancer. The court also noted that the toxicologist failed to assess the plaintiff's dose of radiation. Based on this evidence, the court held that the magistrate did not abuse its discretion in excluding the testimony of the toxicologist, and in the absence of admissible evidence that exposure to the welding electrodes caused his cancer, summary judgment was proper.[85]

In *Cano v. Everest Minerals Corp.*,[86] more than fifty plaintiffs alleged that exposure to natural uranium released from the defendant's facility and vehicles caused them to develop a variety of cancers. A federal district court excluded the testimony of the plaintiffs' medical expert on specific causation, finding that the expert failed to consider the relative significance of other possible causes of the plaintiffs' cancers. The expert's "methodology. . . involve[d] taking a diagnosed condition—cancer—finding all possible causes of that person's cancer from the universe of potential causes, and declaring all possible causes to be actual causes and but-for causes."[87] Although the federal district court had jurisdiction over the plaintiffs' claims pursuant to the Price-Anderson Act,[88] the court noted that Texas substantive law would govern its rulings on the plain-

81. *Id.* at 213-14.
82. *See* Brent M. Rosenthal, Misty A. Farris & Amanda R. Tyler, *Toxic Torts and Mass Torts,* 58 SMU L. REV. 1183, 1203 (2005) (discussing *In re* ROC Pretrial, 131 S.W.3d 129 (Tex. App.—San Antonio 2004, no pet.)).
83. 393 F.3d 577 (5th Cir. 2004).
84. *Id.* at 682-83.
85. *Id.* at 587-90.
86. 362 F. Supp. 2d 814 (W.D. Tex. 2005).
87. *Id.* at 846.
88. 42 U.S.C. § 2210 (Supp. 2003).

tiffs' claims. The court determined that the Texas Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Havner* "controls the issue of what evidence is required to establish causation in a toxic tort case and therefore what evidence is relevant."[89] Disagreeing with language from a vacated opinion by the United States Fifth Circuit Court of Appeals that suggested that the *Havner* definition of the "more likely than not burden of proof" was arguably procedural, the court held that *Havner*'s standards for legally sufficient evidence in a toxic-tort case are a matter of Texas substantive law.[90] The court then rejected the expert's treatment of all risk factors and all levels of exposure as substantial contributing causes of the plaintiffs' cancers because, while "the severity of cancer, once it exists, is independent of dose, the *risk* of cancer development is dose dependent."[91] The court also criticized the expert's selective use of epidemiological studies to show an association between exposure to ionizing radiation and the plaintiffs' cancers without regard for the type, source, and dose of radiation. When the expert tried to identify cases in which exposure to radiation was a predominant cause of a plaintiff's cancer, he compared the yearly dose of background radiation with the cumulative organ dose from exposure to the defendant's uranium, leading the court to conclude that the expert's methodology—"comparing apples to oranges"—was flawed and unreliable.[92]

In *Easter v. Aventis Pasteur, Inc.*,[93] a federal district judge held that the plaintiffs' concession that they could not prove that thimerosal exposure had caused a child's autism precluded the plaintiffs' expert from testifying that thimerosal exposure caused the child's co-morbid conditions (which included sensory- and auditory-processing disorders, attention deficits, hyperactivity and distractibility, cognitive deficits, and behavior and mood disorders). Because the child did not fit the genetic profile of children who are particularly vulnerable to developing thimerosal-induced autism, the plaintiffs conceded they could not prove thimerosal exposure caused the child's autism. And while the plaintiffs' expert cited studies that showed a correlation between thimerosal exposure and co-morbid conditions suffered by the child, those studies involved autistic children. The co-morbid conditions were strongly correlated with autism, with or without exposure to thimerosal, and might have a common cause. The court noted that because

> these symptoms and conditions are so regularly associated with autism, a medical doctor rendering a differential diagnosis would need to be able to rule out all of the potential causes of the patient's condition, including autism, before determining that the co-morbid conditions were caused by something other than what had caused the

89. *Cano*, 362 F. Supp. 2d at 821-22 (discussing Merrell Dow Pharms.v. Havner, 953 S.W.2d 706 (Tex. 1997)).
90. *Id.* at 821 n.13 (citing Bartley v. Euclid, 158 F.3d 261, 273 n.9 (5th Cir. 1998)).
91. *Id.* at 847 n.4 (emphasis in original).
92. *Id.* at 858.
93. 358 F. Supp. 2d 574 (W.D. Tex. 2005).

autism.[94]

The court therefore excluded the testimony of the plaintiff's expert on specific causation, but it expressly left open the door for other "past or future scientific attempts to parse the causes of autism from the causes of the co-morbidities at the heart of the plaintiff's case."[95]

In *Martin v. Home Depot U.S.A., Inc.*,[96] a federal district court dismissed the plaintiffs' claims for fear and increased risk of cancer caused by exposure to arsenic from Chromated Copper Arsenate ("CCA") Treated Wood because Texas law does not provide a "cause of action for negligence or products liability until there is 'actual loss or damage resulting to the interests of another.'"[97] The court then noted that the plaintiffs failed to show that they were actually at an increased risk of cancer, the plaintiffs offered no studies linking exposure to CCA-Treated Wood with increased risk of cancer, and the plaintiffs' expert admitted that "no 'good studies' exist regarding such a causal link."[98] The plaintiffs' expert did not quantify the plaintiffs' exposure and admitted that numerous other exposures contribute to cancer risk aside from CCA-Treated Wood. Being extremely thorough, the court then noted that the evidence did not support a finding that the defendant made an express representation or a misrepresentation of material fact, defeating the plaintiffs' claims for breach of an express warranty, strict liability pursuant to section 402B of the Restatement (Second) of Torts, and violation of the Deceptive Trade Practices Act.

In *Madden v. Wyeth*,[99] a federal district court denied summary judgment on causation, design defect, and punitive damages of the plaintiff's claims for Stevens-Johnson Syndrome ("SJS") allegedly caused by ibuprofen in Children's Advil. The court denied summary judgment on causation because of conflicted expert testimony; while the defense expert testified that too little time elapsed between the child's ingestion of the drug and development of SJS symptoms, the plaintiff presented testimony from other experts that ibuprofen was the likely cause of the child's SJS. Noting "substantial issues surrounding the admissibility of expert testimony presented by both parties," the court was unwilling to rule on objections to the admissibility of expert testimony "without the benefit of fully-briefed *Daubert* motions."[100] The court declined to consider the plaintiff's motion for summary judgment on general causation because, without being able to resolve specific causation as a matter of law, a ruling on general causation would not materially advance the resolution of the case. The court denied summary judgment on the plaintiff's design-

94. *Id.* at 577.
95. *Id.* at 578-79.
96. 369 F. Supp. 2d 887 (W.D. Tex. 2005).
97. *Id.* at 890 (citing Gideon v. John-Manville Sales Corp., 761 F. Supp. 2d 1129, 1136 (5th Cir. 1985)).
98. *Id.* at 891.
99. No. 3-03-CV-0167-BD, 2005 WL 2278081 (N.D. Tex. Sept. 14, 2005).
100. *Id.* at *1 n.1.

defect claim based on evidence that dexibuprofen was a safer alternative, even though dexibuprofen is not FDA-approved. Finally, the court denied summary judgment on the punitive-damages claims, in part, because studies demonstrated a statistically significant association between ibuprofen and SJS, even though the incidence of SJS is very small.[101]

B. Substantive Issues

1. Premises Liability

The Fourteenth District Court of Appeals affirmed a summary judgment for a premises owner under Chapter 95 of the Texas Civil Practice and Remedies Code on en banc rehearing in *Dyall v. Simpson Pasadena Paper Co.*,[102] withdrawing its earlier opinions in the case. Dyall, an employee of an independent contractor, arrived at the Simpson plant to repair a pinhole leak in a pipe. Dyall testified that Simpson employees administered no safety warnings, gave him no safety-data sheets, and gave no impression that the substance leaking from the pipe could be dangerous, but Dyall could not recall whether Simpson employees told him that the pipe might contain traces of chlorine dioxide. The evidence showed that Simpson employees provided Dyall and his coworker with emergency-escape respirators or "throw-down packs," but indicated that they would not need more extensive safety equipment. After working on the leaking pipe flange for about an hour and a half, Dyall became nauseated and vomited, and he later developed severe respiratory problems.[103]

Chapter 95 of the Texas Civil Practice and Remedies Code requires a plaintiff to show that the defendant property owner had both control over the manner in which the work was performed and actual knowledge of the dangerous condition that caused his injuries.[104] The court rejected all sixteen allegations Dyall made regarding ways in which Simpson controlled Dyall's work. In response to Dyall's argument that Simpson exercised control when Simpson's employee required him to carry an emergency-escape respirator, the court held that the mere existence of safety regulations does not establish Simpson's actual control over Dyall and that liability only attaches to the premises owner where the imposition of safety regulations causes or leads to injury by increasing the probability of injury.[105]

The court also rejected Dyall's argument that the legislature never intended Chapter 95 to apply to a situation like his. Dyall relied on a statement of legislative intent that Chapter 95 should not apply to claims involving a premises owner's negligence, which is independent of the owner's exercise of control over the contractor's work. The court held that it did not need to consider legislative intent since the statute is clear

101. *Id.* at *3.
102. 152 S.W.3d 688 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).
103. *Id.* at 693-96.
104. *Id.* at 699.
105. *Id.* at 701-04.

and unambiguous, and even if legislative intent came into play in the case, this case was not a case of independent negligence on the part of the premises owner. The court also held that Dyall had presented no evidence of Simpson's actual knowledge of the dangerous condition. Finally, the court rejected Dyall's common-law negligence claim, finding that Chapter 95 and its requirements applied to all his claims, including his negligence claims.[106]

The lengthy dissent took issue with the majority's treatment of the legislative history of Chapter 95, arguing that the legislature meant "control" to include actions of premises owners such as advising independent contractors whether to use safety devices. The dissent went on to distinguish other premises-liability cases cited by the majority opinion as cases in which either the premises owner did not discuss how the job should be completed or in which the independent contractor was working in an area within his expertise.[107]

2. *Insurance Coverage for Mass Tort Cases*

Insurance disputes between defendants in mass tort cases and their insurers continue to arise in the form of declaratory actions in federal court. In *Mt. Hawley Insurance Co. v. Wright Materials Inc.*,[108] Wright Materials, Inc. and MagicValley Concrete, Ltd. were defendants in a Texas state court action involving personal injury claims of 134 construction workers for injuries resulting from alleged exposure to silica dust. The defendants and their insurer, Mt. Hawley Insurance Company, filed cross motions for summary judgment regarding the defendants' insurance coverage. The insurer contended that since the state court plaintiffs' claims arose out of the release or escape of pollutants in general and silica dust in particular, the claims fell within the policy exclusions, negating the insurer's duty to defend. The magistrate judge for the Northern District of Texas had "little difficulty in concluding that such injuries are excluded from coverage under each of the Mt. Hawley policies."[109] The defendants relied on "a narrow exception to the otherwise absolute pollution exclusion," and argued that there was a "latent ambiguity" in the plaintiffs' petition.[110] Defendants focused on allegations in the petition that plaintiffs had "come into contact with cement, ready-mix concrete, concrete and the dust generated therefrom" and argued that these allegations did not fall within the policy exclusions since it was not clear whether these injuries were caused by the release of pollutants or by contact with wet cement and concrete.[111] The court rejected these arguments, finding that "a fair reading of their petition makes clear that the plaintiffs base their claims on 'cement dust-related disease,'" granted Mt. Hawley's motion for sum-

106. *Id.* at 708-10.
107. *Id.* at 715-23.
108. No. 3-03-CV-2729-BD, 2005 WL 2805565 (N.D. Tex. Oct. 27, 2005).
109. *Id.* at *3.
110. *Id.* at *4.
111. *Id.* at *3.

mary judgment, and entered a declaratory judgment that Mt. Hawley had no duty to defend or indemnify the defendants in the state court action.[112]

In *RLI Insurance Co. v. Wainoco Oil & Gas Co.*,[113] the Fifth Circuit Court of Appeals considered whether the district court abused its discretion in staying a declaratory-judgment action pending the outcome of a related California state court action. The insurer, RLI Insurance Company, filed the declaratory judgment action, seeking a declaration that RLI did not owe its insured Wainoco Oil & Gas Company (now known as Frontier Oil Corporation) a duty to defend or indemnify in California tort actions. In 2003, Wainoco and Frontier were sued in California state court for injuries that were allegedly caused by the release of toxic chemicals at Beverly Hills High School from oil and gas facilities operated by the defendants. Less than two weeks after RLI filed its declaratory-judgment action in federal court in Texas, Wainoco and Frontier filed a declaratory-judgment action in California state court against RLI and the rest of their primary insurers, seeking a declaration that the insurers owed them a duty to defend and indemnify. They then moved to dismiss or, in the alternative, to stay RLI's declaratory-judgment action. The district court granted Wainoco and Frontier's motion and stayed the action under the Declaratory Judgment Act ("DJA")[114] and the abstention doctrine found in *Brillhart v. Excess Insurance Co. of America*.[115] The appellate court held that the district court did not abuse its discretion in exercising its abstention power since the court weighed the seven nonexclusive factors for abstention given in *St. Paul Insurance Co. v. Trejo*.[116] The court found that "[b]ecause all the *Trejo* factors either weighed in favor of yielding to the California coverage action, or were neutral, the district court concluded it was appropriate to exercise its discretion under the DJA and *Brillhart* and refrain from deciding this case."[117] The court did note that the district court stayed, rather than dismissed, the case in "an effort to assure the availability of a federal forum should the California action fail to resolve the matter in controversy."[118]

3. *Federal Preemption of State Law Claims*

Though not in a toxic-tort or mass-tort case, the United States Supreme Court issued an opinion during the Survey period that could affect the viability of future toxic-tort cases. In *Bates v. Dow Agrosciences LLC*,[119] the Court considered whether the Federal Insecticide, Fungicide, and Ro-

112. *Id.* at *5.
113. 131 F. App'x 970 (5th Cir. 2000).
114. 28 U.S.C. § 2201 (2000).
115. *RLI Ins. Co.*, 131 F. App'x at 971-72; Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942).
116. *RLI Ins. Co.*, 131 F. App'x at 972; St. Paul Ins. Co. v. Trejo, 39 F.3d 585 (5th Cir. 1994).
117. *RLI Ins. Co.*, 131 F. App'x at 973.
118. *Id.*
119. 125 S. Ct. 1788 (2005).

denticide Act ("FIFRA")[120] pre-empted state-law tort claims.[121] A group of Texas peanut farmers brought claims for breach of express warranty, fraud, violation of the Texas Deceptive Trade Practices Act ("DTPA"), strict liability, negligent testing, and negligent failure to warn against Dow, alleging that the company's "Strongarm" pesticide severely damaged their crops while failing to control the growth of weeds. Dow argued that FIFRA pre-empted the state-law tort claims,[122] and both the district court and the Fifth Circuit Court of Appeals agreed with Dow.[123]

In a 7-2 opinion written by Justice Stevens, the Court reversed, holding that FIFRA did not pre-empt the plaintiffs' state-law claims. The Court found that the plaintiffs' claims for breach of express warranty, violation of Texas DTPA, strict liability, and negligent testing did not fall within the pre-emption language and rejected the court of appeals reasoning that "a finding of liability on these claims would 'induce Dow to alter [its] label.'"[124] The Court found that only the plaintiffs' "fraud and negligent-failure-to-warn claims are premised on common-law rules that qualify as 'requirements for labeling or packaging'" and are therefore susceptible to FIFRA preemption.[125] The Court remanded these claims for the court of appeals to determine whether the claims imposed labeling or packaging requirements "in addition to or different from" FIFRA's requirements.[126] The Court emphasized "that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption."[127] The Court did note, however, that "[t]o survive pre-emption, the state-law requirement need not be phrased in the *identical* language as its corresponding FIFRA requirement."[128]

In reversing the lower court, the Court noted the importance of tort litigation to environmental protection:

> The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly. Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items. Particularly given that Congress amended FIFRA to allow EPA to waive efficacy review of newly registered pesticides . . . , it seems unlikely that Congress considered a relatively obscure provision like § 136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort

120. 7 U.S.C. § 136 (2000).
121. *Bates*, 125 S. Ct. at 1793.
122. *See* 7 U.S.C. § 136v(b) (2000) (providing that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter").
123. *Bates*, 125 S. Ct. at 1793.
124. *Id.* at 1799 (quoting 332 F.3d 323, 332 (5th Cir. 2003)).
125. *Id.*
126. *Id.* at 1800.
127. *Id.* at 1803.
128. *Id.* at 1804 (emphasis added).

> liability. Over-enforcement of FIFRA's misbranding prohibition creates a risk of imposing unnecessary financial burdens on manufacturers; under-enforcement creates not only financial risks for consumers, but risks that affect their safety and environment as well.[129]

Toxic-tort litigants will likely quote this language in arguing about preemption in years to come.

129. *Id.* at 1801-02 (citations omitted).