AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

RAISING THE BAR

Summer 2019

# COMMITTEE NEWS

## Toxic Torts and Environmental Law

## Legionella: The Inconspicuous Path

Since its discovery in 1976, Legionnaires' Disease has garnered national attention from the general public and stakeholders, including building owners, facility operators, medical professionals, risk managers, insurers, and attorneys.

Outbreaks of Legionnaires' Disease frequently make headline news and result in damage to reputation, loss of future business, and costly litigation. Newsworthy high-dollar demands or settlements ranging from hundreds of thousands to millions of dollars have graced news headlines. Within the past year, news coverage of Legionnaires' Disease has implicated a casino resort in Las Vegas, a hotel in the UK, a VA hospital in Illinois, federal buildings in Canada, and the municipal water system for the city of Flint, Michigan. Often such claims are brought absent conclusive clinical and environmental evidence linking an individual's disease with an alleged point of exposure. Claims often proceed based solely on circumstantial evidence such as travel history for the two weeks prior to symptoms onset (incubation period).

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## In This Issue

## Chair Message

Dear Colleagues:

Before you scroll to the excellent content contained in these electronic pages, please allow me to remind you of this Committee's other activities and invite you to become more involved. Our annual conference is the highlight of our year; it brings in-house counsel, experts, insurance representatives and many of the nations top practitioners together at the famous Hotel Del Coronado in sunny Coronado, CA. Our 29th Annual will be held April 2, 2020 through April 4, 2020 and will feature panels discussing the hot, and a few up-and-coming, issues in our legal space. We hope to see you there!

Our next newsletter will be published this fall and we are currently calling for articles. It is published to the over 500 professionals who are members of our committee and all members can submit ideas for publication. If you have an article you would like to publish please contact us.

Lastly, be on the look out in your email inboxes for our up-coming webinars. Several are in the planning stages and will be announced in the coming months. The webinars feature leading attorneys speaking on current topics they face in today's court rooms. They are an informative and cost effective way to stay up to date and obtain CLE.

I hope you enjoy this newsletter!

**Jonathan Lively**
*Segal McCambridge Singer & Mahoney*

*Jonathan Lively is a Shareholder based in Chicago and is the Chairman of his firm's Product Liability Practice Group. He has over twenty years of experience representing clients throughout the country in toxic tort, product liability, and transportation matters.*

## Connect with Toxic Torts and Environmental Law

*website*

## Stay Connected with TIPS

We encourage you to stay up-to-date on important Section news, TIPS meetings and events and important topics in your area of practice by following TIPS on **Twitter** @ABATIPS, joining our groups on **LinkedIn**, following us on **Instagram**, and visiting our **YouTube** page! In addition, you can easily connect with TIPS substantive committees on these various social media outlets by clicking on any of the links.

## Editor Message

**Jason A. Botticelli**
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It is my pleasure to present the TIPS TTEL Summer Newsletter, which features five articles addressing a diverse range of interesting topics, from Legionnaires' Disease to the status of litigation in talcum powder cases. We also have articles dealing with changes in acceptable expert proof on causation in asbestos cases in NYCAL, the USSC's recent decision on the duty to warn of a product manufacturer in maritime actions and changes to the Illinois Workers' Compensation Act that are having rippling effects in civil litigation in that State.

I hope that you enjoy these articles. Committee members and nonmembers are encouraged to submit article proposals for upcoming Newsletters, the next of which will be published this coming fall. Articles must be between 1,000 and 3,000 words and must be relevant to recent legal, environmental and/or medical developments that would be of interest to those practicing toxic tort or environmental law. Please submit any proposed articles to me via email, in Word format: jbotticelli@goldbergsegalla.com.

I would like to thank the authors that have taken the time to contribute to this edition, as well as the section members for their efforts in supporting this publication. A special thanks to Committee Chair, Jonathan Lively, for his help with this Newsletter and for his leadership on this committee.


# TIPS MEMBER MONDAYS

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TIPS Member Monday provides quality CLE programing and practice-specific committee involvement designed to enhance members' trial skills, learn about emerging state and national issues, and to keep our members on the cutting edge of tort and insurance law.

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# The U.S. Supreme Court Sinks The Bare Metal Defense For Product Manufacturers And The Foreseeability Test For Plaintiffs In Maritime Tort Law Asbestos Case:

# A Deep Dive Into *Air & Liquid Systems Corp., et al. v. DeVries, et al.*, (2019)

## Synopsis

The U.S. Supreme Court ("Court") simultaneously rejected the defense favored absolute "bare metal defense" and the plaintiff favored "foreseeability test" in a case that examined the liability of a product manufacturer's "integrated product" made dangerous from subsequently added asbestos-containing products selected and installed by the Navy pursuant to military specifications. Justice Kavanaugh authored the 63 majority opinion joined by the Chief Justice and liberal Justices Kagan, Ginsburg, Breyer, and Sotomayer in tow.

The issue was whether manufacturing defendants of "bare metal equipment" are liable for harm caused by subsequently added third party manufactured asbestos-containing products. Bare metal equipment is equipment manufactured and delivered to the customer without asbestos insulation or other asbestos containing products, although such products must later be added for the product's proper operation and intended use. For example, a company manufactures a boiler and sells the "bare metal" boiler to the customer (here, the Navy). The boiler's intended use is to generate steam for ship propulsion. Exterior insulation is required on the boiler for it to function properly and safely. After delivery of the boiler to the Navy, the Navy buys asbestos insulation from a third party manufacturer and the Navy installs the insulation pursuant to Navy specifications. The Navy is also responsible for maintenance on the boiler insulation. Over time, the asbestos insulation becomes "friable" during operations and a serviceman on the ship is exposed to the asbestos dust. The serviceman years later develops cancer and claims his cancer was caused by the exposure to asbestos insulation on the boiler. The serviceman sues the boiler manufacturer for negligence in failing to warn that the insulated boiler was dangerous when operated as intended. This is a common scenario in asbestos lawsuits. With a shrinking number of viable defendants to sue due to the increasing number of manufacturers claiming bankruptcy, and in maritime actions the Navy is immune from suit under the Government Contractor Defense, Plaintiffs turn to the bare metal equipment product manufacturers for recovery.

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# Beyond the Gateway Arch – Talc Litigation Update Eleven Months After Mammoth St. Louis City Jury Verdict

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In July 2018 a St. Louis City jury heard one of the first trials involving allegations of the development of ovarian cancer due to talc contaminated with asbestos.[1] In a decision that shocked both the plaintiff and defense bar, the jury awarded $25 million to each of 22 plaintiffs for a total of $550 million in compensatory damages. The jury then spent less than two hours deliberating punitive damages before returning with a total award of $4.14 billion against defendants Johnson & Johnson ($3,150,000,000.00) and Johnson & Johnson Consumer Inc. ($990,000,000.00). In December 2018, the trial judge denied Johnson & Johnson's motion to set aside this verdict, ruling that sufficient evidence was presented to support the award.

In the eleven months since this unprecedented multi-billion award, talc litigation continues in full force with a range of decisions. While this article summarizes some of the major defense verdicts, mistrials, and summary judgment rulings nationwide since the July 2018 decision in St. Louis City, this summary is not exhaustive. Although talc litigation shows no signs of slowing down, defense verdicts remain attainable, and one major player in talc litigation is now out of the picture.

## Defense Verdicts

An Oregon jury delivered a defense verdict for defendant Chanel on September 17, 2018, after a four-week trial in a living pleural mesothelioma claim. Chanel asserted a spontaneous etiology defense and the jury unanimously found that (i) Chanel was not negligent and (ii) there was no defect in the Chanel cosmetic talc product allegedly used by the plaintiff in this case.

Two months later in California, on November 14, 2018, a Northern California state jury returned a defense verdict in favor of defendant J&J.[2] The jury found J&J not liable for plaintiff Carla Allen's mesothelioma. Plaintiff alleged that J&J knew its talcum products contained asbestos and were likely hazardous to the health of consumers. The primary allegation centered on the use of J&J's baby powder by both the plaintiff and her mother Mick Allen, and whether the exposure to that product was a substantial factor in causing Carla Allen's mesothelioma. The Humboldt County, California jury ultimately returned a defense verdict. The jury did find there to be a manufacturing defect, but also found it was not a substantial factor in causing plaintiff's mesothelioma.

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# "A Lot" Is Not Enough For NYCAL Frequency of Exposure

In March 2019, the First Department of the New York Supreme Court, Appellate Division issued a significant causation decision. In *Joanne Corazza as Executrix of the Estate of George Cooney v. Amchem Products Inc., et al*, the plaintiff sued multiple asbestos related defendants, alleging they were all the cause of Mr. Cooney's lung cancer. Notably, Mr. Cooney was a two-and-a-half pack-per-day smoker of 52 years prior to his death. The case was tried to verdict over six weeks in front of Judge Martin Schulman, and the jury returned a verdict in favor of the plaintiff for $12.5 million. The last remaining defendant, a forklift manufacturer, moved for a post-trial JNOV, which was denied, and remittitur, which was granted to the extent of reducing the award to $3.5 million.

That forklift defendant was found 49 percent liable, and was ordered to pay just under $1.8 million to the plaintiff. However, the First Department unanimously reversed the $1.8 million judgment. In so holding, the court emphasized that the plaintiff had failed to establish "some scientific basis for a finding of causation attributable to the particular defendant's product." The court held that the decedent's testimony to performing brake, clutch, and gasket replacement work on the defendant's forklifts "a lot" of times was insufficient without any further context. Accordingly, the court held the plaintiff's experts lacked a sufficient evidentiary foundation for their medical opinions that the decedent's work with the defendant's forklifts were a substantial contributing factor of his lung cancer. By making such a ruling, the First Department has established a higher burden of proof for plaintiffs in asbestos cases. Plaintiffs will no longer be able to rely on general statements that they worked with a defendant's products "a lot" of times, but instead will need to provide additional context for the frequency of their allegations. This approach is in line with New York Court of Appeals precedent about other subjective descriptions of exposure being insufficient, such as "frequent," "excessive," "high-level," and "extensive."

It will be interesting to see how this decision will influence asbestos litigation in New York, within the First Department and beyond. With the First Department setting a higher standard for plaintiffs in their burden of proof, other courts within New York may follow the *Corazza* ruling to prohibit plaintiffs from building cases on such subjective assertions. New York law mandates that where an intermediate Appellate Division rules on an issue that a sister court has not yet ruled on, the Appellate Division decision is binding on the supreme court in other judicial departments. *See e.g. People v. Burgos, 37 Misc. 3d 394, 409, 950 N.Y.S.2d 428 (Sup. Ct. 2012).*

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# You Thought You Were Covered – The New Wave Of Civil Claims Against Illinois Employers For Latent Workplace Injuries

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Whether to account for eroded memories or the deterioration of evidence, plaintiffs in asbestos claims have long been given advantages not afforded to traditional plaintiffs. Governor Pritzker and the Illinois legislature have sought to further enhance the remedies available to these plaintiffs by carving out an exception to the Illinois Workers' Compensation Act and Workers' Occupational Diseases Act for latent injuries. However, Senate Bill 1596, which Governor Pritzker signed into law on May 17, 2019[1], will lead to a wave of costly litigation extending well beyond asbestos cases.

## Senate Bill 1596 & The Workers' Compensation Act's Statue of Repose

The Illinois Workers' Compensation Act and Workers' Occupational Diseases Act provide employees with the right to file for workers' compensation benefits and mandates that this right is an employee's exclusive remedy for work-related injuries and diseases [2][3]. Accordingly, such employees have been barred from brining civil lawsuits for work-related injuries. [4].

Until the passage of Senate Bill 1596, the combined acts included two separate statute of repose provisions that had been strictly applied by courts. [5] First, "[I] n cases of disability caused by exposure to . . . asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred." [6][7]. The second establishes that, "no compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease, except in cases of occupational disease caused by berylliosis or by the inhalation of silica dust or asbestos dust and, in such cases, within 3 years after the last day of the last exposure to the hazards of such disease and except in the case of occupational disease caused by exposure to radiological materials or equipment, and in such case, within 25 years after the last day of last exposure to the hazards of such disease." [8] These provisions are distinct but are applied together, as Section 1(f) requires that the disablement due to an occupational disease must occur within a specific time period after last exposure, while section 6(c) requires that a claim be filed within a time period after the last exposure. *Plasters v. Indus. Comm'n*, 246 Ill. App. 3d 1, 615 N.E.2d 1145, 1149 (1993).

American workplaces phased out the use of asbestos products beginning in the late 1960's. The disease asbestosis, caused by the inhalation of massive quantities of asbestos fiber, was common decades ago and early indications of the disease were quickly seen radiographically; but the incidence of this disease has tracked the use of asbestos down to almost zero. By contrast, asbestos related cancers (including mesothelioma) continue to be seen in America; these diseases have lengthy, multi-decade latency periods before they manifest. Because of these facts, essentially zero employees will experience symptoms within 3 years of their last day of exposure and only a small minority will be diagnosed within 25 years of their last day of exposure. [9] With full appreciation of this reality, the Illinois Supreme Court has held that the exclusive remedy provision applies to occupational diseases barred by the statute of response. [10] The Court reasoned that "[t]he acts do not prevent an employee from seeking a remedy against other third parties for an injury or disease. Rather, in this case, the acts restrict the class of potential defendants from whom [Plaintiff] could seek a remedy." [11]

In an attempt to overturn this judicial precedent, Illinois lawmakers passed Senate Bill 1596 to expand employees' class of potential defendants to include their employer. Specifically, the new statute amends 820 Ill. Comp. Stat. Ann. 305/1.2 and states that the exclusive remedy provisions

> "do not apply to any injury or death sustained by an employee as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision. As to any such injury or death, the employee, the employee's heirs, and any person having standing under the law to bring a civil action at law, including an action for wrongful death and an action pursuant to Section 27-6 of the Probate Act of 1975, has the nonwaivable right to bring such an action against any employer or employers." [12]

Yet, this new exception will create new claims which have not been litigated previously and how it interacts with other provisions of the Workers' Compensation and Workers' Occupational Disease acts are far from clear and are certain to prompt litigation.

## New Potential Plaintiffs

The amendments apply to claims barred by *any* repose provisions contained within the acts. Therefore, it applies regardless of whether a plaintiffs' workers' compensation claim was barred under 1(f) or 6(c). Employees will now bring civil

lawsuits for latent occupational diseases and other injuries against their employers for those injuries which employers were previously shielded from liability.

Looking solely at the sheer volume of claims filed, the largest new pool of plaintiffs' is likely to be those suffering from asbestos related diseases.[13] Yet the broad language which encompasses the three year statute of repose period in 6(c) will allow former employees suffering from other conditions to file these new civil actions as well. Governor Pritzker's statement on his signing of the bill explicitly references employees who were exposed to radiation and beryllium and [14] Illinois Courts have already barred employees' claims under this repose provision for pneumoconiosis, benzene exposure, and even damage to hearing from loud noises. [15][16][17] It is conceivable that former employees suffering from degenerative orthopedic injuries which manifest years after employment will now have access to the court room against their employer.

## Constitutionality: Ex Post Facto Lawmaking

One of the most important questions created by Senate Bill 1596 is if this newly created exception will be applied retroactively. Nothing in the statute makes it explicitly retroactive. "Basic statutory interpretation principles dictate that the law in force at the time the employee was working for the employer and suffered the allegedly harmful exposures will apply." [18] The question will turn in part on whether the statute is deemed to be procedural or legal. "Those [laws] that are procedural in nature may be applied retroactively, while those that are substantive may not." [19] "Even a procedural law may not be applied retroactively if it: "(1) impairs rights that a party possessed when it acted, (2) increases a party's liability for past conduct or (3) imposes new duties with respect to transactions already completed." [20]. Because this class of plaintiffs had no cause of action against their employers prior to these amendments it seems clear that the judicial factors stopping retroactive application are met. The rights bestowed on the employer by legislation are impaired if not eliminated. Employers face new liabilities against a new class of plaintiffs for actions that occurred potentially decades in the past. Moreover, the amendments alter employers' bargained employment and insurance transactions of the past and the considerations on which those contracts were made. However, contrary arguments will certainly be made, the issue will be left to the discretion of the trial court judges and will almost certainly need to be litigated through the appellate system. For a more in-depth assessment the statute's constitutionality, see "Ill. Workers' Comp Bill Should Not Apply Retroactively," published through Law360 and sited herein.

## Other Workers' Compensation Bars: Last Exposure

Since Senate Bill 1596 only targets the "period of repose or repose provisions" of the Illinois Workers' Compensation and Illinois Occupational Disease Act, it does not impact 820 Ill. Comp. Stat. Ann. 310/1(d). This section of the act provides: "*The employer liable for the compensation in this Act shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease claimed upon regardless of the length of time of such last exposure, except, in cases of silicosis or asbestosis, the only employer liable shall be the last employer in whose employment the employee was last exposed during a period of 60 days or more after the effective date of this Act, to the hazards of such occupational disease, and, in such cases, an exposure during a period of less than 60 days, after the effective date of this Act, shall not be deemed exposure.*" [21] The Illinois Supreme Court upheld this section in 2003, holding that only the last employer could be held liable for damages the Plaintiff suffered as a result of exposure to loud noises. [22] This section of the Act remains unchanged by the amendments and should continue to protect all employers except for an employee's final employer from the impact of these amendments. However, attorneys litigating in this area should take note of this language contained in the amendment, "the nonwaivable right to bring such an action against any employer or *employers*." [23]. This language suggests an employee could have the right to bring a cause of action against multiple employers. The use of the plural in the statute can be reconciled with 310/1(d) because the diseases asbestosis and silicosis are specifically exempted from the last employer rule. Thus, only in claims for these two diseases would an employee have a right to bring this new civil claim against more than his final employer.

## Contribution: Statutory Liens

Potentially the largest impact on employers is the likely loss of their ability to file a statutory lien against plaintiffs' monetary awards obtained from third parties. Since Senate Bill 1596 attacks the exclusive remedy provisions rather than the repose provision, the legislature has chosen to provide this new class of plaintiffs with a civil remedy apart from workers' compensation. Under 820 Ill. Comp. Stat. Ann. 305/5(b). "An employer is entitled to a workers' compensation lien on any recovery that its injured employee might get from a third party that caused or contributed to the injury." [24][25] This provision of the Act enabled employers to recover dollars paid to employees who received workers' compensation payments when those employees pursued claims against third parties who contributed to the injury and prevailed. [24] [25] In practice, many plaintiffs chose not to file workers' compensation claims and only pursued the more lucrative lawsuits against third parties. Plaintiffs' attorneys will claim that because these lawsuits are proceeding under wrongful death and

Section 27-6 of the Probate Act of 1975, [26] they are completely divorced of the practices and procedures of workers' compensation claims. Employers will counter that this interpretation forfeits a significant number of the bargained for protections of the workers' compensation system, on which they relied in making employment, insurance, and other decisions. The courts will decide; but it is conceivable that employers no longer have the right to a lien against third party recoveries and will not be able to recover *via* lien the amounts paid to resolve lawsuits filed by the new class of plaintiffs.

## Conclusion

Employers litigating claims under Senate Bill 1596 will be subject to new liabilities and will also bear the increased cost of defending a civil action rather than a workers' compensation claim. The impact of Bill 1596 on employers' abilities to obtain insurance and the increased cost of that insurance is not yet known. With the large pool of potential plaintiffs created by this legislation, employers will need to aggressively defend these matters early in order to ensure a limited application of the 820 Ill. Comp. Stat. Ann. 305/1.2. Fighting for a purely prospective application of the law and the application of 820 Ill. Comp. Stat. Ann. 310/1(d) will be key to staving off the potential tidal wave of new claims by employees.

**Endnotes**

[1] *Prtizker Signs Asbestos Tort-Claims Bill Into Law*, Workers Compensation News (May *Plasters*, 246 Ill. App. 3d at 7–8https://www.workcompcentral.com/news/article/id/51d497f88354ddd70815c242348a64be0ed97bcb.

[2] 820 Ill. Comp. Stat. Ann. 305/1.

[3] 820 Ill. Comp. Stat. Ann. 310/1.

[4] *Osgood v. City of Bos.*, 165 Mass. 281, 43 N.E. 108, 114–15 (1896).

[5] *Plasters v. Indus. Comm'n*, 246 Ill. App. 3d 1, 7–8, 615 N.E.2d 1145, 1149 (5th 1993).

[6] 820 Ill. Comp. Stat. Ann. 310/6(c).

[7] 820 Ill. Comp. Stat. Ann. 305/6(d).

[8] 820 Ill. Comp. Stat. Ann. 310/6(c).

[9] G. Frost, *The Latency Period of Mesothelioma Among a Cohort of British Asbestos Workers,* British Journal of Cancer (2013)(discussing the latency period for mesothelioma).

[10] *Folta v. Ferro Eng'g*, 2015 IL 118070, 43 N.E.3d 108, 114–15.

[11] *Folta*, 43 N.E.3d at 120.

[12] 820 Ill. Comp. Stat. Ann. 305/1.2.

[13] Megan Shockley, *Asbestos Litigation Trends: Midyear Update*, KCIC (September 4, 2018), https://www.kcic.com/trending/feed/asbestos-litigation-trends-midyear-update/.

[14] Office of the Governor, Gov. *Pritzker Signs Legislation Helping Workers Exposed to Toxic Substances* (May 17, 2019), https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=20071.

[15] *Hicks v. Indus. Comm'n*, 251 Ill. App. 3d 320, 324, 621 N.E.2d 293, 295 (1993).

[16] *Serv. Adhesive Co. v. Indus. Comm'n*, 226 Ill. App. 3d 356, 366–67, 589 N.E.2d 766, 772 (1992).

[17] *Hamilton v. Indus. Comm'n*, 203 Ill. 2d 250, 256, 785 N.E.2d 839, 842 (2003).

[18] William Irwin, Ill. Workers' Comp Bill Should Not Apply Retroactively, Law 360 (May 8, 2019), https://www.law360.com/articles/1156925/ill-workers-comp-bill-should-not-apply-retroactively.

[19] William Irwin, Ill. Workers' Comp Bill Should Not Apply Retroactively, Law 360 (May 8, 2019), https://www.law360.com/articles/1156925/ill-workers-comp-bill-should-not-apply-retroactively.

[20] William Irwin, Ill. Workers' Comp Bill Should Not Apply Retroactively, Law 360 (May 8, 2019), https://www.law360.com/articles/1156925/ill-workers-comp-bill-should-not-apply-retroactively.

[21] 820 Ill. Comp. Stat. Ann. 310/1(d).

[22] *Hamilton*, 203 Ill. 2d at 256.

[23] 820 Ill. Comp. Stat. Ann. 305/1.2. (emphasis added)

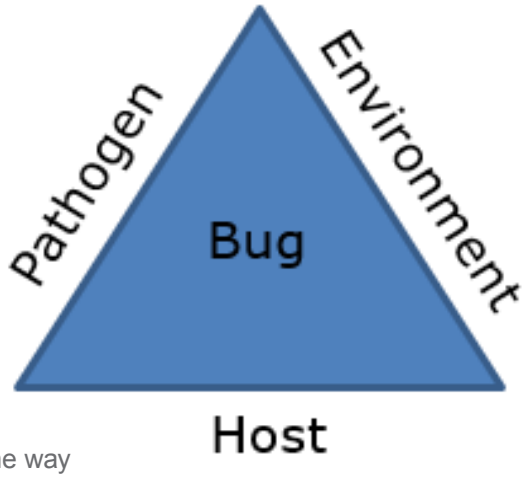
[24] John Dwight Ingram, John Dwight Ingram, *The Meaning of "Arising Out of" Employment in Illinois Workers' Compensation Law*, 29 J. Marshall L. Rev. 153, 169 (1995).

[25] *Cooley v. Power Constr. Co., LLC*, 2018 IL App (1st) 171292, ¶ 15, 107 N.E.3d 435, 440.

[26] 820 Ill. Comp. Stat. Ann. 305/1.2.

*Legionella... Continued from page 1*

## Legionella in the Environment




Legionella is a genus of rod-shaped (bacilli) bacteria with at least 58 known species, of which 20 species are known to have the potential of causing disease in humans. One species, Legionella pneumophila, is thought to be responsible for up to 90% of respiratory infections that are caused by Legionella bacteria.

In nature, Legionella bacteria are found in fresh water aquatic environments worldwide at relatively low concentrations that typically do not present a health concern. Unlike other opportunistic pathogens (bugs) of concern found in the built environment such as pneumonia, aspergillus, or Methicillin-resistant Staphylococcus aureus (MRSA), Legionella is already present in the water supply entering a building's water system and the way the water is stored, heated, and circulated can create optimal habitat conditions for Legionella bacteria to multiply. This leads to Legionella colonizing a building water system and bacteria concentrations rising thousands of times above the level in the incoming water supply, increasing the risk of disease from the Legionella in the water. A healthy human body can eliminate legionella bacteria through its normal course, however, when the bacteria proliferates unchecked or is encountered by a compromised individual or population, exposures may have deadly consequences.

Potential causes of legionella proliferation in building water systems and critical factors include water stagnation, construction, changes in water quality (disinfection levels), scale and sediment, biofilm growth, optimal growth temperature, and aerosolization / inhalation.

## Disease Types, Diagnostic Tests, and Rising Rates

There are two types of diseases attributed to Legionella bacteria: Pontiac Fever and Legionnaires Disease. Collectively, these two adverse health outcomes are termed Legionellosis. Pontiac Fever is a mild flu-like illness that is non-lethal. Pontiac Fever is thought to be medically undiagnosed and resolves without antibiotic therapy. Legionnaires Disease is a more severe form of Legionellosis, which results in pneumonia and is potentially fatal. While less than 5% of persons exposed to Legionella develop Legionnaires Disease, the Center for Disease Control and Prevention (CDC) estimates that 5-10% of these cases result in death. However, the death rate may be as high as 50% for susceptible populations, including the elderly or immune compromised, especially where diagnosis and antibiotic treatment are delayed.

In the U.S. during 2017, there were about 6,100 cases of Legionellosis reported to the CDC and it is estimated that the true incidence may have been much higher.

Since 2000, the number of cases reported annually has trended upward. It is unclear whether this trend is due to broader hazard awareness, improved clinical diagnostic testing, increased case reporting, or greater number and susceptibility of an aging demographic.

The most commonly used diagnostic test to rapidly diagnose an individual with Legionnaires Disease is by performing a urinary antigen test. Urinary antigen tests can only detect Legionella pneumophila serogroup 1 (Lp1) and do not allow for direct comparison to strains found in the environment.. A more technically difficult diagnostic technique that is also performed is culture analysis of lower respiratory secretions, lung tissue, or pleural fluid. Culture analysis can detect all species and serogroups of legionella and can be used to link the specific strain found in the individual diagnosed to the alleged source of infection. It is recommended by the CDC to use the culture and urinary antigen tests in combination.

## Regulations and Standards

A variety of regulations and standards exist to provide guidance in developing site-specific best practices. Notable guidance recently published by ASHRAE®, approved by ANSI in 2015 and updated in 2018 is Standard 188, “Legionellosis: Risk Management for Building Water Systems.” In June 2017, the CDC published an online toolkit, which provides a simplified 7-step process based on key elements of the ASHRAE Standard 188. In June 2017, the Centers for Medicare and Medicaid Services (CMS) issued a memorandum requiring all facility of the type with potentially compromised populations including hospitals, critical access hospitals, and long-term care facilities to develop water management programs aimed at reducing the risk of Legionellosis attributable to facility water systems. The CMS memo references “consideration” of ASHRAE Standard 188 and the CDC toolkit as means for achieving compliance.

## Managing Risks

Increased attention on Legionella hazards requires risk managers to reconsider water management practices for their facility. While healthcare and other facilities with at-risk populations are mandated to develop water management programs, the risks are not negligible for other facility types. Considering the spike in reported incidence of Legionellosis and the accompanying media attention and litigation it has attracted, risk managers for facilities that have less at-risk populations, but have centralized domestic hot water systems, pools and spas, decorative water features, or cooling towers may also consider implementing a water management program using best-practices guidelines.

Following the implementation of a water management program, a water management team should establish procedures to confirm, both initially and on an ongoing regularly scheduled basis, that the water management program is being implemented as designed (verification) and is effectively controlling conditions throughout the building water system (validation). Environmental testing is a useful tool to validate the effectiveness of control measures in use throughout a facility and the laboratory results, rate of outlets with detectable concentrations of Legionella, and strain are all important factors to consider and pinpoint if Legionella is found in the building water system. Other opportunistic waterborne pathogens referenced in the CMS memo that can be present in the built environment and are important to keep in mind while assessing risk in healthcare facilities include Pseudomonas, Acinetobacter, Burkholderia, Stenotrophomonas, nontuberculous mycobacteria, and fungi.

The key to preventing Legionnaires' disease is to maintain building water systems in order to reduce the risk of legionella growth and spread.

**References**

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*The U.S. Supreme... Continued from page 5*

The Court ruled that a product manufacturer has a duty to warn of third party later added parts when 1) its product requires incorporation of the part; 2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses; and 3) the manufacturer has no reason to believe that the product's users will realize the danger.

The Court's holding resolved the Circuit Court split decisions on the application of the bright line absolute bare metal defense and the more stringent foreseeability test in assessing a manufacturer's duty to warn. The split decisions came from the Third Circuit Court of Appeals adopting the foreseeability test from *In re: Asbestos Prod. Liab. Litig. (No. VI)*, 873 F.3d 232 (3d Cir. 2017), *cert. granted sub nom. Air & Liquid Sys. Corp. v. Devries*, 138 S. Ct. 1990, 201 L. Ed. 2d 246 (2018), and *aff'd sub nom. Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019) and the Sixth Circuit Court of Appeals adopting the bare metal defense in *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488 (6th Cir. 2005), *abrogated by Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

The Court expressly limited its ruling to the Maritime context. In its ruling, the Court reinforced its decision in favor of the veteran's families by citing Maritime Law's long standing recognition of special solitude for the welfare of individuals and families of those individuals who undertake to venture upon hazardous and unpredictable sea voyages.[1]

## Brief Summary of Maritime Law

Maritime Law, also known as Admiralty Law, is the traditional body of rules and practices relating to commerce and navigation, business transacted at sea or relating to navigation, ships, seaman, harbors, and general maritime affairs.[2] Maritime Law exclusively governs activities at sea or in any navigable waters.

The Supreme Court is the Federal Common Law Court in Maritime Tort Law cases, subject to any controlling statutes enacted by Congress.[3] Article III, Section 2 of the U.S. Constitution vests expansive jurisdiction over all actions related to events occurring at sea, extending to all things done upon and relating to the sea, to transactions relating to commerce and navigation, and all maritime contracts, torts, offenses, and injuries.

Facing dangerous conditions at sea, maritime workers are often described as "wards of admiralty" and given heightened legal protections not available for workers in other fields. Examples of such heightened protections are the Maritime Doctrines of

Seaworthiness, and Maintenance and Cure, as well as The Jones Act of 1920 which provide remedies for injury and death of a seaman.[4]

Seaworthiness means that the vessel owner has an absolute, non-delegable duty to ensure that the vessel, including the ship, hull, decks, and machinery, are reasonably fit to be at sea. The doctrine only applies to vessels in navigation and to seaman or other workers performing traditional seaman's duties who are not covered by the Longshore and Harbor Workers' Compensation Act. A defective condition must proximately cause the injury to make the vessel unseaworthy. Seaworthiness is generally a question of fact for the jury. The owner's duty to provide a seaworthy vessel is independent of the duty of reasonable care under the Jones Act. Liability for an unseaworthy condition does not depend on negligence, fault, or blame. If an owner does not provide a seaworthy vessel, no amount of care or prudence excuses the owner. [5]

Maintenance and Cure provides a seaman disabled by injury or illness while in the service of the ship with medical care and treatment (cure) and the means of maintaining oneself during the convalescence period (maintenance). A claim under this doctrine is not based on any acts or omissions as ensuring recovery regardless of fault. Maintenance during the period of the ship-owners liability means the reimbursement of actual expenses for food and lodging comparable to what the seaman was entitled to while at sea. Cure is medical care for those "presently sick or injured" and does not cover conditions not yet diagnosed, such as in cases of asbestos exposure where the seaman is diagnosed years after leaving the service of the ship.

The Jones Act permits a seaman or the seaman's beneficiaries to sue the seaman's employer for damages in a jury trial for the employer's negligence in causing injury or death during the seaman's employment.[6] The Act does not define "seaman" but to qualify as a seaman, one must have an employment related connection to a vessel or an identifiable fleet of vessels in navigation.[7] The standard for negligence is whether the negligence was a cause, however slight, of the harm.

## Brief Analysis of Tort Law

Traditional Tort Law establishes a duty to exercise reasonable care when conduct presents a risk of harm to others. Accordingly, a manufacturer has a duty to warn when it knows or has reason to know that its product is dangerous or is likely to be dangerous when used as intended, and the manufacturer has no reason to believe that the product's users will realize the danger.[8]

## Factual History of The Consolidated Cases

Navy veterans, Kenneth McAfee ("McAfee") and John DeVries ("DeVries"), sued equipment manufacturers in Pennsylvania State Court claiming that asbestos exposure from integrated equipment during their service on Navy ships caused them to develop cancer. DeVries was a Navy engineering officer on the USS TURNER in the 1950s and 1960s. McAfee was a boatswain's mate who serviced compressors with asbestos-containing component parts on a different vessel in the late 1970s and 1980s. During this time, asbestos was in widespread use by the Navy aboard ships for high pressure and high temperature steam driven systems.

Defendants manufactured "bare metal equipment" ("Defendant Manufacturers") such as boilers, turbines, pumps, and blowers used on Navy ships that required asbestos insulation or other asbestos parts to function as intended. The Defendant Manufacturers did not incorporate asbestos into their products, but delivered the equipment as "bare metal equipment" — meaning delivered to the Navy without asbestos. Once acquired, the Navy later purchased asbestos products manufactured by third parties, such as asbestos insulation, packing, and gaskets, and installed the same onto the original bare metal equipment pursuant to Navy specifications so that the integrated equipment could operate as intended and in a safe manner.

As is typical in Navy exposure cases, Plaintiffs had limited options to seek recovery for their harm because Plaintiffs could not sue the Navy due to immunity under the Government Contractor Defense[9] and because the third party asbestos manufacturers were bankrupt. Accordingly, Plaintiffs sued the Defendant Manufacturers alleging negligent failure to warn of the dangers of asbestos in the integrated product.[10]

## Procedural History

The Defendant Manufacturers removed the cases to Federal District Court invoking Federal Maritime Jurisdiction. They moved for summary judgment based on the "bare metal defense" arguing no liability for harm caused by parts later added by third parties. The defense's basic idea is that a manufacturer who delivers a "bare metal product " — that is without the insulation or other material that must be added for the product's proper operation — is not generally liable for harm caused by asbestos in the later-added materials. The court granted summary judgment.

The Third Circuit Court of Appeals vacated and remanded. The court reasoned that the appropriate test was not the bare metal test but the "foreseeability approach"

which holds that a bare metal product manufacturer may be liable for harm resulting from the later added asbestos-containing material if foreseeable that the product would be used with the later added asbestos-containing material. *In re: Asbestos Products Liability Litigation (No. VI)*, 873 F.3d at 241.

Defendant Manufacturers Air & Liquid Systems, CBS, Foster Wheeler, Ingersoll Rand, and General Electric petitioned the Supreme Court for Certiorari to appeal the Third Circuit's ruling. The Court granted certiorari on May 14, 2018. The case was argued on October 10, 2018, and decided on March 19, 2019.

## Analysis

The Court ruled that a product manufacturer has a duty to warn of third party later added parts when 1) its product requires incorporation of a part; 2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses; and 3) the manufacturer has no reason to believe that the product's users will realize the danger. The Court reasoned that requiring a warning will not impose a significant burden on the product manufacturer who already has a duty to warn of the dangers of its own products and is best positioned to warn because it is the most informed about the nature of the ultimate integrated product. By contrast, the part manufacturer may not be aware that its part will be used in a way that poses a risk of danger.

In analyzing the duty to warn when the manufacturer's product requires later incorporation of a dangerous part for the integrated product to function as intended, the Court analyzed three approaches: 1) the foreseeability rule; 2) the bare metal defense; and 3) a hybrid approach.

The first approach, the foreseeability rule, is more plaintiff oriented and holds the product manufacturer to the highest standard. Liability attaches when it is foreseeable that its product will be incorporated with another product or part, even if the manufacturer's product does not require use or incorporation of that other product or part.

In sharp contrast and falling at the other end of the spectrum is the second approach, the absolute bare metal defense. It is the most defense oriented rule and holds the product manufacturer to a less strict standard as compared to the stringent foreseeability rule. Here, the product manufacturer is not liable for harm caused by the integrated product even if it required incorporation of the part and knew that the integrated product was likely to be dangerous for its intended use as long as the

manufacturer did not make, sell, distribute, or incorporate the part into the product. In asbestos cases, the result is that a product manufacturer is not liable for third party manufactured asbestos-containing products subsequently installed within or on its products.[11]

The Court rejected both approaches. It found that the foreseeability rule too broadly imposes sweeping burdens and uncertain duties by requiring a product manufacturer to imagine and warn about all possible uses. With massive liability looming for the manufacturer for failing to correctly predict how its product might be used with other products, the Court found the foreseeability rule to impose a difficult and costly burden while simultaneously overwarning users. The Court also found the bare metal defense was too lenient in the opposite direction.

In resolving the split decisions, the Court compromised by crafting a new three part standard that falls in between the two approaches as more appropriate for the Maritime context. The new standard creates a duty to warn on the manufacturer when 1) its product requires incorporation of a part; 2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses; and 3) the manufacturer has no reason to believe that the product's users will realize the danger.

## The Dissent

Justices Gorsuch delivered the dissent joined by conservatives Justices Thomas and Alito, reasoning that the bare metal defense is consistent with traditional Common Law of Torts in that a manufacturer has no duty to warn or instruct about another manufacturer's product even though such product might be used with the manufacturer's own product.[12] Rather, the manufacturer's duty is restricted to warnings based on the characteristics of the manufacturer's own products.[13] Further, it is black-letter law that the supplier of a product must generally warn only about those risks associated with the product itself, not those associated with products and systems into which it later may be integrated.[14] Moreover, the traditional common law still makes sense today because the manufacturer is in the best position to understand and warn users about its risks.

The dissenters agreed with the Court's rejection of the Third Circuit's foreseeability rule. However, they sharply criticized the Court's crafting of the third approach, calling it an improvement over the Third Circuit's foreseeability approach, but ultimately suffering the same defects with neither standard having meaningful roots in common law.

The dissent warned of diluting a manufacturer's incentive to warn about the dangers of its products because it requires other people to share the duty to warn and its corresponding costs. Further, the Court's new standard risks long, duplicative, fine print, and conflicting warnings that consumers will take less seriously and disregard. Thus, consumer welfare is not well served by requiring manufacturers to warn about dangerous propensities of products they do not design, make or sell.

The dissent called out a list of "headscratcher" uncertainties invited by the new test such as 1) when does a consumer's side-by-side use of two products qualify as "incorporation" of products? 2) what qualifies as an "integrated part?"; and 3) if a defendant reasonably expects that the manufacturer of a third party product will comply with its own duty to warn, is that sufficient "reason to believe" that users will "realize" the danger to absolve defendant of liability?

The dissent closed with noting the silver lining — that the Court expressly limited the new standard to the Maritime context and did not purport to define the proper tort rule outside of the context. This leaves courts with tort cases outside of Maritime "free to use the more sensible and historically proven common law rule."

## Potential Impacts of Decision

As to the Plaintiffs' bar, the decision will likely result in an increase of new lawsuits in Navy asbestos cases now that the defense is stripped of the absolute bare metal defense. For existing cases, Navy exposure might become more of a highlighted exposure when it was otherwise dormant in cases of mixed exposures. This would include such cases as where a Plaintiff, who served in the Navy or was aboard Navy ships, also asserts asbestos exposure from other contexts such as construction products or talcum powder.

The defense will likely focus on developing other existing defenses and developing new defenses based on the "headscratcher" uncertainties highlighted by the dissenters. A potential new defense would be to argue that the Navy, as opposed to the serviceman, is the intended "user" and "consumer" of the equipment. This is directly relevant to the third prong of the new test regarding whether the manufacturer has no reason to believe that the product's users will realize the danger. If the Navy, not the seaman, is the product's user and consumer, the sophistication level is highly elevated. The Navy, a sophisticated user/intermediary, well understands the dangers in operating equipment in a particular manner. This is a concept furthered by the Navy acquiring and installing asbestos insulation on its controlled premises (the ship), and authoring the specifications for the asbestos.

These issues are relevant to the Consumer Expectation Theory and Sophisticated User/Sophisticated Intermediary defense. With the Navy identified as the intended "user" and "consumer," liability is potentially cut off from the bare metal equipment manufacturer.[15]

**Endnotes**

1 Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 285, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980).

2 Black's Law Dictionary (9th ed. 2014).

3 Exxon Shipping Co. v. Baker, 554 U.S. 471, 507–508, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008).

4 The Longshore and Harbor Workers' Compensation Act generally covers maritime workers who are not seaman.

5 Federal Jury Practice and Instructions, Sixth Edition, O'Malley, Grenig & Lee § 156:101.

6 46 U.S.C.A. § 30104-30106 (West).

7 Vessel is any kind of water-craft or equipment capable of being used for transportation on navigable waters.

8 Restatement (Second) of Torts § 388 (1965).

9 Boyle v. United Techs. Corp., 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

10 Plaintiffs died during the litigation and the survivors continued the claims.

11 O'Neil v. Crane Co., 53 Cal. 4th 335, 266 P.3d 987 (2012), Simonetta v. Viad Corp., 165 Wash. 2d 341, 197 P.3d 127 (2008), and Braaten v. Saberhagen Holdings, 165 Wash. 2d 373, 198 P.3d 493 (2008).

12 Firestone Steel Prod. Co. v. Barajas, 927 S.W.2d 608, 616 (Tex. 1996).

13 Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395 (Ct. App. 1985).

14 Restatement (Third) of Torts: Prod. Liab. § 5 (1998), Comment b, p. 132 (1997).

15 This article is dedicated to my father, David Joseph Murphy, Warrior of the Sea.

*Beyond... Continued from page 6*

J&J won another defense verdict on March 27, 2019, when a New Jersey jury found it was not liable in causing the mesothelioma of 58-year-old plaintiff Ricardo Rimondi. Rimondi alleged decades of use of J&J's baby powder, which the plaintiff claimed contained talc contaminated with asbestos. However, plaintiff's experts failed to acknowledge that the plaintiff grew up and lived in close proximity to an asbestos cement factory.

Less than two weeks later, another California jury found for J&J. In *Blinkinsop v. Johnson & Johnson*, *et al.,* a California jury found that a defendant's talcum powder did not contain asbestos, and therefore rejected the plaintiff's claims that his use of the defendant's products caused his mesothelioma.[3] Following a five-week trial, a Long Beach jury deliberated for less than 24 hours in returning a unanimous verdict in favor of J&J.

On May 21, 2019 a South Carolina jury also found J&J not liable. *In Beth-Anee F. Johnson et al. v. Johnson & Johnson*, a 49-yearold plaintiff claimed that she developed peritoneal mesothelioma following decade's long use of the J&J baby powder. The jury, after deliberating for approximately 3 hours following a week-long trial, found that J&J was not negligent, had not breached the implied warranty on their product and did not sell products that caused plaintiff's disease.

## Mistrials

On September 24, 2018, a mistrial was declared in a talc lawsuit filed against J&J in the Superior Court for Los Angeles, California, after a jury remained deadlocked following more than five days of deliberations. The plaintiff, Carolyn Weirick, alleged the development of mesothelioma through the use of asbestos-contaminated talc, and sought at least $25 million in damages.[4]

Two mistrials in the same case resulted in South Carolina in 2018. In May 2017 plaintiffs filed suit against fifteen companies alleging that exposure to asbestos caused plaintiff Antoine Bostic, a thirty year old attorney, to develop mesothelioma; one month prior to his death plaintiffs filed an amended complaint, adding talcum powder defendants, including J&J. In both mistrials (May 2018 and November 2018), the jury deliberated for less than a day before stating that additional deliberations would be of no help, leading the judge to declare a mistrial.[5]

## Nonsuits

Following a four-week trial, nonsuit was entered on February 5, 2019, just prior to closing arguments in a talc mesothelioma trial venued in Los Angeles, California state

court. At the conclusion of the plaintiffs' case, Colgate-Palmolive moved for nonsuit, arguing that the plaintiffs had failed to present a prima facie case linking the use of Cashmere Bouquet talcum products to the plaintiff's injury. The plaintiffs argued that they only had to prove that fibers from the defendant's product contributed to the aggregate dose of asbestos to which the plaintiff was exposed during his or her lifetime. Subsequent to all of the evidence being submitted, the court heard argument on the motion for nonsuit and granted it later the same day.

## Summary Judgment

Summary judgment remains elusive, with the majority of decisions denying same. Below are some of the summary judgment rulings issued by various courts since the July 2018 verdict in St. Louis City.

A Georgia court granted summary judgment for defendant Colgate-Palmolive on September 28, 2018.[6] The plaintiff, Sharon Hanson, used Colgate Palmolive's Cashmere Bouquet talcum powder product for 12 years, from 1961 to 1973. She was later diagnosed with both ovarian cancer and mesothelioma, and passed in April 2018. The court excluded the opinions of plaintiff's four causation experts due to Colgate's *Daubert* challenge. The court also concluded that the plaintiff was unable to demonstrate that the Cashmere Bouquet product which she used contained asbestos. Even if the product contained asbestos, there was no evidence regarding the level of plaintiff's asbestos exposure and the contribution of the Cashmere Bouquet product to the plaintiff's mesothelioma and ovarian cancer.

The Supreme Court of New York denied summary judgment for defendants in November 2018. Plaintiff Donna Olson filed suit against the defendants J&J and J&J Consumer Inc. (defendants) alleging she developed pleural mesothelioma as a result of exposure to cosmetic talcum powder, including baby powder and Shower to Shower from 1953-2015.[7] Additionally, the plaintiff claimed exposure from her mother's application of the same. Defendants argued that the plaintiffs had not presented any evidence of exposure to asbestos. Specifically, they argued that: 1) the talc was sourced from asbestos free mines 2) the mined talc was purified 3) there were internal tests to ensure the lack of contamination 4) both government and independent tests confirmed the product was asbestos free. The court was not persuaded and noted that pointing to gaps in the plaintiff's proof was not sufficient to grant summary judgment.

Two weeks later, New York again denied summary judgment to J&J on November 30, 2018.[8] Plaintiff Anna Zoas alleged that her mesothelioma was caused by asbestos present in J&J baby powder. J&J argued that there was no asbestos contamination from their products for numerous reasons, and that its experts

demonstrated that the plaintiff was not exposed to asbestos through the use of their products. Plaintiff stated that the defense experts did not "unequivocally" establish that J&J products could not have contributed to the causation of the plaintiff's injury. The court noted that based upon the conflicting expert opinions, the reasonable inference standard and construing the evidence in a light most favorable to the plaintiff, the motion for summary judgment should be denied.

The year 2019 started with a summary judgment win for the defense in Pennsylvania. On February 8, 2019, the Philadelphia County Court of Common Pleas granted summary judgment to Colgate-Palmolive Company in a case wherein the plaintiffs alleged that asbestos exposure from Cashmere Bouquet talcum powder caused decedent's mesothelioma.[9] Summary judgment was granted after the court precluded the expert opinions of plaintiff's geologist, pathologist, industrial hygienist, and airborne concentration experts.

## Conclusion

During the eleven months between July 2018 and June 2019 there were various rulings in cases alleging personal injury due to asbestos-contaminated talc. One of the biggest developments during this time was the status change of frequent defendant Imerys Talc. On February 13, 2019, Imerys Talc America, Inc., Imerys Talc Vermont, Inc., and Imerys Talc Canada Inc. filed a petition to seek bankruptcy protection under U.S. Chapter 11.[10] In support of their petition, the Imerys entities referenced "significant potential liabilities as a result of thousands of claims by plaintiffs alleging personal injuries caused by exposure to talc mined, processed, and/or distributed by one or more of the Debtors" as a factor leading to the filing. According to the petition, the entities face 13,800 pending ovarian cancer claims and 850 pending mesothelioma claims. By the company's calculations, in the mesothelioma claims, approximately 63 percent of the plaintiffs allege exposure to asbestos through the use of cosmetics, 24 percent allege exposure in industrial occupational settings, and 13 percent allege both cosmetic and industrial exposure. Due to this bankruptcy, larger verdict shares could be apportioned to remaining defendants in any given case.

As with all litigation, assorted factors come into play when attempting to predict the outcome of claims, including venue and the fickleness of juries. As the above brief summary of a portion of these cases shows, the outcome of this litigation is less than clear, as all parties involved advocate fully for their clients.

### Endnotes

1 Ingham et al. v. Johnson & Johnson, et al.; Case No. 1522-CC1417.

2 Carla Allen v. Brenntag North America, Inc., et al., No. DR180132, Superior Court of the State of California, Humboldt County

3 Blinkinsop v. Albertson Co., BC677764, Superior Court, Los Angeles Co. (Long Beach).

4 Weirick v. Brenntag North America, BC656425, California Superior Court for Los Angeles County (Pasadena).

5 Antoine Bostic v. Johnson & Johnson, 2017-CP-16-0400, Court of Common Pleas for Fourth Judicial Circuit of South Carolina (Darlington).

6 Hanson v. Colgate-Palmolive Co., No. CV 216-034, 2018 WL 4686438 (S.D. Ga. Sept. 28, 2018).

7 In re: New York City Asbestos Litigation, Donna Olson and Robert Olson v. Brenntag North America, Inc., et al., No. 190328/2017, Supreme Court of New York, New York County

8 Zoas v. BASF Catalysts, LLC, No. 190162/2017, Supreme Court of New York, New York County

9 Charles Brandt, special administrator for the estate of Sally Brandt, deceased v. Colgate-Palmolive, et al., Philadelphia County Court of Common Pleas

10 In re Imerys Talc America, Inc., et al., U.S. Bankruptcy Court for the District of Delaware, No. 19-10289-LSS (February 13, 2019)

*"A Lot"... Continued from page 7*

With regard to NYCAL, courts have already begun demanding more detailed information regarding a plaintiff's asbestos exposure at trial. In April 2015, a trial court jury awarded a verdict of $8 million to a deceased plaintiff and $3 million to the deceased's plaintiff's wife for loss of consortium. In re New York City Asbestos Litig., 48 Misc. 3d 460, 11 N.Y.S.3d 416 (N.Y. Sup. Ct. 2015). Following the verdict, a product manufacturer moved for orders striking the causation opinions of plaintiffs' expert witnesses, dismissing the action and entering judgment as matter of law in favor of the manufacturer, or alternatively setting aside the verdict and granting a new trial. Upon a review of the expert opinions in the case, the trial court held that plaintiffs' evidence of decedent's "regular" exposure to asbestos from brakes, clutches, or gaskets sold by the defendant was legally insufficient to establish that such exposure was a significant contributing factor in causing the decedent's mesothelioma. Therefore, the court granted the defendant's motion to set aside the verdict. In February 2017, the Appellate Division of the First Department affirmed the court's grant of the defendant's motion to set aside the verdict. *In re Robinson v. Battle, 148 A.D. 230, 256, 133 N.Y.S. 57 (App. Div. 1911)*. And in November 2018, the Court of Appeals affirmed the Appellate Division's ruling.

With a combination of the *Juni* and *Corazza* decisions over the last six months, the law in New York is clearly improving on causation for defendants in asbestos litigation. The *Corazza* ruling creates an immediate problem in cases where plaintiffs have already admitted that they were unaware of the frequency of their alleged exposure to asbestos from defendants' products. In such cases, the necessary foundation established by these decisions may be irreparably absent. If the record is closed, and no additional evidence obtained, those plaintiffs' cases are at risk for dismissal under these standards. In cases where deposition testimony has taken place but discovery is incomplete, plaintiffs may now have to find additional objective evidence of the frequency of exposure to each of the defendants' products, or risk the dismissal of these cases under the *Corazza* and *Juni* requirements.

These rulings further create problems for plaintiff's firms who currently have an effective strategy of minimizing the exposures of settled co-defendants, as it will be a lot harder to do when the record contains quantification of exposures from the settled defendants' products. Specifically, by providing objective frequencies of exposure to each defendant's products at a deposition, defendants remaining at trial will now have direct evidence of the quantum of exposure in support of its allocation defenses.

Relatedly, an objective record of the plaintiff's allegations will have a significant impact on expert's substantial factor analysis in asbestos cases. With quantifiable frequencies of work involving each defendant's asbestos-containing product in a given case, defense experts will be able to benchmark the plaintiff's allegations against epidemiological and regulatory levels to demonstrate that they are of limited or no consequence. Trial defendants will also be able to compare the allegations against them, with the plaintiff's lifetime of allegations to demonstrate that the allegations against them are an insignificant portion of the plaintiff's total asbestos exposure.

In short, while the rationale of the *Corazza* decision is somewhat narrow, there are reasons to believe that it will significantly impact New York asbestos litigation going forward.

## Calendar

| | | |
|---|---|---|
| August 5, 2019 | **TIPS Free Member Monday Webinar**<br>Juel Jones – 312/988-5596 | Solo Small Firm<br>Webinar Online |
| September 19-20, 2019 | **Cannabis Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | InterContinental Hotel<br>Chicago, IL |
| October 16-19, 2019 | **TIPS Fall Leadership Meeting**<br>Contact: Janet Hummons – 312/988-5656<br>Juel Jones – 312/988-5596 | Grand Wailea Hotel<br>Wailea, HI |
| October 24-25, 2019 | **Aviation Litigation**<br>Contact: Danielle Daly – 312/988-5708 | Ritz-Carlton<br>Washington, DC |
| November 6-8, 2019 | **Fidelity & Surety Law Fall Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | Hilton Boston Back Bay<br>Boston, MA |
| January 16-18, 2020 | **Life Health & Disability**<br>Contact: Danielle Daly – 312/988-5708 | Hotel Van Zandt<br>Austin, TX |
| January 29-31, 2020 | **Fidelity & Surety Law Midwinter Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Speaker Contact: Juel Jones – 312/988-5597 | Grand Hyatt New York<br>New York, NY |
| February 12-16, 2020 | **ABA Midyear Meeting**<br>Contact: Juel Jones – 312/988-5597<br>Janet Hummons – 312/988-5656 | JW Marriott<br>Austin, TX |
| February 20-22, 2020 | **Insurance Coverage Litigation Midyear Conference**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | Arizona Biltmore Resort<br>Phoenix, AZ |
| March 5-6, 2020 | **Cyber Security Conference**<br>Contact: Janet Hummons – 312/988-5597 | TBD Atlanta, GA |
| March 14-18, 2020 | **20th National Trial Academy**<br>Contact: Janet Hummons – 312/988-5656<br>Danielle Daly – 312/988-5708 | National Judicial College<br>Reno, NV |

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